

# Public Version

File No. CT-2016-

## COMPETITION TRIBUNAL

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-34 (the “**Act**”);

**AND IN THE MATTER OF** an application by CarGurus, Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by CarGurus, Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

### BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
April 15, 2016 CT-2016-003	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 4

**CARGURUS, INC.**

Applicant

- and -

**TRADER CORPORATION**

Respondent

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### MEMORANDUM OF FACT AND LAW OF THE APPLICANT

(Application for Leave Pursuant to Section 103.1 of the *Competition Act*)

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#### **WEIRFOULDS LLP**

Barristers & Solicitors  
4100 - 66 Wellington Street West  
P.O. Box 35, Toronto-Dominion Centre  
Toronto, ON M5K 1B7

**Nikiforos Iatrou**  
**Bronwyn Roe**

Tel: 416-365-1110  
Fax: 416-365-1876

niatrou@weirfoulds.com  
broe@weirfoulds.com

**Lawyers for the Applicant**

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**TO: The Registrar  
Competition Tribunal**  
90 Sparks Street, Suite 600  
Ottawa, ON K1P 5B4  
Tel: 613-957-7851; Fax: 613-952-1123  
filing.depot@ct-tc.gc.ca

**AND TO: John Pecman  
Commissioner of Competition**  
Competition Bureau  
50 Victoria Street  
Gatineau, QC K1A 0C9  
Tel: 819-997-4282  
Fax: 819-997-0324

**AND TO: GOODMANS LLP**  
Bay Adelaide Centre  
333 Bay Street, Suite 3400  
Toronto, ON M5H 2S7

**Peter Ruby  
Michael Koch  
Hannah Arthurs**

Tel: 416-979-2211  
Fax: 416-979-1234

pruby@goodmans.ca  
mkoch@goodmans.ca  
harthurs@goodmans.ca

**Lawyers for the Respondent**

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## PART I - THE APPLICATION IN A NUTSHELL

1. CarGurus, Inc. (“**CarGurus**”) seeks leave to commence an application to the Competition Tribunal against Trader Corporation (“**Trader**”) pursuant to s. 103.1 of the *Competition Act* (“**Act**”).<sup>1</sup>
2. CarGurus and Trader compete by offering Digital Marketplaces that allow consumers to search Vehicle Listings from automobile dealers and private sellers for new and used vehicles for sale. Trader is dominant in two relevant markets: (1) the downstream market for Digital Marketplaces in Canada; and (2) the upstream market for the supply of Vehicle Listings to Digital Marketplaces.
3. Trader is engaged in anticompetitive conduct in order to shut CarGurus out of the Digital Marketplaces market:
  - (a) Trader discriminates against CarGurus in respect of Vehicle Listings that Trader administers by refusing to syndicate those listings on usual trade terms made available to other Digital Marketplaces;
  - (b) Trader refuses to syndicate to CarGurus Vehicle Listings from dealers who request that Trader do so;
  - (c) Trader instructs third parties not to syndicate to CarGurus by threatening to otherwise cut off its syndication to these third parties; and
  - (d) Trader improperly asserts copyright and has commenced litigation over thousands of non-copyrightable photographs, in an attempt to litigate CarGurus out of the market for Digital Marketplaces for Vehicle listings.

Alternatively, even if Trader’s copyright assertions are upheld, Trader’s refusal to supply its copyrighted photographs in listings is also violating the Act since:

- (e) such a refusal is more than the mere exercise of copyright because of its cumulative effect on Trader’s market power in the provision of Digital Marketplaces.

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<sup>1</sup> RSC 1985, c C-34.

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4. Collectively, the above conduct is referred to below as **“Trader’s Conduct”**.
5. Trader, as the dominant Digital Marketplace in the Canadian market, has leveraged its dominance to attempt to shut CarGurus out of the market. In so doing, Trader has violated ss. 75, 76, and 77 of the Act. CarGurus has been directly and substantially affected as a result:
  - (a) The number of multiple leads CarGurus can generate for dealers has diminished significantly;
  - (b) CarGurus has lost █████ of leads for dealers whose Vehicle Listings are related to Trader;
  - (c) CarGurus has lost approximately █████ of its overall lead volume;
  - (d) CarGurus’ conversion rate (the percentage of visitors to the CarGurus Website who contacted at least one dealer about a car for sale) has decreased by █████; and
  - (e) Detailed views of CarGurus pages have dropped by █████, leading to a corresponding █████ drop in advertising revenue.
6. CarGurus estimates that Trader’s Conduct has reduced CarGurus’ revenue by █████ to date. CarGurus’ forgone revenue through 2017 is estimated to be █████.
7. By rendering CarGurus unable to effectively compete, Trader is simultaneously preventing or lessening competition, denying dealers and consumers the innovation and choice that CarGurus offers and ensuring that dealers and consumers use Trader’s higher-cost, less innovative vehicle listing services.
8. CarGurus’ proposed application readily meets the low threshold required on a leave application. The conduct complained of could be the subject of an order pursuant to each of sections 75, 76 and 77. The Application for leave should be granted.

## PART II - STATEMENT OF FACTS

### A. The Parties

9. CarGurus owns and operates websites that enable potential purchasers of automobiles to research and compare listings for used and new automobiles within a geographic area, and to contact sellers.<sup>2</sup> In the context of this application, such websites are referred to as “**Digital Marketplaces**”.
10. CarGurus announced the launch of its Canadian website, <http://www.ca.cargurus.com> (the “**CarGurus Website**”) on May 26, 2015.<sup>3</sup> CarGurus’ U.S. website, <http://www.cargurus.com> (the “**CarGurus U.S. Website**”), launched in 2007.<sup>4</sup>
11. Trader operates websites in Canada—[autotrader.ca](http://autotrader.ca) (English-language) and [autohebdo.com](http://autohebdo.com) (French-language) (collectively, the “**Trader Website**”)—that are Digital Marketplaces which directly compete with the CarGurus Website.<sup>5</sup> Trader is the dominant Digital Marketplace in Canada.<sup>6</sup>
12. One major difference between Trader and CarGurus is that CarGurus’ business model contemplates offering free (i.e., no cost) listing services to dealers, whereas Trader operates on a higher-cost subscription model. Further, Trader’s subscription model bundles various services, making it difficult to discern exactly what Trader charges for leads to dealers. CarGurus’ simple, low-cost model made it a very successful competitor

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<sup>2</sup> Affidavit of Martha Blue (sworn March 3, 2016), paras 6, 22 [**First Blue Affidavit**], Exhibit 2 to the Affidavit of Martha Blue (sworn April 14, 2016) [**Second Blue Affidavit**].

<sup>3</sup> First Blue Affidavit, paras 19, 29.

<sup>4</sup> First Blue Affidavit, para 22.

<sup>5</sup> First Blue Affidavit, para 19.

<sup>6</sup> First Blue Affidavit, para 67; Second Blue Affidavit, paras 31-34.

against AutoTrader in the U.S., and it is clear that Trader is trying to keep this low-cost model from flourishing in Canada.<sup>7</sup>

## **B. Digital Marketing of Automobiles for Sale in Canada**

13. Over the last few decades, the consumer purchase path in the automotive industry has transformed. Today, the path increasingly begins online, and while most consumers do not buy vehicles online, they often conduct research and price evaluations before visiting sellers.<sup>8</sup> Consumers use Digital Marketplaces to acquire information about vehicle availability, features and prices, quickly and at a low (or no) cost.<sup>9</sup>
14. When researching online, consumers want information tailored to their needs while searching for a new or used automobile, and use online channels to narrow their search. At the same time, they expect that in accessing a given Digital Marketplace, they will see as much vehicle inventory as is available in the market, so that they may conduct accurate, comparative research. Consumers have come to expect this, given their experiences using Digital Marketplaces for travel, real estate and other purchases. If a consumer thinks that a Digital Marketplace only lists a fraction of available inventory, he or she is more likely to use another, more comprehensive, alternative.<sup>10</sup>
15. Information about specific makes and models of automobiles is commonly available online from original equipment manufacturers (“**OEMs**”).<sup>11</sup>
16. Information about automobiles available for sale is commonly provided by dealers,<sup>12</sup> private sellers,<sup>13</sup> and Digital Marketplaces.<sup>14</sup>

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<sup>7</sup> Second Blue Affidavit, para 20.

<sup>8</sup> First Blue Affidavit, para 8.

<sup>9</sup> Second Blue Affidavit, para 4.

<sup>10</sup> Second Blue Affidavit, para 6.

<sup>11</sup> First Blue Affidavit, para 10.

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17. Other “offline” means to make consumers aware of vehicle pricing and availability, such as TV and newspaper advertising, are not comparable to, nor a substitute for, online resources, given the limitations of such traditional media. While some consumers may also use such media to inform themselves, increasingly, they are relying on online sources of information.<sup>15</sup>
18. A number of businesses provide services to OEMs, dealers and private sellers to make it easier to disseminate vehicle listing information to consumers. For example, there are a number of suppliers of online support services to OEMs and dealers, including Trader and a U.S.-based company called Dealer Dot Com, Inc. (“**DDC**”).<sup>16</sup>
19. One of the many services that Trader, DDC and others offer to OEMs and dealers in the United States and Canada is website development and hosting. Trader and DDC offer joint website development and web hosting to OEMs and dealers under Trader’s dealerSMARTsolutions products. For the purpose of this Application, companies that offer website development and hosting will be referred to as “**Enhanced Services Providers**”.<sup>17</sup>
20. In Canada, roughly 1,500 dealers have their websites hosted on the servers maintained by DDC. These websites display Vehicle Listings that are also syndicated to Digital Marketplaces.<sup>18</sup>

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<sup>12</sup> First Blue Affidavit, para 11.

<sup>13</sup> First Blue Affidavit, para 13.

<sup>14</sup> First Blue Affidavit, para 16.

<sup>15</sup> Second Blue Affidavit, para 7.

<sup>16</sup> First Blue Affidavit, para 14.

<sup>17</sup> First Blue Affidavit, para 15.

<sup>18</sup> First Blue Affidavit, para 43.



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21. Typically, the information available on Digital Marketplaces includes, for each vehicle, the make, model, year, Vehicle Information Number (“**VIN**”), mileage, price, photographs, and other details about the car, such as the type of transmission and engine size. This collection of information is displayed in a “**Vehicle Listing**”.<sup>19</sup>
22. In some cases, the price of the vehicle is not provided because the dealer wants to be able to negotiate it. However, it is uncommon to market a vehicle without photographs.<sup>20</sup> Photographs are a key feature for how dealers and sellers present and market their vehicles online and an essential input for a Digital Marketplace to be an effective competitor.<sup>21</sup> Buyer interest in a Vehicle Listing is much higher if even a single photograph is included.<sup>22</sup>
23. Both DDC and Trader, in addition to being Enhanced Service Providers, are also Feed Providers. “**Feed Providers**” receive Vehicle Listings from dealers directly and provide data feeds of these Vehicle Listings to Digital Marketplaces.<sup>23</sup>
24. In the U.S., some Feed Providers take photographs of vehicle inventory for dealers (“**capture services**”). Some dealers also take photographs of the vehicles themselves. These photographs are then used in Vehicle Listings. CarGurus does not offer capture services,<sup>24</sup> Trader does.<sup>25</sup>

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<sup>19</sup> First Blue Affidavit, para 17.

<sup>20</sup> First Blue Affidavit, para 18.

<sup>21</sup> Second Blue Affidavit, para 45.

<sup>22</sup> Second Blue Affidavit, para 45; Exhibit E to the Dunbar Affidavit, Exhibit 3 to the Second Blue Affidavit.

<sup>23</sup> First Blue Affidavit, para 23.

<sup>24</sup> First Blue Affidavit, para 24; Second Blue Affidavit, para 9. In the U.S., regardless of who takes the photograph, the prevailing industry view is that dealers own the photographs in the Vehicle Listings. If dealers do not want their Vehicle Listings displayed on the CarGurus U.S. Website, the Vehicle Listings are removed by CarGurus upon request. Take-down requests in the U.S., however, are very rare because CarGurus provides a valuable service to dealers. In particular, the more often dealer

25. Trader and CarGurus are direct competitors in that they both operate Digital Marketplaces that aggregate information from OEMs, dealers and private sellers and make it accessible to consumers through search engines on their respective websites in Canada.<sup>26</sup>

26. Through these Digital Marketplaces, Trader and CarGurus do not sell automobiles; rather, they connect buyers and sellers so that transactions may be conducted directly.<sup>27</sup>

**C. Trader is the Dominant Digital Marketplace in Canada and the Dominant Supplier of Vehicle Listings to Digital Marketplaces**

27. There are approximately 10 businesses in Canada that operate Digital Marketplaces.<sup>28</sup>

28. Trader is the dominant Digital Marketplace in Canada and the dominant supplier of Vehicle Listings to Digital Marketplaces. Trader describes itself as “the leading digital player in Canadian automotive, boasting the top marketplaces autoTRADER.ca (which generates 14 million visits each month), autoHEBDO.net, and the popular car buyer information site Autos.ca”.<sup>29</sup>

29. There are a number of ways to track market share, including the number of dealers and their Vehicle Listings, inventory, and daily views:<sup>30</sup>

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inventory is presented to potential buyers, the greater the number of leads to the dealers; the greater the number of leads, the greater the likelihood of a resulting sale: First Blue Affidavit, para 25.

<sup>25</sup> First Blue Affidavit, para 100.

<sup>26</sup> First Blue Affidavit, para 19.

<sup>27</sup> First Blue Affidavit, para 20.

<sup>28</sup> First Blue Affidavit, para 67.

<sup>29</sup> Second Blue Affidavit, para 31.

<sup>30</sup> First Blue Affidavit, para 68.

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- (a) **Dealers:** Trader's website indicates that it has a relationship with 6218 dealers in Canada.<sup>31</sup> Assuming an estimate of 8,000 dealers in Canada, Trader has a relationship with 78% of the new and used automotive dealers in Canada. If there are fewer than 8,000 dealers in Canada, Trader has an even larger market share.<sup>32</sup>
- (b) **Vehicle Listings:** CarGurus believes that Trader has the exclusive control of an estimated 42.5% of all Vehicle Listings in Canada. This estimate is based on CarGurus' internal analysis of Vehicle Listings that CarGurus cannot obtain from any source other than, or without the consent of, Trader. In fact, Trader-controlled inventory may be higher if all or part of the other 57.5% of inventory from Feed Providers includes Vehicle Listings from Trader.<sup>33</sup>
- (c) **Website Visits:** In terms of customer traffic, ComScore data shows that of all the Digital Marketplaces that present only new and used car listings (unlike, for example, Kijiji.ca Cars and Vehicles, which also displays listings for spare parts and accessories), Trader is by far the largest, enjoying four times the number of unique visitors as the next largest competitor.<sup>34</sup>
30. Trader has admitted its dominance as a major supplier of Vehicle Listings in Canada in an affidavit filed in support of an application it filed against CarGurus in the Ontario Superior Court of Justice for alleged copyright infringement (the "**Trader Application**"), wherein Roger Dunbar (Vice President of Marketing at Trader) states at paragraph 11 of his affidavit that "Trader is at the center of the car buying process in Canada, connecting consumers, dealers and original equipment manufacturers".<sup>35</sup>
31. Because of Trader's dominance in the downstream market, dealers and automobile sellers believe they need to have their listings on the Trader Website, and enter into agreements with Trader whereby the dealers and sellers give up to Trader any rights in

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<sup>31</sup> First Blue Affidavit, para 69.

<sup>32</sup> First Blue Affidavit, para 70.

<sup>33</sup> First Blue Affidavit, paras 71-72.

<sup>34</sup> Second Blue Affidavit, para 31.

<sup>35</sup> First Blue Affidavit, para 74.

Vehicle Listings. This grants Trader access to a massive database of unique listings over which it has absolute control.<sup>36</sup>

## D. Network Effects in Digital Marketplaces

32. Digital Marketplaces are a two-sided platform, in that they connect two distinct groups of users: sellers of vehicles and potential buyers of vehicles. Each group benefits from an increase in the size of the group on the other side of the platform.<sup>37</sup>

33. Comprehensive Vehicle Listings are critical to the success of a Digital Marketplace, for several reasons:

- (a) Consumers who use Digital Marketplaces for Vehicle Listings expect to be able to access comprehensive listings: they want to know that they are accessing as many Vehicle Listings as are available for the geographic area they are interested in, and they expect the information that comprises the Vehicle Listing to be as complete as possible. This ensures that the consumer has confidence that he or she is being afforded the opportunity to conduct thorough comparisons and effective research.<sup>38</sup>
- (b) If a consumer has doubts about the comprehensiveness of the Vehicle Listings at a given Digital Marketplace, that consumer is more likely to choose to use an alternative, more comprehensive, Digital Marketplace. In a two-sided market like this (with dealers on one side, populating the Digital Marketplace with vehicles, and consumers on the other side, seeking to conduct market research), a drop in the number of consumers using the site will have a concomitant effect on the number of dealers who will be willing to use the site.<sup>39</sup>
- (c) There is a direct correlation between Vehicle Listings, website traffic, “**leads**” to dealers (inquiries from consumers to specific dealers about specific Vehicle Listings, containing the consumer’s name and basic contact information) and resulting revenue for the Digital Marketplace.<sup>40</sup>

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<sup>36</sup> Second Blue Affidavit, para 34.

<sup>37</sup> Second Blue Affidavit, para 5.

<sup>38</sup> Second Blue Affidavit, para 36.

<sup>39</sup> Second Blue Affidavit, para 37.

<sup>40</sup> First Blue Affidavit, para 120.

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- (d) In terms of website traffic, Vehicle Listings have a multiplier effect. If on the first visit to a Digital Marketplace, a consumer is presented with a comprehensive Vehicle Listings inventory, the consumer is more likely to have a positive experience. As a result of that positive experience, the consumer is more likely to return to the website and refer others to that website.<sup>41</sup>
34. For CarGurus, more visitors to the CarGurus Website results in more leads to dealers (i.e. potential consumers are directed to the dealer and its Vehicle Listings). Leads are the only tangible way that CarGurus can show dealers that the CarGurus Website adds value to their businesses.<sup>42</sup>
35. There are other benefits to having comprehensive inventory. Visitors stay on the CarGurus Website for longer when there is, for example, a higher number of photographs of vehicles. This in turn increases page views, which in turn assists to attract further Vehicle Listings, advertisers, and improve search results rankings.<sup>43</sup>
36. Trader's dominance and status as a major Digital Marketplace for Vehicle Listings allows it to benefit from powerful network effects, a fact that is acknowledged by Roger Dunbar in the Trader Application.<sup>44</sup>
37. As described below, CarGurus is suffering from the inverse of these network effects, caused by Trader's refusal to allow CarGurus access on usual trade terms to what Trader has designated as "Trader Inventory",<sup>45</sup> which includes the following (collectively, "**Inventory**"):
- (a) Vehicle Listings on dealer websites that are hosted using dealerSMARTsolutions products;

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<sup>41</sup> First Blue Affidavit, para 121.

<sup>42</sup> First Blue Affidavit, para 122.

<sup>43</sup> First Blue Affidavit, para 123.

<sup>44</sup> First Blue Affidavit, para 75; Dunbar Affidavit at para 15, Exhibit 3 to the Second Blue Affidavit.

<sup>45</sup> First Blue Affidavit, para 76.

- (b) Vehicle Listings containing photographs allegedly taken using Trader's capture service; and
  - (c) Vehicle Listings syndicated by Trader (i.e. fed by Trader to third parties pursuant to written agreements).<sup>46</sup>
38. The market power that Trader enjoys in the upstream market due to its exclusive rights is being used to lessen competition in the downstream market, by hindering CarGurus' ability to present to consumers comprehensive Vehicle Listings.

## **E. CarGurus' U.S. Business is Innovative and Consumer-Focused**

39. There are several ways in which CarGurus' Digital Marketplace is innovative and distinguishes itself from others in the U.S. (and in Canada as discussed in the next section):<sup>47</sup>
- (a) **Clean Interface.** The CarGurus U.S. Website provides a clean (i.e. uncluttered) interface for users. The website is efficient, effective and easy to use.
  - (b) **Mathematical algorithms to produce Instant Market Value ("IMV").** CarGurus developed a mathematical algorithm to analyze and compare prices and features on automobiles for sale. The algorithm looks at each individual Vehicle Listing on a CarGurus website and gives an analysis for the consumer as to whether the associated price is "fair", "good", "great" or "over-priced" relative to other Vehicle Listings in the market. In other words, CarGurus does the analysis for the consumer rather than the consumer having to research whether the price offered for a particular car by a particular dealer is a good deal. Unlike other sites, like Trader's, CarGurus embeds this feature into its website. CarGurus was the first Digital Marketplace in the U.S. to apply a comparative analysis to individual Vehicle Listings. Components of CarGurus' mathematical algorithm are the subject of two pending patents in the U.S.
  - (c) **Search Engine.** The CarGurus U.S. Website is a search engine and not merely a classified site. CarGurus tries to index and provide consumers with the entirety of vehicle inventory available for purchase listed online and in the market.

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<sup>46</sup> First Blue Affidavit, para 49.

<sup>47</sup> First Blue Affidavit, para 27.

- (d) **Consumer-Focused Site.** CarGurus is a consumer-focused site even though its revenue is generated from dealers. CarGurus tracks how long vehicles have been on dealers' lots, dealers' reputations, consumer feedback on dealers, fraud detection, and dealers who may be trying "bait and switch" techniques. CarGurus gathers a great deal of information from Vehicle Listings to rank vehicles using its IMV, providing the best potential matches to consumers. CarGurus tries to create a fair and transparent marketplace to help consumers make good purchasing decisions. CarGurus believes what is good for the consumer is also good for the dealer, and will result in a less complicated transaction with a more satisfied consumer. Consumers who visit dealers with a third party price validation are often more ready to purchase a vehicle and less likely to haggle.
  - (e) **Price Drop Feature.** CarGurus tracks the price history of Vehicle Listings posted on a CarGurus website and alerts users who have signed up for such alerts to drops in price for specific vehicles being tracked by those users. Notably, in response to this innovation, Trader began offering this service in September 2015.
  - (f) **Traffic.** As of March 2016, CarGurus operates the largest Digital Marketplace in the U.S. by average daily unique visitors. By driving traffic to the CarGurus U.S. Website, CarGurus, in turn, drives more consumers to dealers.
  - (g) **Pricing for Dealers.** CarGurus sends leads to dealers free of charge. As explained below, CarGurus uses leads to demonstrate its value to dealers and encourage them to purchase advertising packages from CarGurus. For example, if the CarGurus U.S. Website has generated numerous leads to dealers, they may be more inclined to purchase additional dealer services that typically generate more leads.
40. The CarGurus U.S. Website also offers a discussion platform for car enthusiasts and automotive experts, who submit questions, offer insight, gather and share information and provide reviews of vehicles and dealers. This platform also helps make the website a destination for consumers interested in purchasing new and used vehicles.<sup>48</sup>

## F. CarGurus' Launch in Canada

41. On May 26, 2015, CarGurus announced the launch of the Canadian CarGurus Website.<sup>49</sup>

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<sup>48</sup> First Blue Affidavit, para 28.

<sup>49</sup> First Blue Affidavit, para 29.

42. Given the success of CarGurus in the U.S., CarGurus believed that it could effectively compete in the Canadian marketplace by replicating the innovative features that it had developed for the U.S. market, as discussed above.<sup>50</sup>
43. For example, the CarGurus Website is similarly clean, efficient, and operates as a search engine rather than merely a classified site. CarGurus was the first Digital Marketplace in Canada to employ and embed into its website an analysis and ranking of individual Vehicle Listings based on pricing, features, and IMV.<sup>51</sup>
44. At launch, CarGurus populated the CarGurus Website primarily with inventory from data feeds, but would also crawl certain dealer websites for additional Vehicle Listings.<sup>52</sup> The benefit for dealers to appearing on the CarGurus Website was clear: as in the U.S., this would generate greater publicity for Vehicle Listings and increase the number of leads, all at no cost to dealers. Of course, if for whatever reason, a dealer wanted CarGurus to take down its listings, CarGurus would do so and implement a “dealer block”.<sup>53</sup> CarGurus has since ceased crawling dealer websites and now relies on data feeds exclusively.<sup>54</sup>

## **G. CarGurus’ Revenue Model Depends on Generating Leads to Dealers**

45. CarGurus’ revenue model begins by generating leads to dealers. CarGurus does not charge dealers for leads sent to them; rather, leads are intended to demonstrate to dealers the value of having Vehicle Listings on the CarGurus Website. This no-cost model has been welcomed in the U.S., as is seen by CarGurus’ ability to become, as of

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<sup>50</sup> First Blue Affidavit, para 30.

<sup>51</sup> First Blue Affidavit, para 31.

<sup>52</sup> First Blue Affidavit, para 33.

<sup>53</sup> First Blue Affidavit, paras 26, 38-39.

<sup>54</sup> Second Blue Affidavit, para 8.



March 2016, the largest Digital Marketplace in the U.S.<sup>55</sup> CarGurus uses leads to promote its enhanced advertising packages to dealers, which in turn generates revenue.<sup>56</sup>

46. CarGurus effectively offers three tiers of advertising packages to dealers:<sup>57</sup>

- (a) **Basic** – This is the free, no-cost package whereby CarGurus posts Vehicle Listings on the CarGurus Website, tracks leads, and provides the dealer with anonymized leads and a means for communicating with the potential consumer through CarGurus. The dealer is limited to 12 photographs per Vehicle Listing.
- (b) **Enhanced Placement** – This is the package whereby CarGurus posts the dealer’s Vehicle Listing on the CarGurus Website, tracks leads, and provides the dealer with leads that contain consumer contact information and a means for consumers to communicate directly with dealer. CarGurus additionally posts on the CarGurus Website certain dealer content, such as its trademark, name and contact information, phone number, directions, link to its primary website and/or vehicle details page (“**VDP**”), so that this content may be viewed by users. The dealer may upload more than 12 photos per Vehicle Listing.
- (c) **Featured Placement** – This package is the same as the Enhanced Placement package, with CarGurus additionally showcasing dealer inventory at the top of search results pages in “Featured Listings” slots.

47. There is a direct correlation between Vehicle Listings and leads and CarGurus’ ability to identify prospective new dealers for CarGurus’ enhanced advertising packages.<sup>58</sup>

48. [REDACTED]

<sup>55</sup> Second Blue Affidavit, para 13.

<sup>56</sup> First Blue Affidavit, paras 55-60; Second Blue Affidavit, paras 21-22.

<sup>57</sup> Second Blue Affidavit, para 23.

<sup>58</sup> First Blue Affidavit, para 127; Second Blue Affidavit, para 46.

<sup>59</sup> [REDACTED]

49. CarGurus' total revenue from Canadian dealers to March 31, 2016 is approximately [REDACTED], well below the [REDACTED] CarGurus projected it would have generated in this time period.<sup>60</sup>

## H. **Trader's Exclusivity Provision Prevents DDC From Sending Vehicle Listings to CarGurus**

50. On October 10, 2013, DDC and CarGurus entered into a Referral and License Agreement (the "**DDC Agreement**"), which grants CarGurus the rights to publish certain Canadian Vehicle Listings inventory from DDC customers.<sup>61</sup>

51. While CarGurus continues to receive U.S. Vehicle Listings from DDC, DDC has informed CarGurus that it can no longer send CarGurus any Inventory for Canada because of DDC's "exclusive" agreement with Trader covering Canada.<sup>62</sup>

52. CarGurus has determined that approximately 103,000 of the 144,974 photographs over which Trader alleges copyright in the Trader Application were obtained by CarGurus from dealer websites hosted by DDC.<sup>63</sup>

53. CarGurus did not know that Trader claimed ownership of the alleged copyright in the vehicle photographs that were included in the Inventory. Rather, CarGurus thought that it was each dealership that owned any copyright in each Vehicle Listing, which is the typical situation in the U.S.<sup>64</sup>

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<sup>60</sup> Second Blue Affidavit, para 30.

<sup>61</sup> First Blue Affidavit, para 44.

<sup>62</sup> First Blue Affidavit, para 48.

<sup>63</sup> First Blue Affidavit, para 51. Trader has also referenced 72,882 "new" photographs that it alleges have been infringed by CarGurus: Second Blue Affidavit, para 17 and Exhibit 8.

<sup>64</sup> First Blue Affidavit, para 53. DDC does not claim ownership of any of the copyright on the websites it hosts in the U.S. or Canada: First Blue Affidavit, para 52.

54. Accordingly, CarGurus believed that if any Canadian dealer objected to the posting of the dealer's Vehicle Listings on the CarGurus Website, CarGurus would be contacted by the dealer (or by DDC), and would remove the content in the same manner as content is removed in the U.S.<sup>65</sup>

## I. Trader Refuses to Syndicate to CarGurus on Usual Trade Terms

55. In June 2015, DDC advised CarGurus that it was getting pressure from Trader to stop CarGurus from "whatever [CarGurus was] doing" by either using its relationship with CarGurus or through technological means.<sup>66</sup>

56. On July 7, 2015, following discussions between CarGurus and Trader, Trader sent CarGurus a document called the Data Feed Agreement (hereinafter the "**Syndication Agreement**").<sup>67</sup>

57. CarGurus could not accept the terms of the Syndication Agreement, as it believed a number of terms were designed to prevent CarGurus from effectively competing with Trader in the Canadian marketplace. These terms are clearly designed to stifle competition:

- (a) Section 2.6.1 of the Syndication Agreement would require that leads to dealers from CarGurus Website visitors go through Trader, so that the leads are attributable to Trader. This would suggest to the dealer that the lead is coming from Trader and not CarGurus, which aside from harming CarGurus' business by suggesting to the dealers that CarGurus is providing no value, is false and misleading. Moreover, by insisting that all leads be sent via Trader, the lead volume that Trader could claim to be sending to dealers would be erroneously inflated.<sup>68</sup>

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<sup>65</sup> First Blue Affidavit, para 54.

<sup>66</sup> First Blue Affidavit, para 77.

<sup>67</sup> First Blue Affidavit, para 84.

<sup>68</sup> First Blue Affidavit, para 87.

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As was described above, lead attribution is critical. If a dealer is under the impression that Trader, and not CarGurus, is the source of the lead, the dealer will have little incentive to enter into a paying relationship with CarGurus; it would assume that CarGurus is ineffective at connecting it with consumers.<sup>69</sup>

- (b) Section 2.6.1 would require CarGurus to put an indexable link back to the listing on the Trader Website. This is contrary to Google's policy regarding "unnatural" links. In particular, Trader wanted CarGurus to link back to the Vehicle Listing on the Trader Website and ensure that the link is crawlable by Google and does not have a no-follow tag on it. This practice signals to Google that it should give that target website a higher ranking in Google searches. Google has forbidden doing this as part of an exchange agreement because it would allow companies to artificially increase their rankings in Google's search engine. If CarGurus engaged in such linking back, Google could impose penalties on the CarGurus Website, with the ultimate penalty being de-indexing of the CarGurus Website from Google's search engine.<sup>70</sup>
- (c) Section 2.6.2 of the Syndication Agreement would have required CarGurus to contact dealers through phone numbers and emails that Trader provided to CarGurus, that CarGurus use Trader email addresses and phone numbers for sending leads to dealers (no matter what the dealer requests), and that CarGurus allow Trader to intercept and track CarGurus' emails and phone calls to dealers. All of these requirements would significantly harm CarGurus' business by giving Trader intelligence about CarGurus' business.<sup>71</sup>

At a minimum, it would give Trader insight into the number of leads CarGurus generates, conversations CarGurus' users have with dealers, the inventory that CarGurus was able to generate leads on, and CarGurus' relative value to a dealer compared to theirs.<sup>72</sup> The anticompetitive effects of allowing Trader access to this information are clear.

- 58. CarGurus did not receive any further communication from Trader between July 7, 2015 and December 1, 2015, when Trader contacted CarGurus about the copyright litigation that would follow.<sup>73</sup>

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<sup>69</sup> First Blue Affidavit, para 122; Second Blue Affidavit, para 35.

<sup>70</sup> First Blue Affidavit, para 89.

<sup>71</sup> First Blue Affidavit, para 90.

<sup>72</sup> First Blue Affidavit, para 92.

<sup>73</sup> First Blue Affidavit, para 93.

**J. Trader Alleges Copyright Infringement, Causing CarGurus to Remove Vehicle Photographs**

59. On December 2, 2015, CarGurus' received a letter from Trader, which alleged that CarGurus copied and is communicating to the public at least 150,000 photographs owned by Trader.<sup>74</sup>

60. CarGurus did not know until this time that Trader claimed copyright ownership in photographs on dealer websites, nor did CarGurus know that these photographs were allegedly taken by Trader employees and contractors.<sup>75</sup>

61. Since the December 2 letter did not identify the dealers or VINs associated with the photographs at issue, CarGurus did not know which photographs on the CarGurus Website were alleged to infringe.<sup>76</sup>

62. Accordingly, on the evening of December 8, 2015, CarGurus removed all photographs from the CarGurus Website for Vehicle Listings that were not obtained from Feed Providers. This resulted in the removal of over 1 million photographs.<sup>77</sup>

**K. Trader Prevents Dealers and Feed Providers from Syndicating to CarGurus**

63. As indicated above, it is common for dealers and Feed providers to syndicate their Vehicle Listings to as many Digital Marketplaces as possible, with a view to gaining as much visibility for those listings as possible.

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<sup>74</sup> First Blue Affidavit, para 94.

<sup>75</sup> First Blue Affidavit, para 95.

<sup>76</sup> First Blue Affidavit, para 96.

<sup>77</sup> First Blue Affidavit, para 97.

64. Trader has told dealers and Feed Providers not to syndicate Inventory to CarGurus, on the basis that Trader's prior consent is required. Trader refuses to provide that consent.<sup>78</sup>
65. As a result, Feed Providers (including Carpages.ca and DDC) have cancelled data feeds to CarGurus. Carpages.ca has not provided data feeds to CarGurus, saying that it is unable to re-syndicate Vehicle Listings for Canada without the express permission of Trader. In one instance Carpages re-syndicated by mistake and was advised by Trader not to do so.<sup>79</sup> DDC has had to stop providing CarGurus with any Inventory for Canada.<sup>80</sup>
66. CarGurus understands that other Trader syndication agreements lack the anti-competitive terms described at paragraph 57. For example, CarGurus' Senior Vice President Technology has reviewed other Canadian Digital Marketplaces and has never seen a link back to the Trader Website. Accordingly, the requirement in Section 2.6.1 of the Syndication Agreement appears to have been designed to target CarGurus and CarGurus alone.<sup>81</sup>
67. As noted in paragraph 37, Inventory includes not just dealers who use the Trader capture service, but all dealers to whom Trader provides any services (even simple web hosting services). This is a significant percentage of dealers in Canada, and has resulted in Feed Providers stopping syndication of dealers' Vehicle Listings to CarGurus regardless of whether the dealer uses Trader's capture service.<sup>82</sup>

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<sup>78</sup> First Blue Affidavit, para 105.

<sup>79</sup> First Blue Affidavit, paras 106-107.

<sup>80</sup> First Blue Affidavit, paras 53-58.

<sup>81</sup> First Blue Affidavit, para 112.

<sup>82</sup> First Blue Affidavit, para 113.

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68. For example, even if a dealer takes its own photographs but puts them on a DDC-hosted website, and uses Trader for syndication, Trader will not syndicate the Vehicle Listing to CarGurus though Trader can claim no copyright in the photographs.<sup>83</sup>
69. Even where a dealer advises Trader that the dealer would like to have its inventory syndicated to CarGurus, Trader can refuse to grant its permission, even if the dealer has taken its own photographs, because Trader has refused to enter into a syndication agreement with CarGurus.<sup>84</sup>
70. Trader's Conduct is contrary to representations that it makes on the Trader Website, which suggest that Trader syndicates "everywhere".<sup>85</sup> To the contrary, it would appear that Trader is highly selective and strategic about syndication.<sup>86</sup> CarGurus poses a real competitive threat to Trader, and as such, it is clear that syndicating "everywhere" does not include CarGurus.
71. Since Trader refuses to syndicate any Inventory to CarGurus on terms that would allow CarGurus to effectively compete with Trader, CarGurus would need to have dealers compile all listing information about their vehicles and take a second set of photographs (assuming that the existing photographs may be owned by Trader), and then upload the information and different photographs into at least two different systems: the Trader Website and at least one Feed Provider. This would involve a very significant amount of work, which a dealer is not likely to do if it can simply rely on Trader to do it for them. Moreover, because their listing is already on Trader's Digital Marketplace and it is

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<sup>83</sup> First Blue Affidavit, para 114.

<sup>84</sup> First Blue Affidavit, para 115.

<sup>85</sup> First Blue Affidavit, Exhibit G.

<sup>86</sup> First Blue Affidavit, para 116.

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dominant, the benefit from being on a competing Digital Marketplace is reduced. Accordingly, it appears that Trader has unfairly targeted CarGurus.<sup>87</sup>

72. CarGurus is negotiating with Kijiji.ca to obtain a data feed agreement, and although the talks are in the early stages, Kijiji has told CarGurus that it will not send a feed for any Inventory without Trader's consent. To date, Trader has refused consent.<sup>88</sup>
73. Since the Fall of 2015, CarGurus has been trying to work with a company called CarProof which tracks historical data on vehicles, such as whether a vehicle has been in any accidents. CarProof told CarGurus that "one of our canada [sic] marketplace partners is pushing us to agree not to integrate with cargurus in Canada. Apparently you have the incumbents in Canada nervous".<sup>89</sup> CarGurus understands "the incumbents" as meaning Trader.<sup>90</sup>
74. CarGurus is still trying to source Vehicle Listings from all available Feed Providers in Canada. However, even if CarGurus obtains data feeds from all of them, the CarGurus Website will not have a true reflection of the available Canadian inventory, as Trader controls at least 42.5% of the marketplace and will not allow Feed Providers to syndicate any Inventory to CarGurus.<sup>91</sup>

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<sup>87</sup> First Blue Affidavit, para 117.

<sup>88</sup> First Blue Affidavit, para 118.

<sup>89</sup> First Blue Affidavit, para 119 and Exhibit H..

<sup>90</sup> First Blue Affidavit, para 119.

<sup>91</sup> Second Blue Affidavit, para 56.



75. By refusing its consent, Trader is trying to ensure that inventory is not syndicated to CarGurus even if a dealer requests it and a Feed Provider would otherwise be willing to syndicate that dealer's inventory to CarGurus.<sup>92</sup>
76. CarGurus has received complaints from dealers who want to have their Vehicle Listings on the CarGurus Website but have been prevented in doing so by Trader. CarGurus has a list of more than 30 dealers who would like to work with CarGurus but cannot because of Trader's refusal to consent to syndication of Inventory to CarGurus. Moreover, Trader itself acknowledges that at least 36 dealers have approached Trader seeking syndication of their Vehicle Listings to CarGurus. Trader has refused.<sup>93</sup>

### **PART III - ISSUE**

77. The sole issue on this Application is whether CarGurus should be granted leave to make an application under ss. 75, 76, and/or 77 against Trader.

### **PART IV - ARGUMENT**

#### **(1)**

#### **The Applicable Legal Test**

78. Section 103.1 of the Act grants private parties the right to commence an application pursuant to ss. 75, 76 or 77 of the Act, with leave of the Competition Tribunal ("**Tribunal**"):

**103.1** (1) Any person may apply to the Tribunal for leave to make an application under section 75, 76 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under that section.

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<sup>92</sup> Second Blue Affidavit, para 57.

<sup>93</sup> Second Blue Affidavit, para 58.

79. Subsections 103.1(7) and 103.1(7.1) set out the tests to be employed by the Tribunal for requests for leave under that section to commence an action pursuant to s. 75/77 and s. 76, respectively:

**Granting leave to make application under section 75 or 77**

(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

**Granting leave to make application under section 76**

(7.1) The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.

80. When determining whether to grant leave, the Tribunal is to ask whether 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."<sup>94</sup>
81. The leave stage is a summary screening process.<sup>95</sup> The standard of proof on a leave application pursuant to s. 103.1 is lower than proof on a balance of probabilities, which will be the standard applicable to the decision on the merits.<sup>96</sup> The Tribunal needs only to be satisfied that the respondent's practice *could* be the subject of an order.

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<sup>94</sup> *National Capital News Canada v Milliken*, 2002 Comp Trib 41 at para 14.

<sup>95</sup> *Barcode Systems Inc v Symbol Technologies Canada ULC*, 2004 FCA 339, [2005] 2 FCR 254 at para 24 [**Barcode**].

<sup>96</sup> *Barcode*, *ibid* at para 17.

82. If there are any facts in CarGurus' affidavit that might meet the requirements of sections 75, 76, and 77, “the benefit of any doubt should work in favour of granting leave in order not to finally preclude [the Applicant] from its day before the Tribunal”.<sup>97</sup>
83. With this lower standard of proof in mind, the Tribunal must answer two questions on this leave application: (1) has CarGurus been directly and, for the purposes of ss. 75 and 77, substantially affected in its business by a reviewable practice?; and (2) could the reviewable practice in question be the subject of an order pursuant to the sections of the Act on which CarGurus relies?

## (2)

### **CarGurus Has Been Directly and Substantially Affected in its Business by Trader's Conduct**

84. An application under s. 103.1 of the Act requires sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in its business by a reviewable practice (in the case of s. 76, a direct effect will suffice<sup>98</sup>). To be “substantial” there must be an effect that is “important or significant”; it need not be such that the affected party will be unable to carry on.<sup>99</sup>
85. Trader's Conduct has directly and substantially affected CarGurus' business. It has suffered losses in its anticipated revenues, and decreased traffic and access to dealers and Vehicle Listings. In a networked, two-sided, market like Digital Marketplaces, having decreased access to Vehicle Listings results in decreased website visits by consumers. This in turn leads to fewer dealers seeking to place their inventory on the CarGurus Website.

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<sup>97</sup> *Barcode*, *ibid* at para 27.

<sup>98</sup> *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*, 2015 Comp Trib 26, [2015] CCTD No 26 at para 30.

<sup>99</sup> *Stargrove*, *ibid* at para 29.

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86. The harm will only become magnified as time goes on. The longer CarGurus is forced to operate without comprehensive listings, the more consumers and visitors it is going to lose, leading to even greater harm to its revenues. This is not speculation, this is common sense. The dealers from whom CarGurus generates revenues will not continue to use CarGurus' Digital Marketplace if they think that doing so will not expose them to consumers. Consumers, in turn, will not use CarGurus' Digital Marketplace if they think that CarGurus has incomplete inventory, or lacks photos of the vehicles the consumers are researching.
87. CarGurus' entire business in Canada depends on access to comprehensive Vehicle Listings, particularly those that contain photographs: there is a direct correlation between Vehicle Listings, website traffic, leads to dealers and resulting revenue for CarGurus' Digital Marketplace.<sup>100</sup> There is also a direct correlation between photos and leads.<sup>101</sup>
88. The removal of Inventory from CarGurus' Canadian website has had, and is having, a direct and substantial measurable and deleterious impact on CarGurus' business. Without being able to obtain Inventory, CarGurus will not be able to effectively compete with Trader.<sup>102</sup>
89. As a result of Trader's Conduct, the CarGurus Website is missing a significant proportion of Vehicle Listings and CarGurus believes that it is obvious to users of the CarGurus Website that it does not have all available inventory. Without a comprehensive inventory

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<sup>100</sup> First Blue Affidavit, para 120.

<sup>101</sup> First Blue Affidavit, para 157.

<sup>102</sup> Second Blue Affidavit, para 43.

of photographs in Vehicle Listings, CarGurus is receiving less traffic and generating fewer leads to dealers, which prevents revenue realization.<sup>103</sup>

90. Since CarGurus removed the photographs over which Trader has asserted copyright:
- (a) **The number of dealers with a material number of leads has diminished.** This is particularly acute in the market on which CarGurus has focused, namely, English-speaking consumers in Ontario, where there is the highest concentration of dealers.<sup>104</sup>
  - (b) Email leads for inventory posted to the CarGurus Website from Inventory dropped from an average of [REDACTED] leads/day to [REDACTED] leads/day. In other words, without photographs, **CarGurus has lost [REDACTED] of leads** for dealers whose Vehicle Listings are related to Trader.<sup>105</sup>
  - (c) In terms of overall lead volume (after normalizing for traffic differences), **CarGurus lost approximately [REDACTED] of its overall lead volume.**<sup>106</sup>
  - (d) CarGurus' **conversion rate** (the percentage of visitors to the CarGurus Website who contacted at least one dealer about a car for sale) **decreased by [REDACTED]**. A negative impact to conversion rate demonstrates an increasingly negative user experience of the CarGurus Website, which diminishes the CarGurus Website's growth, repeat visitors, and value provided to dealers.<sup>107</sup>
  - (e) **Total Vehicle Detail Page ("VDP") views have dropped by [REDACTED]**. Most of CarGurus' advertising revenue is made from advertising on VDPs, the reduction in total VDP views represents not only a large reduction in user engagement (measured by time spent on the CarGurus Website), but also a corresponding [REDACTED] decrease in advertising revenue.<sup>108</sup>
91. CarGurus estimates that the loss of photographs and inability to display Inventory has cost CarGurus approximately [REDACTED] in revenue to date (a loss of [REDACTED]). CarGurus' forgone revenue through 2017 is estimated to be [REDACTED].<sup>109</sup>

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<sup>103</sup> First Blue Affidavit, para 124.

<sup>104</sup> Second Blue Affidavit, para 46.

<sup>105</sup> Second Blue Affidavit, para 47.

<sup>106</sup> Second Blue Affidavit, para 48.

<sup>107</sup> Second Blue Affidavit, para 52.

<sup>108</sup> Second Blue Affidavit, para 53.

<sup>109</sup> Second Blue Affidavit, para 50.

92. In the longer term, the reduction in leads and the corresponding reduction in the ability to monetize leads will affect all aspects of CarGurus' Canadian business, preventing CarGurus from continuing to develop innovative features to assist consumers in their purchasing path. Consumers suffer from the lack of innovation and lack of competition. If Trader continues its current practices, the percentage of the market it controls will only increase with time as it enters into exclusive agreements with additional dealers and Feed Providers, and the adverse effects on CarGurus' business from Trader's Conduct are likely to grow.<sup>110</sup>
93. Trader's Conduct is, without question, directly and substantially affecting CarGurus' business.

### (3)

#### **Trader's Conduct Could be Subject to an Order Pursuant to Sections 75, 76, and 77 of the Act**

94. In assessing the potential merits of a case, the Tribunal may address the relevant elements summarily in keeping with the expeditious nature of the leave proceeding under section 103.1.<sup>111</sup>
95. Trader's Conduct is anticompetitive. Trader enjoys market power in the upstream Vehicle Listings market. It uses this market power to deny (directly and indirectly) Inventory to CarGurus. The result of this foreclosure is to enhance, create, or maintain its market power in the downstream Digital Marketplaces market. The reason it has targeted CarGurus is because of CarGurus' ability to become a significant competitor, based on its U.S. track record and ability to replicate in Canada its innovative U.S. offerings by offering at the outset no-cost services and leads to dealers.

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<sup>110</sup> Second Blue Affidavit, para 54.

<sup>111</sup> *Barcode*, *supra* note 95 at para 19.

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96. Trader's treatment of CarGurus and its refusal to deal with CarGurus on commercially reasonable terms stems from Trader's concern that CarGurus' expansion in the Canadian market would threaten Trader's position in the market.
97. Trader views CarGurus as its biggest competitive threat because the CarGurus Website is innovative and CarGurus drives considerable value to dealers and the public, as is proven by CarGurus' U.S. business. CarGurus' IMV ratings drive traffic and views not only to the CarGurus' Website, but also dealers' websites based on CarGurus' rankings. This provides value to dealers that Trader cannot.<sup>112</sup>
98. Moreover, CarGurus offers these services either for free or for a lower cost than Trader offers its services. For example, CarGurus' basic package, which is offered to dealers free of charge, includes dealers' inventory on the CarGurus Website with up to 10 photographs, and allows CarGurus Website users to anonymously email such dealers about their available vehicles for sale.<sup>113</sup>
99. CarGurus believes that Trader's different treatment of CarGurus and its refusal to deal with CarGurus on the usual trade terms with which it deals with other Digital Marketplaces stems from CarGurus' low pricing policy and from Trader's concern that CarGurus' expansion in the Canadian market would force Trader to compete by providing more innovative products and services and by lowering its prices.<sup>114</sup>
100. Even if Trader holds copyright in the photographs (which CarGurus denies), Trader's refusal to provide access to its photographs of vehicles is not the mere exercise of copyright. Because of network effects the market power in a collection of copyrighted

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<sup>112</sup> Second Blue Affidavit, para 40.

<sup>113</sup> Second Blue Affidavit, para 41.

<sup>114</sup> Second Blue Affidavit, para 42.

photographs exceeds the market power of a single photograph. The number of Vehicle Listings affected by the exercise in copyright is important, and the larger the number, the greater the competitive implications of a denial of access. Moreover, the exercise of those rights is creating and maintaining Trader's market power in the market for Digital Marketplaces in Canada.

## **A. Refusal to Deal (Section 75(1))**

101. Subsection 75(1) of the Act sets out the requirements for the reviewable trade practice of refusal to deal:

### **Jurisdiction of Tribunal where refusal to deal**

**75. (1)** Where, on application by the Commissioner or a person granted leave under section 103.1, 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 unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

102. CarGurus submits that this case meets all five requirements of s. 75:



- (a) CarGurus is substantially affected in its business and precluded from carrying on its business due to its inability to obtain Vehicle Listings from Trader to include on the CarGurus Website on usual trade terms (through a syndication agreement).
  - (b) CarGurus is unable to obtain these rights because the Inventory is in Trader's sole control. Trader controls at least 42.5% of the Canadian Digital Marketplace market.<sup>115</sup> In other words, CarGurus is precluded from obtaining rights to an estimated 42.5% of all Vehicle Listings in Canada.
  - (c) CarGurus is willing to meet the usual trade terms of Trader for the syndication of Inventory through a commercially reasonable syndication agreement. It has tried to enter into a syndication agreement with Trader, but Trader refuses to deal with it on its usual, standard terms.
  - (d) Vehicle Listings and Inventory are not in limited supply – as noted above, these are digital listings that are normally syndicated to Digital Marketplaces as a matter of course.
  - (e) Trader's refusal to deal is having an adverse effect on competition in the market for Digital Marketplaces in Canada. Trader's Conduct stems from its concern that CarGurus' expansion in the Canadian market would threaten Trader's market dominance. The effect of this conduct is that the consuming public is being denied CarGurus' innovative, consumer-focused website.
103. CarGurus respectfully requests that the Tribunal consider the importance of both a competitive and innovative Canadian marketplace. Trader's refusal to deal with CarGurus stifles CarGurus' innovative business model, which ultimately impacts consumers who are denied the opportunity to access such an innovative business model.

## **B. Price Maintenance (Section 76)**

104. Similarly, there is sufficient, credible evidence that the Tribunal could make an order against Trader pursuant to ss. 76(2) and 76(8) of the Act:

### **Price maintenance**

**76.** (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

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

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<sup>115</sup> First Blue Affidavit, para 71.

(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.

## **Order**

(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.

## **Persons subject to order**

(3) An order may be made under subsection (2) against a person who

(a) is engaged in the business of producing or supplying a product;

... or

(c) has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography.

...

## **Refusal to supply**

(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.

105. Trader is engaged in the business of supplying Vehicle Listings, as required by s. 76(3)(a).

106. If it is accepted that Trader holds copyright in the photographs (which Trader asserts but CarGurus denies), Trader also falls within s. 76(3)(c), as it would have the exclusive

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rights and privileges conferred by the copyright in the photographs and corresponding Inventory associated with the syndication agreements.<sup>116</sup>

107. Trader's Conduct falls within s. 76(1)(a)(ii) because it has refused to supply a product, namely Vehicle Listings, to CarGurus. Specifically, Trader has refused to grant CarGurus Vehicle Listings that Trader designates as its own Inventory on the CarGurus Website in an attempt to keep CarGurus from competing in the market for Digital Marketplaces. Trader is doing so because CarGurus' low pricing policy for various services, including the IMV produced by CarGurus' mathematical algorithms, and generally innovative features, would take away from Trader's market share.
108. Trader's Conduct also falls within s. 76(1)(a)(ii) because it has "otherwise discriminated" against CarGurus. Trader has discriminated against CarGurus by denying it access to Vehicle Listings Trader has designated as its own Inventory on the CarGurus Website, and by refusing to deal with it on the usual trade terms with which Trader deals with other Digital Marketplaces. This discrimination arises because of CarGurus' low pricing policy and its innovative website.
109. Trader has also acted contrary to s. 76(8) by inducing DDC and other Feed Providers, as a condition of doing business with Trader, to refuse to syndicate Inventory to CarGurus. Trader invokes its contractual rights to prevent DDC and other Feed Providers from syndicating Vehicle Listings to CarGurus.
110. In *Stargrove*, Justice Barnes, citing the Federal Court of Appeal in *Apotex Inc v. Eli Lilly and Company*<sup>117</sup> stated that "discriminatory conduct falling under section 76 may not be

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<sup>116</sup> In *Stargrove*, *supra* note 98, Justice Barnes held that by virtue of paragraph 76(3)(c), it is not a bar to relief that the impugned conduct is carried out by a party with an exclusive intellectual property right. Justice Barnes, citing *Apotex Inc v Eli Lilly and Company*, 2005 FCA 361 at paras 28 and 2, went on to explain that "discriminatory conduct falling under section 76 may not be 'the mere exercise of an intellectual property right'".

'the mere exercise of an intellectual property right".<sup>118</sup> Trader's discriminatory conduct is not a legitimate exercise of intellectual property rights.

111. Trader's refusal to supply has impeded CarGurus' entry into and expansion in the Digital Marketplaces market in Canada and has resulted, and is likely to result, in a substantial lessening or prevention of competition, as consumers are being denied access to an innovative, consumer-friendly Digital Marketplace.

## C. Exclusive Dealing (Section 77)

112. Subsection 77 has also been violated by Trader in this case:

### Definitions

77. (1) For the purposes of this section,

"exclusive dealing" means

(a) any practice whereby 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 supplied by or designated by the supplier or the supplier's nominee, or

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

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

...

### Exclusive dealing and tied selling

(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it

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<sup>117</sup> *Apotex Inc v Eli Lilly and Company*, 2005 FCA 361 at paras 28 and 34.

<sup>118</sup> *Stargrove*, *supra* note 98 at para 35.

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is engaged in by a major supplier of a product in a market or because it is widespread in a market, 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, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

113. Trader is a major supplier of Vehicle Listings in Canada, and the sole supplier of Inventory.
114. Exclusivity provisions in Trader's agreements with dealers and Feed Providers provide that dealers and Feed Providers cannot syndicate Inventory to CarGurus without Trader's consent, which consent Trader refuses to grant. As a result, CarGurus cannot access Inventory.
115. Trader's exclusive dealing has impeded CarGurus' entry into and expansion in the Digital Marketplaces market in Canada.
116. Trader's exclusive dealing has resulted, and is likely to result, in a substantial lessening of competition, as consumers are being denied access to an innovative, consumer-friendly Digital Marketplace.
117. While CarGurus denies that Trader (or any party) holds copyright in the photographs at issue, even if Trader does hold copyright to the photographs, the Act can apply to anticompetitive conduct involving intellectual property rights where the conduct is

something more than the mere exercise of the IP right.<sup>119</sup> The Competition Bureau's Intellectual Property Enforcement Guidelines provide that, if a company uses IP protection to engage in conduct that creates, enhances or maintains market power as proscribed by the Act, or engages in a practice of launching frivolous litigation to exclude competitors, then the Bureau may intervene.<sup>120</sup>

118. The United States Department of Justice and Federal Trade Commission describe the intersection between intellectual property law and antitrust law in their Antitrust Guidelines for the Licensing of Intellectual Property:

Intellectual property law bestows on the owners of intellectual property certain rights to exclude others. These rights help the owners to profit from the use of their property. An intellectual property owner's rights to exclude are similar to the rights enjoyed by owners of other forms of private property. As with other forms of private property, certain types of conduct with respect to intellectual property may have anticompetitive effects against which the antitrust laws can and do protect. ...

... As in other antitrust contexts, however, market power could be illegally acquired or maintained, or, even if lawfully acquired and maintained, would be relevant to the ability of an intellectual property owner to harm competition through unreasonable conduct in connection with such property.<sup>121</sup>

119. If Trader is found to hold copyright in the photographs, CarGurus does not seek to deny Trader its right to benefit from its legitimate intellectual property. However, Trader's exploitation of its right, in combination with the rest of Trader's Conduct, is having a negative impact on competition in the Digital Marketplace market, and, by extension, is violating the Act.
120. CarGurus has met the low threshold required on a leave application pursuant to s. 103.1. It should be granted leave.

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<sup>119</sup> Competition Bureau, *Intellectual Property Enforcement Guidelines* (Ottawa: 31 March 2016), s. 4.2.1 at p 16, s 7.1 at p 24.

<sup>120</sup> *Ibid*, s 4.2.1 at p 15.

<sup>121</sup> United States Department of Justice and Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* (6 April 1995), ss 2.1, 2.2.

## PART V - ORDER SOUGHT

121. CarGurus seeks an order:

- (a) granting it leave to commence an Application against the Respondents pursuant to ss. 75, 76, and 77 of the Act, in the form contained within the Proposed Notice of Application; and
- (b) awarding CarGurus its costs of this Application for leave, if opposed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**Date:** April 15, 2016



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**WEIRFOULDS LLP**

Barristers & Solicitors  
4100 - 66 Wellington Street West  
P.O. Box 35, Toronto-Dominion Centre  
Toronto, ON M5K 1B7

**Nikiforos Iatrou**  
**Bronwyn Roe**

Tel: 416-365-1110  
Fax: 416-365-1876

niatrou@weirfoulds.com  
broe@weirfoulds.com

**Lawyers for the Applicant**

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## SCHEDULE “A” – Authorities

1. *National Capital News Canada v Milliken*, 2002 Comp Trib 41.
2. *Symbol Technologies Canada ULC v Barcode Systems Inc*, 2004 FCA 339.
3. *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*, 2015 Comp Trib 26.
4. *Apotex Inc v Eli Lilly and Company*, 2005 FCA 361.
5. Competition Bureau, Intellectual Property Enforcement Guidelines (Ottawa: 31 March 2016).
6. United States Department of Justice and Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* (6 April 1995).



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## Schedule “B” – Statutes and Regulations

### Competition Act, RSC, 1985, c C-34

#### PART VIII MATTERS REVIEWABLE BY TRIBUNAL

##### RESTRICTIVE TRADE PRACTICES

##### *Refusal to Deal*

##### **Jurisdiction of Tribunal where refusal to deal**

**75.** (1) Where, on application by the Commissioner or a person granted leave under section 103.1, 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 unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

##### **When article is a separate product**

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

##### **Definition of “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.

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## Inferences

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

## *Price Maintenance*

### Price maintenance

**76.** (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

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

(i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or

(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.

### Order

(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.

### Persons subject to order

(3) An order may be made under subsection (2) against a person who

(a) is engaged in the business of producing or supplying a product;

(b) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards; or

(c) has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography.

...

### Refusal to supply

(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

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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.

...

## Inferences

(10) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

...

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

## ***Exclusive Dealing, Tied Selling and Market Restriction***

### Definitions

**77.** (1) For the purposes of this section,

“exclusive dealing”

« *exclusivité* »

“exclusive dealing” means

(a) any practice whereby 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 supplied by or designated by the supplier or the supplier’s nominee, or

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

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

...

### Exclusive dealing and tied selling

(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, 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,

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with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

## **Damage awards**

(3.1) For greater certainty, the Tribunal may not make an award of damages under this section to a person granted leave under subsection 103.1(7).

## **Where no order to be made and limitation on application of order**

(4) The Tribunal shall not make an order under this section where, in its opinion,

(a) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,

(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

(c) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose,

and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.

## **Where company, partnership or sole proprietorship affiliated**

(5) For the purposes of subsection (4),

(a) one company is affiliated with another company if one of them is the subsidiary of the other or both are the subsidiaries of the same company or each of them is controlled by the same person;

(b) if two companies are affiliated with the same company at the same time, they are deemed to be affiliated with each other;

(c) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person; and

(d) a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade-mark or trade-name to identify the business of the grantee, if

(i) the business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and

(ii) no one product dominates the business.

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## **When persons deemed to be affiliated**

(6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the “first” person) supplies or causes to be supplied to another person (the “second” person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trade-mark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated.

## **Inferences**

(7) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

## **GENERAL**

### **Leave to make application under section 75, 76 or 77**

**103.1** (1) Any person may apply to the Tribunal for leave to make an application under section 75, 76 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person’s application under that section.

## **Notice**

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75, 76 or 77, as the case may be, is sought.

## **Certification by Commissioner**

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(a) is the subject of an inquiry by the Commissioner; or

(b) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75, 76 or 77, as the case may be, is sought.

## **Application discontinued**

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a) or (b) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75, 76 or 77.

## **Notice by Tribunal**

(5) The Tribunal shall as soon as practicable after receiving the Commissioner’s certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

## **Representations**

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(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

## **Granting leave to make application under section 75 or 77**

(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

## **Granting leave to make application under section 76**

(7.1) The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.

## **Time and conditions for making application**

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75, 76 or 77 must be made. The application must be made no more than one year after the practice or conduct that is the subject of the application has ceased.

## **Decision**

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

## **Limitation**

(10) The Commissioner may not make an application for an order under section 75, 76, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7) or (7.1), if the person granted leave has already applied to the Tribunal under section 75, 76 or 77.

## **Inferences**

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

## **Inquiry by Commissioner**

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

## **Interim order**

**104.** (1) If an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a

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person who has made an application under section 75, 76 or 77, may issue any interim order that it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

## **Terms of interim order**

(2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

...

## COMPETITION TRIBUNAL

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”);

**AND IN THE MATTER OF** an application by CarGurus, Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by CarGurus, Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

**BETWEEN:**

**CARGURUS, INC.**

Applicant

- and -

**TRADER CORPORATION**

Respondent

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## MEMORANDUM OF FACT AND LAW OF THE APPLICANT

(Application for Leave Pursuant to  
Section 103.1 of the *Competition Act*)

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### **WEIRFOULDS LLP**

Barristers & Solicitors  
4100 - 66 Wellington Street West  
P.O. Box 35, Toronto-Dominion Centre  
Toronto, ON M5K 1B7

**Nikiforos Iatrou**  
**Bronwyn Roe**

Tel: 416-365-1110  
Fax: 416-365-1876

niatrou@weirfoulds.com  
broe@weirfoulds.com

**Lawyers for the Applicant**