

CANADA 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 CarGurus, Inc. for an Order pursuant to section 103.1 granting leave to make application under sections 75, 76 and 77 of the *Competition Act*.

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT July 13, 2016 CT-2016-003 Andrée Bernier for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 31

CARGURUS, INC.

Applicant

- and -

TRADER CORPORATION

Respondent

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, TRADER CORPORATION
(Response to Application for Leave Pursuant to Section 103.1)

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PART I - OVERVIEW

1. Trader Corporation (“Trader”) opposes the application of CarGurus, Inc. (“CarGurus”) for leave to apply for an order under sections 75, 76 and 77 of the *Competition Act* (the “Act”). CarGurus has failed to provide sufficient credible evidence to give rise to a bona fide belief that it has been directly and substantially affected in its business by Trader’s actions, or that Trader has engaged in conduct that could be subject to an order of the Competition Tribunal (the “Tribunal”).

2. CarGurus’ application for leave under section 103.1 of the Act should be dismissed as against Trader for the following reasons.

(a) CarGurus has failed to provide sufficient credible evidence that it has been either directly or substantially affected by Trader’s conduct as required by subsections 103.1(7) and 103.1(7.1).

(b) Trader has not refused to deal with CarGurus within the meaning of section 75 of the Act. CarGurus has infringed Trader’s copyright by scraping its website. On discovering this, Trader, which had offered CarGurus a draft syndication license similar to those entered into by Trader with other operators of digital marketplaces, has required that CarGurus first compensate Trader for that infringement, as a condition of entering into a license with CarGurus.

(c) CarGurus does not require a syndication license from Trader in order to successfully operate its digital marketplace. Moreover, CarGurus has alternate sources of supply for the content it is seeking, including, most importantly, the creation of its own data feeds.

(d) In any event, the “product” which CarGurus is seeking is an intellectual property licence that is not in “ample supply” within the meaning of section 75 of the Act. There is also no evidence that Trader’s conduct is having or likely to have an adverse effect on competition in a market.

- (e) CarGurus is seeking the Tribunal's intervention as a way of avoiding both the cost of generating its own data for listings on its site as well as the consequences of its infringement of Trader's intellectual property. CarGurus' conduct should not be sanctioned by granting leave.
- (f) Section 76 of the Act also does not apply. Trader has not maintained the price of any product, and is not motivated in any way by CarGurus' pricing structure, which is not "low-cost" as compared to Trader's model in any event.
- (g) Finally, Trader has not required or induced dealers or others into exclusivity arrangements within the meaning of section 77 of the Act. Rather, Trader requires its consent for the use of its intellectual property. This does not prevent CarGurus from dealing directly with dealers and others in a manner not involving Trader's intellectual property.

3. Trader submits that CarGurus' application is improperly aimed at leveraging an ongoing dispute in the Ontario Superior Court of Justice between Trader and CarGurus, in which Trader has alleged that CarGurus is liable for copyright infringement (the "Copyright Application"). In this application, CarGurus has used a "scatter-gun" approach of citing sections of the Act that are clearly inapplicable as part of its wider strategy aimed at escaping the consequences of Trader's proper exercise of its legitimate copyright.

4. In Trader's respectful submission, under these circumstances, the Tribunal should exercise its residual discretion not to grant leave under subsections 103.1(7) and 103.1(7.1) of the Act.

PART II - FACTS

(i) The Parties

5. Trader is a corporation operating, among other services, what are referred to as "digital marketplaces" for vehicles in Canada. Via websites autotrader.ca and

autohebd.net, Trader advertises a large inventory of new and used vehicles for sale in Canada through what are referred to as “vehicle listings”. Through these and competing digital marketplaces, purchasers can search and sort the vehicle listings by model, make, colour and year, among other criteria, and can contact vehicle sellers, which include both vehicle dealers and private sellers. In addition to operating its digital marketplaces, Trader provides a comprehensive set of marketing software solutions to Canadian vehicle dealers.

Affidavit of Roger Dunbar, sworn December 22, 2015, CarGurus Application Record, Tab C Exhibit “3” (“Dunbar Affidavit”), para. 4.

6. Trader sources its inventory of vehicle listings from private sellers and vehicle dealers. Trader does not buy or sell vehicles, but acts as an intermediary between buyers and sellers.

Dunbar Affidavit, para. 11.

Reply Affidavit of Roger Dunbar, sworn March 24, 2016, CarGurus Application Record, Tab C Exhibit “7” (“Reply Dunbar Affidavit”), para. 4.

7. CarGurus also operates an online digital marketplace for vehicles via cargurus.com, and is a major player in the United States market.

Affidavit of Oliver Chrzan, sworn March 3, 2016, CarGurus Application Record Tab C Exhibit “6”, para. 4.

8. CarGurus entered the Canadian market in May, 2015.

Affidavit of Martha Blue, sworn March 3, 2016, CarGurus Application Record Tab C Exhibit “2” (“First Blue Affidavit”), para. 29.

9. CarGurus’ Canadian revenues have quintupled since Trader launched the Copyright Application. As well, year-over-year, cargurus.com’s user views originating from Canada have increased by over 100%.

Affidavit of Martha Blue, sworn April 14, 2016, CarGurus Application Record Tab C (“Second Blue Affidavit”), paras. 28-29;

Dunbar Affidavit, para. 30.

(ii) Data Feed Information and the Trader Photos

10. In order to compete with other providers, including free marketplace services, Trader aims to provide premium services to dealers in conjunction with the ability to list their inventory on Trader's websites. One such service offered by Trader is its Capture service. If a dealer subscribes to Trader's Capture service, Trader has one of its employees, or a contractor who has assigned his or her intellectual property rights to Trader, visit the dealership, consult with and gather information from the dealer and take photos of the vehicles ("Trader Photos"). The Trader representative will then organize this vehicle information and the Trader Photos (collectively, Trader's "Data Feed Information") and upload all this data for display on one or more of Trader's and the dealer's websites.

Dunbar Affidavit, para. 24.

11. Where Trader receives requests from a critical mass of dealers wishing to provide the Data Feed Information to other digital marketplaces, including competitors of Trader, Trader will generally provide such Data Feed Information through a licensing process referred to as "syndication". Trader has a standard form of syndication agreement that it presents to the potential licensee in such circumstances, but the specific terms of each agreement are negotiated on an agreement-by-agreement basis.

Dunbar Affidavit, paras. 23 and 27;

Reply Dunbar Affidavit, paras. 9-10.

12. Trader's agreements do not require dealers to exclusively use Trader's services. They are free to use Trader's services along with services that may be provided by Trader's competitors.

13. Data Feed Information and the Trader Photos are, individually and together, copyrighted works. Trader has not assigned its copyright interests in the Data Feed Information to any person.

Dunbar Affidavit, para. 28.

(iii) CarGurus' Infringement of Trader Copyright

14. Beginning in May, 2015, Trader received complaints from certain dealers that their vehicles were appearing on CarGurus' website without their permission. Trader investigated, found its Trader Photos on the CarGurus website, and learned that CarGurus had been "scraping" this content from Trader-managed websites.

Affidavit of Allen Wales, sworn December 22, 2015, CarGurus Application Record, Tab C Exhibit "5" ("Wales Affidavit"), para. 6.

15. In June, 2015, Trader wrote to CarGurus advising that Trader holds the copyright in the contents of the Trader-managed websites and requesting that CarGurus cease misappropriating same.

Wales Affidavit, paras. 10-11.

16. In July, 2015, Trader attempted to resolve the dispute by sending to CarGurus a copy of Trader's draft form of syndication agreement for CarGurus' review. While waiting for CarGurus to respond to this initial offering of terms, Trader launched an investigation to determine the extent of CarGurus' infringement of Trader's copyright. CarGurus did not respond.

Wales Affidavit, paras. 16-25.

17. On December 2, 2015, Trader's counsel wrote to CarGurus' counsel to report on the results of Trader's investigation and to demand that CarGurus cease its infringing conduct. Soon thereafter, Trader launched the Copyright Application seeking, among other things, statutory damages for infringement.

Wales Affidavit, para. 26.

Notice of Application, dated December 18, 2015 (Court File No. CV-15-11232-00CL).

18. Trader remains open to negotiating a syndication agreement with CarGurus once the matters at issue in the Copyright Application, which is currently ongoing, are resolved, assuming that a critical mass of dealers have requested syndication with CarGurus (as is Trader's typical practice).

Reply Dunbar Affidavit, para. 11.

19. Even were Trader to syndicate its Data Feed Information to CarGurus, it could only do so with respect to the content of individual dealers that specifically request that Trader syndicate their vehicle listings to CarGurus.

Dunbar Affidavit, para. 27.

20. In this regard, CarGurus can only point to thirty dealers that have requested their content be syndicated on cargurus.com. By contrast, as of November 30, 2015, approximately 5,300 commercial sellers of vehicles had inventory hosted on the Trader websites.

Reply Dunbar Affidavit, para. 11;

Dunbar Affidavit, para. 14.

PART III - POINTS IN ISSUE

21. The issue is whether CarGurus has satisfied the test for leave under subsections 103.1(7) and 103.1(7.1) of the Act. Trader submits that the answer is no.

PART IV - SUBMISSIONS

(a) The Tests for Leave

22. Subsection 103.1(7) of the Act sets out the test for leave in respect of sections 75 and 77 of the Act:

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

Competition Act, Section 103.1(7).

The test for leave under subsection 103.1(7.1) is the same in respect of section 76 of the Act except that the applicant need only show that they have been "directly affected" by the alleged reviewable conduct.

***Stargrove Entertainment Inc. v. Universal Music Publishing Group Canada*, 2015 Comp. Trib. 26 ("Stargrove"), para. 30.**

23. As noted by the Federal Court of Appeal in the *Barcode* decision, in order to be granted leave, an applicant must provide sufficient credible evidence of what is alleged to give rise to a *bona fide* belief that (a) the applicant may have been directly and substantially affected in its business by a reviewable practice, and that (b) the practice in question could be subject to an order.

***Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 F.C.A. 339 ("*Barcode*"), paras. 16-17.**

24. Therefore, in order to be granted leave, an applicant must provide evidence of each element of the alleged reviewable practice. This is an independent condition, which must be met even if the applicant is able to show that its business has been directly and/or substantially affected by the conduct alleged.

Barcode, para. 18.

***Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2011 F.C.A. 188 (“Nadeau Appeal”), paras. 68-69.**

25. Trader submits that CarGurus’ application is not supported by sufficient credible evidence to give rise to a *bona fide* belief either: that CarGurus may have been directly (or substantially) affected in its business by reason of the allegations it has made herein or that any of Trader’s conduct could be subject to an order under any of sections 75, 76 or 77 of the Act. In these submissions, Trader will first address whether Trader’s conduct could be subject to an order under these sections.

(b) Insufficient Credible Evidence that the Practice in Question Could be Subject to an Order Against Trader

(i) Section 75 – Refusal to Deal Test Not Met

26. Section 75 of the Act provides in its relevant part:

(1) Where ... the Tribunal 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,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms

...

(3) For the purposes of this section, the expression “trade terms” means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

27. CarGurus has failed to meet its burden under each subsection of section 75.

28. First and as an overarching matter, CarGurus’ application fails to meet the basic causative requirements of section 75.

29. Subsection 75(1)(b) requires that the applicant’s inability “to obtain adequate supplies of the product [be] because of insufficient competition among suppliers of the product in the market.” [emphasis added] This has been consistently interpreted as a question of causation, which demands that the evidence show that insufficient competition among suppliers is the “overriding reason” why the applicant is unable to obtain adequate supplies of the product.

Canada (Director of Investigation & Research) v. Xerox Canada Inc.
(1990), 33 C.P.R. (3d) 83 (“Xerox”), para. 83;

Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc., 2009 Comp. Trib. 6 (“Nadeau Tribunal”), paras. 228-229 and 247;

Nadeau Appeal, paras. 68-69.

30. Similarly, subsection 75(1)(a) requires that the applicant be “precluded from carrying on business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms.” [emphasis added]

31. It is important to bear in mind that syndication agreements only constitute the legal framework within which Trader may share Data Feed Information with another digital marketplace. What determines whether this information will in fact be shared is the interest of the dealer to have its vehicle listings appear on that other site. CarGurus’ evidence is that only thirty (30) dealers have requested syndication with CarGurus. This represents only 0.375%-0.5% of all dealers in Canada, as calculated by CarGurus itself. This is hardly sufficient to meet the causal requirements of subsections 75(1)(a) and (b).

See paragraph 20 above;

First Blue Affidavit, para. 66.

32. Similarly, CarGurus' exponential growth, even since Trader asserted its copyright and launched the Copyright Application, is antithetical to any allegation that CarGurus is "precluded from carrying on business" as a causal result of Trader's conduct.

See paragraph 9 above.

33. Moreover, in evaluating subsection 75(1)(a), the Tribunal has acknowledged that it is proper to query whether the applicant has "other options in terms of supply" (i.e., a source of supply, other than the respondent, which is available in the relevant market). Where the applicant has access to an alternative source of supply that the applicant simply chooses not to pursue, it cannot be said that insufficient competition among suppliers is the "overriding reason" why the applicant is unable to obtain adequate supplies or that the applicant is precluded from carrying on its business "due to" the respondent's conduct.

Nadeau Tribunal, para. 222.

34. That is the case here. This case is not like the *Used Car Dealers Association* decision, where the applicant's only recourse (absent receiving an order from the Tribunal) was to buy the data it needed from its competitors.

***The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, 2011 Comp. Trib. 10 ("UCDA"), para. 35.**

35. Here, CarGurus has several alternative sources of supply. Most notably:

- (a) CarGurus can obtain content for vehicle listings from sources other than Trader, including from other data feed providers; and
- (b) CarGurus can generate its own content and, in particular, it can generate its own equivalent to the Trader Photos by replicating Trader's Capture service.

Affidavit of Roger Dunbar, sworn June 17, 2016, ("Supplemental Dunbar Affidavit"), paras. 12-15.

36. Trader acknowledges that this Tribunal has suggested that the existence of an alternative source of supply will not preclude an applicant from meeting the

requirements of subsection 75(1)(b) where such alternative source is “clearly...inferior” or economically unviable.

***Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1989] C.L.D. 1247 (Comp. Trib.) (“Chrysler”), para. 66;**

***Nadeau Appeal*, paras. 68-69.**

37. The preceding paragraph, however, provides no salve to this applicant. CarGurus has not alleged that, and there is no logical reason why, it would not be viable for CarGurus to obtain vehicle listing content from other data feed providers or to generate its own equivalent content. With respect to:

(a) CarGurus obtaining vehicle listing information from other feed providers: This is a practice that CarGurus already engages in. Even accepting, for the sake of argument, CarGurus’ contention that Trader controls as much as 42.5% of all vehicle listings (which Trader has denied), this means that CarGurus can still access the majority of vehicle listings from other providers. Kijiji is an example of a company that has competed and grown in the marketplace on this basis. CarGurus itself has been successful in obtaining a very significant number of vehicle listings on this basis; as of March 2016, its website had approximately 312,000 classified ads, as compared to approximately 350,000 classified ads on Trader’s website.

***First Blue Affidavit*, para. 34;**

***Supplemental Dunbar Affidavit*, paras. 12-13 and 15.**

(b) CarGurus generating its own content: There is no impediment to CarGurus replicating Trader’s Capture service beyond CarGurus’ recalcitrance to incur this reasonable business expense. Trader does not require that dealers not allow other photographs to be taken of their vehicles, or that other information regarding the vehicles not be gathered. From a business perspective, implementing a Capture Service is a cost that Trader has undertaken – profitably – for years, and the start-up capital to implement such a service is well within the capacity of a major company like CarGurus. CarGurus

acknowledges that Trader is not the only data feed provider to take vehicle photographs, but does not attempt to explain why CarGurus does not do so.

Supplemental Dunbar Affidavit, para. 14;

Second Blue Affidavit, para. 9.

38. This case can be sharply contrasted to the *Chrysler* decision, where all alternative sources of supply to genuine Chrysler parts were clearly inferior. In *Chrysler*, the evidence showed that the applicant's customers specified that they would only accept genuine Chrysler parts, as opposed to replacement parts from other suppliers. The relevant "product" was therefore defined as being only genuine Chrysler parts, and the Tribunal's analysis of subsections 75(a) and (b) correspondingly considered only the availability of genuine Chrysler parts in the market.

***Chrysler*, paras. 24 at 49-66.**

39. Here, there is no evidence or even allegation that customers will not accept or respond favourably to vehicle listings that are functionally equivalent to Trader's Data Feed Information simply because such data/listings were not generated by Trader – from the customer's perspective, there is no "genuine" Trader content in the same way that there are genuine Chrysler parts.

40. CarGurus simply refuses to entertain the option of generating its own version of Trader's Data Feed Information, in particular vehicle photographs, but instead seeks relief from this Tribunal. As noted in the *Barcode* decision, the purpose of the Act is to "maintain and encourage competition in Canada...not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer" or between suppliers.

***Barcode*, para. 23.**

41. Further rebutting CarGurus' application in respect of subsection 75(1)(b), this Tribunal has noted that "any inference that insufficient competition led to a refusal to deal may be rebutted by evidence that shows an objectively justifiable business reason"

that explains the respondent's conduct. This can be contrasted to conduct undertaken with an expressly anti-competitive purpose.

***B-Filer Inc. v. Bank of Nova Scotia*, 2006 Comp. Trib. 42 (“B-Filer”), paras. 146-147.**

***Xerox*, para. 91.**

42. Trader has an objectively justifiable business reason for refusing to grant CarGurus access to its Data Feed Information – CarGurus' blatant infringement of Trader's copyright. Trader is willing to syndicate its copyrighted content to its competitors, and does so regularly, but only where such competitor agrees to pay for its license.

First Dunbar Affidavit, paras. 26-27.

43. The terms of syndication agreements, like most other commercial agreements, are negotiated between the parties, and as such there is no such thing as “standard” terms to the extent that “standard” implies absolute uniformity of terms as between agreements. What is customary, is that Trader sends a draft form of syndication agreement to a putative partner, following which the parties negotiate terms.

Reply Dunbar Affidavit, para. 10.

44. Having chosen copyright infringement over negotiation, CarGurus cannot now assert that Trader is refusing to deal on its usual terms.

See paragraph 15-18, above.

45. CarGurus' application therefore also fails under subsection 75(1)(c), which requires that the applicant be willing to meet the usual and customary trade terms of the supplier or suppliers of the product.

46. This case also fails to meet the requirements of Subsection 75(d) of the Act, that is, it does not relate to a “product ... in ample supply.” This Tribunal recently held that relief is “simply not available” under section 75 “where the impugned conduct involves the refusal to grant a license over copyrighted materials.”

***Stargrove*, para. 26.**

47. The logic underpinning this approach to the interplay between competition law and copyright licensing was described by this Tribunal thusly in the *Warner Music* decision:

... 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.” [emphasis added]

***Director of Investigation and Research v. Warner Music Canada Ltd.*, 1997 C.C.T.D. No. 53, para. 30.**

48. Trader has valid copyright in its Data Feed Information, including the Trader Photos. Section 2 of the *Copyright Act* defines an “artistic work” as including, among other things, “photographs” and “compilations”, with “compilation” defined as a work resulting from the selection and arrangement of data. As held by the Supreme Court of Canada, the standard for originality required in order to ground a copyright is low.

***Copyright Act*, R.S.C. 1985, c. C-42;**

***CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, at page 356, paras. 24 and 25.**

49. The only relief available under section 75 is that the Tribunal may order a supplier to accept a person as a customer. The effect of CarGurus’ requested order, if granted, would be to compel Trader to license its intellectual property in the Trader Photos. That is essentially the same order as that requested against Warner Music and rejected by the Tribunal in that case as being outside its jurisdiction.

50. This case is not like the *Used Car Dealers Association* case, where leave was granted in part because the right to access the product in that case was not capable of being properly characterized as a license. Here, CarGurus’ entire application is premised on an alleged refusal by Trader to syndicate (i.e., license) its Data Feed Information and in particular the Trader Photos.

UCDA, paras. 21-22.

51. Trader further submits that CarGurus has failed to provide sufficient credible evidence that the alleged refusal to deal of which it complains is likely to have an adverse effect on competition in a downstream market, as required by subsection 75(1)(e) of the Act.

Nadeau Appeal, paras. 97-98.

52. In this case, the relevant downstream market, at its narrowest, is the Canadian vehicle digital marketplace. Competitors in this market include numerous websites, including Kijiji, eBay Motors U.S., Edmunds, Canadian Black Book, Cars.com, Wheels.ca, Auto123.com and AutoExpert. In the broader market, other competitors include media companies such as newspapers and niche classified publications, as well as vehicle brokerage firms.

Second Blue Affidavit, Exhibit 10, pg. 341;

First Dunbar Affidavit, paras. 21-22 and 34.

53. CarGurus' application materials provide insufficient information on the basis of which a *bona fide* belief could be established that Trader's alleged refusal to deal has, or is likely to have, an adverse effect on the relevant downstream market. CarGurus has failed to demonstrate that Trader's market power has increased or that consumer choice or prices have been affected. Trader and CarGurus are but two of many competitors in this market.

54. In summary, therefore, CarGurus has failed to provide sufficient credible evidence to support a *bona fide* belief that an order could be made against Trader under section 75 of the Act.

(ii) Section 76 – Price Maintenance Provisions Not Applicable

55. Section 76 of the Act provides in its relevant part:

(1) ...if the Tribunal finds that

(a) a person referred to in subsection (3) directly or indirectly

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

(b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

(2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.

(8) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that any person, by agreement, threat, promise or any like means, has induced a supplier, whether within or outside Canada, as a condition of doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons, and that the conduct of inducement has had, is having or is likely to have an adverse effect on competition in a market, the Tribunal may make an order prohibiting the person from continuing to engage in the conduct or requiring the person to do business with the supplier on usual trade terms.

56. CarGurus has failed to meet the burden on it under either subsection 76(1) or 76(8) as its evidence fails to meet the basic tenets of the “price maintenance” prohibition under the Act.

57. As noted by this Tribunal in the *Visa Canada* decision, section 76(1) addresses resale price maintenance; it “requires a resale of a product” that is “identical or substantially similar” to the product for which price is being allegedly maintained.

***Commissioner of Competition v. Visa Canada Corporation*, 2013 Comp. Trib. 10 (“*Visa*”), paras. 115 and 134;**

See also: Canada, Competition Bureau, *A Guide to Amendments to the Competition Act* (Toronto, April 22, 2009) (“The price maintenance provisions are designed to provide resellers with...”); Omar Wakil, *The 2016 Annotated Competition Act* (Carswell: Toronto, 2015), pg. 208 (“Subsection 76(1) creates the reviewable practice of ‘resale price maintenance’...”) [emphasis added].

58. The *Visa Canada* decision concerned credit card networks owned by Visa and MasterCard. These networks have three main groups: Issuers of credit cards (e.g. TD Bank) and Acquirers (e.g. Moneris) who provide technology to Merchants (e.g. a convenience store) that enable Merchants to accept credit cards. The Commissioner alleged that certain of the rules imposed by Visa and MasterCard as a condition of participating in their credit card networks had the effect of discouraging the reduction of fees charged by Acquirers to Merchants. The Tribunal found that Acquirers do not resell either Visa or MasterCard services to Merchants, but rather provide a different set of services from those provided by Visa and MasterCard to Acquirers, and therefore declined to grant a remedy under section 76.

59. The order sought by CarGurus here must be rejected for the same reason as the Commissioner's application was rejected in the *Visa Canada* decision. CarGurus is not seeking to resell Trader's Data Feed Information in the same or substantially the same form as syndicated by Trader. Rather, like the Acquirers in the *Visa Canada* decision, CarGurus seeks to repackage Trader's Data Feed Information into a related, but different service (as noted in CarGurus' application record, CarGurus does not charge dealers for listing vehicle information unless additional services are tacked on).

Second Blue Affidavit, paras. 20-23.

60. In fact, CarGurus will oftentimes alter Trader content before repackaging it. The provisions of section 76 invoked by CarGurus concern the supply of a "product", not a product *input* such as Data Feed Information and Trader Photos. CarGurus' allegations in respect of section 76 are in fact allegations of a refusal to deal (in product inputs), which must be dealt with under the strict requirements of section 75 of the Act.

Wales Affidavit, para. 7-8.

61. Nor has CarGurus presented any evidence beyond bald, unsubstantiated allegations that Trader has induced any supplier to refuse supply to CarGurus, as required by subsection 76(8), which allegation is also denied by Trader.

62. CarGurus' memorandum of fact and law alleges correspondence from Dealer Dot Com ("DDC") wherein DDC allegedly advised that it could no longer supply vehicle

listings CarGurus as a result of its exclusive arrangement with Trader; but CarGurus' application record does not contain a copy of such correspondence (redacted or otherwise) or even the date upon which such correspondence allegedly occurred.

Memorandum of Fact and Law of the Applicant, paras. 51 and 65;

First Blue Affidavit, para. 48.

63. By contrast, CarGurus' application record does contain (redacted) copies of other correspondence with third parties.

See, for example, CarGurus Application Record, Tab C, Exhibit "2", Exhibit E.

64. CarGurus' allegations in respect of Feed Providers (as defined in CarGurus' application) other than DDC are similarly unsubstantiated.

Memorandum of Fact and Law of the Applicant, para. 64;

First Blue Affidavit, para. 105.

65. Moreover, even if CarGurus' allegations were taken at face value, it must be noted that CarGurus has not alleged (let alone presented evidence) that DDC or other Feed Providers have been "induced" into refusing supply to CarGurus, as required by subsection 76(8). CarGurus has fallen well short of demonstrating sufficient credible evidence necessary to be granted leave under subsection 76(8).

66. Nor has Trader "otherwise discriminated" against CarGurus as this phrase has been interpreted in the context of section 76. As noted by this Tribunal, such discrimination refers to "treating a person differently than another without proper justification." [emphasis added]

Stargrove, para. 34.

67. In this connection, Trader submits that:

(a) it has not treated CarGurus any differently than any other competitor, as Trader's prevailing practice is to provide its standard form of syndication

agreement as a starting point and to negotiate terms from there, which is precisely what it has attempted to do with CarGurus; and

(b) to the extent that Trader has treated CarGurus differently than other competitors, which Trader denies, that is solely because Trader's other competitors do not scrape Trader's copyrighted content in lieu of negotiating syndication as CarGurus has done – Trader is willing to syndicate to CarGurus once the matters at issue in the Copyright Application are resolved.

See paragraph 18, above.

68. Moreover, while section 76 is available where the product at issue is a copyrighted work, this Tribunal has opined that no compulsory remedy should issue under section 76 where “the owner of an exclusive intellectual property right lawfully refuses a license.” While Trader has not refused to license CarGurus here, but merely insisted that CarGurus address its infringement in advance of obtaining a license, this statement of the Tribunal is instructive and strongly suggests that CarGurus should not be entitled to relief under section 76 here.

Stargrove, para. 37.

69. In any event, CarGurus' application presents no evidence demonstrating that Trader has been motivated by a low pricing policy of CarGurus (as required pursuant to this Tribunal's interpretation of section 76).

Stargrove, paras. 32 and 33.

70. Trader denies being motivated by any alleged low-pricing policy of CarGurus. Quite conversely, Trader, having analyzed the cost-to-value propositions of both its and CarGurus' services, believes that CarGurus' price structure is simply different, but not actually “low cost” as compared to Trader's model. Logically, Trader cannot be motivated by something it does not believe to exist and does not in fact exist.

Supplemental Dunbar Affidavit, paras. 6-9.

71. In summary, therefore, CarGurus has failed to provide sufficient credible evidence to support a *bona fide* belief that an order could be made against Trader under section 76 of the Act.

(iii) Section 77 – No Exclusive Dealing

72. Exclusive Dealing is defined in the Act as any practice whereby:

(a) a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products of or designated by the supplier, or

(ii) refrain from dealing in a kind of product except as supplied by the supplier or its nominee; and

(b) a supplier of a product induces a customer to meet a condition set out in a) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet those conditions.

73. CarGurus has failed to provide evidence to ground a claim under either paragraphs (a) or (b).

74. As a primary matter, Trader does not even have exclusive control over vehicle listings. Many customers (i.e., dealers) listing vehicles with Trader also list their vehicles with other digital marketplaces. Trader does not require that dealers deal exclusively or primarily with Trader. Specifically, Trader in no way precludes CarGurus from developing its own equivalent to the Data Feed Information (including Trader Photo equivalents) in partnership with dealers.

Reply Dunbar Affidavit, para. 6.

75. Trader's agreements with dealers do not even contain provisions that require exclusivity:

(a) Trader's form of Master Services Agreement simply notes that "Trader exclusively owns the intellectual property related to any [content]...taken, created, written or developed by Trader." [Emphasis added.]

(b) Trader's form of Data Feed Agreement requires only that the "Syndication Partner" – e.g., CarGurus – not re-syndicate Trader content.

(c) Trader's form of Dealership Syndication Agreement does protect all aspects of Data Feed Information under copyright, but does not restrict dealers from providing native information.

Second Blue Affidavit, paras. 61-63.

76. CarGurus' application contains no evidence, and provides no reasonable inference to suggest, that Trader has induced dealers to meet exclusivity conditions (which conditions, it bears repeating, do not even exist) by offering to supply Data Feed Information on more favourable terms or conditions as a result.

77. Specifically, CarGurus' evidence fails to demonstrate, and its memorandum of fact and law fails even to allege, that dealers receive a financial benefit (either directly or indirectly, explicitly by agreement or by necessary implication) in return for dealing exclusively with Trader.

Reply Dunbar Affidavit, paras. 14-17.

78. This is distinguishable from the *NutraSweet* decision, where inducement could be inferred from the existence of financial incentives to exclusivity such as rebates and access to a cooperative marketing fund.

***Canada (Director of Investigation & Research) v. NutraSweet Co.*, [1990] C.L.D. 1078 (Comp. Trib.) ("NutraSweet"), paras. 161 and 162.**

79. If dealers have not sought to do business with CarGurus, it is of their own volition, not because of any requirement or inducement of Trader. If anything, it is CarGurus' own behaviour that has caused it to have trouble with dealers.

Reply Dunbar Affidavit, paras. 14-17.

80. CarGurus' application alleges a list of dealers that it claims have complained about Trader's conduct, but provides no particulars; this can be contrasted to Trader's

evidence, which specifically lists names of some of the dealers who have complained to Trader about CarGurus.

Memorandum of Fact and Law of the Applicant, para. 76;

Reply Dunbar Affidavit, paras. 11 and 15-16;

Supplemental Dunbar Affidavit, paras. 10-12;

Dunbar Affidavit, para. 32.

81. Moreover, section 77 will only apply where the alleged exclusive dealing, because it is engaged in by a major supplier of a product, is likely to:

(a) impede entry into or expansion of a firm in a market;

(b) impede introduction of a product into or expansion of sales of a product in a market; or

(c) have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially [...]

82. Trader notes that it is Kijiji that is, by far, the largest automotive digital marketplace in Canada. As noted, Kijiji grew without obtaining Data Feed Information from Trader.

Reply Dunbar Affidavit, para. 7;

Second Blue Affidavit, Exhibit 10, pg. 341.

83. The term “impede” queries whether the relevant product market would be substantially more competitive but for the impugned conduct.

Canada (Commissioner of Competition) v. Canada Pipe Co., 2006 F.C.A. 233, paras. 58 and 98.

84. CarGurus’ application presents no evidence that the relevant product market would be substantially more competitive but for Trader’s conduct. CarGurus alleges that its own business would benefit from the order it seeks, not that such an order would lead to broader pro-competitive effect(s) in the market. Aside from bald assertions that its service is innovative, CarGurus has not presented any evidence (let alone, sufficient

credible evidence) that as a result of Trader's alleged conduct, innovation or choice has been restricted, that prices have been artificially raised or lowered, or of any other exclusionary effect in the market.

85. Finally, as with section 75, relief under section 77 is simply not available where the alleged exclusivity pertains to a refusal to licence intellectual property.

Stargrove, para. 27.

86. In summary, therefore, CarGurus has failed to provide sufficient credible evidence to support a *bona fide* belief that an order could be made against Trader under section 77 of the Act.

(c) Insufficient Credible Evidence that the Applicant may have been Directly and Substantially Affected in its Business

87. While the standard of “sufficient credible evidence” is less than proof on a balance of probabilities, a “mere possibility” that CarGurus’ business has been directly and substantially affected is not enough.

Audatex Canada, ULC v. CarProof Corporation, 2015 Comp. Trib. 28, para. 43.

Barcode Systems Inc. v. Symbol Technologies Canada ULC, 2004 Comp. Trib. 1 (aff’d 2004 F.C.A. 339), para. 13.

88. This Tribunal has also held that the term “direct” requires a causal relationship between the respondent’s conduct and the business consequences alleged by the applicant, which relationship must be demonstrated by evidence that is more than speculative in order for leave to be granted.

Mrs. O’s Pharmacy v. Pfizer Canada Inc., 2004 Comp. Trib. 24, para. 25.

89. In the context of section 103.1 of the Act, the word “substantial” has been defined as meaning “important” and “significant”. This Tribunal has consistently taken the position that a substantial effect on a business is measured in the context of the entire business. In other words, this Tribunal will look at the “overall business result.”

Sears Canada Inc. v. Parfums Christian Dior Canada Inc., 2007 Comp. Trib. 6 (“Sears”), paras. 16-21 and 31;

Chrysler, para. 54.

90. CarGurus’ application must therefore fail on several fronts.

91. First, as discussed above, CarGurus’ choice not to engage in a sincere negotiation with Trader for syndication and unwillingness to investigate alternative sources of supply undercuts its allegation that Trader has caused CarGurus’ harm.

See paragraphs 16-18 and 29-42.

92. Second, CarGurus has not raised more than a mere possibility that its business has been substantially affected – in its attempt to demonstrate an overall business

result, CarGurus has only pointed to non-certified projections of its revenue. CarGurus has not attempted to explain the basis for these projections (which are hearsay in any event) and/or why these projections are commercially reasonable.

Memorandum of Fact and Law of the Applicant, paras. 91;

Second Blue Affidavit, paras. 50.

93. In fact, CarGurus' Canadian revenues have quintupled since Trader asserted its lawful copyright, suggesting directly that CarGurus has not been substantially affected.

Second Blue Affidavit, paras. 28-29.

94. CarGurus points to several measurements (lost page views, lost lead volume, etc.), each of which CarGurus alleges to have resulted "since CarGurus removed the photographs over which Trader has asserted copyright." Here, then, CarGurus is explicitly basing its assertion of substantiality on a scenario that assumes infringement as a baseline.

Memorandum of Fact and Law of the Applicant, paras. 90.

95. CarGurus' claims are speculative, lack the necessary elements of causality and do not rise to the required level of "sufficient credible evidence" required to found a *bona fide* belief that CarGurus has been directly and substantially affected by Trader's conduct.

(iv) Tribunal Should Not Exercise Discretion

96. In the alternative, should the Tribunal find that CarGurus has met the requirement to demonstrate sufficient credible evidence that an order could be made under one or more of the sections of the Act, Trader submits that given CarGurus' course of conduct, the Tribunal should not exercise its discretion to grant leave.

97. The relief set out in sections 75-77 of the Act are discretionary in nature, and the Tribunal may decline to grant relief even where all of the elements of a given section have been met.

B-Filer, para. 232 [s.75];

Visa, para. 393 [s. 76];

Canada (Commissioner of Competition) v. Canada Pipe Co., 2005
Comp. Trib. 3, para. 52 [s.77].

98. This Tribunal has noted that an apparently simple solution can lead to “unintended consequences” and the need to ensure that the supposed “cure will not be worse than the disease.” In this vein, this Tribunal has resisted the granting of relief where the result would not be commercially reasonable or consistent with the purposes of the Act. It is not commercially reasonable for CarGurus’ infringement of Trader’s copyright to be rewarded by an order of this Tribunal that is tantamount to a compulsory license.

Visa, para. 398;

B-Filer, para. 235.

99. Granting of leave in this case would sanction CarGurus’ use of the Tribunal process to leverage its position in the Copyright Application. This would be antithetical to the proper relationship between intellectual property law and competition law. As most recently noted by the Competition Bureau in its *Intellectual Property Enforcement Guidelines*:

The unilateral exercise of the IP right to exclude does not violate the general provisions of the Act no matter to what degree competition is affected. To hold otherwise could effectively nullify IP rights, impair or remove the economic, cultural, social and educational benefits created by them, and be inconsistent with the Bureau’s underlying view that IP and competition law are generally complementary.

Canada, Competition Bureau, Intellectual Property Enforcement Guidelines (Ottawa: CB, 18 September 2014) at §4.2.1.

PART V - ORDER SOUGHT

100. Trader seeks an order denying CarGurus leave and dismissing its application as against Trader, with costs.

PART VI - LIST OF AUTHORITIES AND STATUTES TO BE REFERRED TO

<i>Jurisprudence</i>	
1.	<i>Audatex Canada, ULC v. CarProof Corporation</i> , 2015 Comp. Trib. 28
2.	<i>Barcode Systems Inc. v. Symbol Technologies Canada ULC</i> , 2004 Comp. Trib. 1
3.	<i>Barcode Systems Inc. v. Symbol Technologies Canada ULC</i> , 2004 F.C.A. 339
4.	<i>B-Filer Inc. v. Bank of Nova Scotia</i> , 2006 Comp. Trib. 42
5.	<i>Canada (Commissioner of Competition) v. Canada Pipe Co.</i> , 2005 Comp. Trib. 3
6.	<i>Canada (Commissioner of Competition) v. Canada Pipe Co.</i> , 2006 F.C.A. 233
7.	<i>Canada (Director of Investigation & Research) v. NutraSweet Co.</i> , [1990] C.L.D. 1078 (Comp. Trib.)
8.	<i>Canada (Director of Investigation & Research) v. Xerox Canada Inc.</i> (1990), 33 C.P.R. (3d) 83
9.	<i>Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.</i> , 1997 C.C.T.D. No. 53
10.	<i>CCH Canadian Ltd. v. Law Society of Upper Canada</i> , [2004] 1 S.C.R. 339
11.	<i>Chrysler Canada Ltd. v. Canada (Competition Tribunal)</i> , [1989] C.L.D. 1247 (Comp. Trib.)
12.	<i>Commissioner of Competition v. Visa Canada Corporation</i> , 2013 Comp. Trib. 10
13.	<i>Mrs. O's Pharmacy v. Pfizer Canada Inc.</i> , 2004 Comp. Trib. 24
14.	<i>Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.</i> , 2009 Comp. Trib. 6
15.	<i>Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.</i> , 2011 F.C.A. 188
16.	<i>Sears Canada Inc. v. Parfums Christian Dior Canada Inc.</i> , 2007 Comp. Trib. 6
17.	<i>Stargrove Entertainment Inc. v. Universal Music Publishing Group Canada</i> , 2015 Comp. Trib. 26

18.	<i>The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada</i> , 2011 Comp. Trib. 10
Legislation	
19.	<i>Competition Act</i> , R.S.C. 1985, c. C-34 (Sections 103.1 and 75-77)
20.	<i>Copyright Act</i> , R.S.C. 1985, c. C-42 (Section 2)
Secondary Sources	
21.	Canada, Competition Bureau, <i>Intellectual Property Enforcement Guidelines</i> (Ottawa: September 18, 2014) at §4.2.1.
22.	Canada, Competition Bureau, <i>A Guide to Amendments to the Competition Act</i> (Ottawa: April 22, 2009)
23.	Omar Wakil, <i>The 2016 Annotated Competition Act</i> (Carswell: Toronto, 2015), pg. 208

All of which is respectfully submitted this 23rd day of June, 2016.

(Revised July 13, 2016)

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