

File No.:

Registry Document No.:

COMPETITION TRIBUNAL**IN THE MATTER OF** the Competition Act, R.S.C. 1985, c. C-34, as amended;**AND IN THE MATTER OF** an Application by Audatex Canada, ULC for an Order pursuant to section 103.1 granting leave to make application under section 75 of the *Competition Act*.**BETWEEN:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT CT-2015-010 October 1, 2015 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	#2

AUDATEX CANADA, ULC

Applicant

- and -

CARPROOF CORPORATION, TRADER CORPORATION, AND eBAY CANADA LIMITED

Respondents

**NOTICE OF APPLICATION
PURSUANT TO SECTION 75 OF THE *COMPETITION ACT***

TAKE NOTICE THAT:

1. The Applicant, Audatex Canada, ULC (“**Audatex**”), will make an application to the Competition Tribunal (the “**Tribunal**”) pursuant to section 75 of the *Competition Act* (the “**Act**”) for an Order directing the Respondents to accept Audatex as a customer and to supply Canadian automobile listings data to Audatex on usual trade terms, and for an Order that CarProof Corporation (“**CarProof**”) pay Audatex’s costs of this application

AND TAKE NOTICE THAT:

2. The persons against whom the orders are sought are the Respondents. The addresses of the Respondents are:

- (a) CarProof Corporation
130 Dufferin Avenue, Suite 1101
London, Ontario, N6A 5R2

(b) TRADER Corporation
405 The West Mall, Suite 110
Etobicoke, Ontario, M9C 5J1

(c) eBay Canada Limited
500 King Street West, Suite 200
Toronto, Ontario, M5V 1L9

3. Audatex will rely on the Statement of Grounds and Material Facts attached hereto as **Schedule "A"**, on the Affidavit of Gabor Toth, sworn on October 1, 2015, and such further or other material as counsel may advise and the Tribunal may permit.

4. Audatex requests that this Application be heard in English.

5. Audatex requests that the documents for this Application be filed in electronic form.

Dated at Toronto this 1st day of October, 2015.

On behalf of the Applicant Audatex

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AND TO: **eBay Canada Limited**
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SCHEDULE "A"

STATEMENT OF GROUNDS AND MATERIAL FACTS

I. The Parties

1. The Applicant, Audatex, is a corporation incorporated under the laws of the Province of Alberta. Audatex provides data and software solutions to Canadian auto insurance companies and automobile repair shops to streamline the accident claims process, both for estimating the cost of repairs and calculating market values of automobiles. Audatex's customers include six of the 10 largest Canadian auto insurers and approximately 2,500 automobile repair shops in Canada. Audatex is a wholly-owned indirect subsidiary of Solera Holdings, Inc., which among other things, provides software and services with respect to the processing of automobile insurance claims and is publicly traded on the New York Stock Exchange.

2. The Respondent, CarProof, is a corporation incorporated under the laws of Canada. CarProof produces and sells automobile history reports, which include information about, *inter alia*, accidents and liens.

3. The Respondent, TRADER Corporation ("**Trader**"), is a corporation incorporated under the laws of Canada. Trader owns the Canadian websites, www.autotrader.ca and www.autohebdo.net (collectively, "**Auto Trader**"), which are online automobile classified advertisements services that, for a fee, allow anyone to list an automobile for sale.

4. The Respondent, eBay Canada Limited ("**eBay**"), is a corporation incorporated under the laws of the Province of New Brunswick. eBay owns the Canadian website, www.kijiji.ca ("**Kijiji**"), which is an online classified advertisements service that, for free, allows anyone to list an automobile for sale.

II. Automobile Listings Data

5. Automobile listings data is the information about an automobile that is contained in an advertisement listing an automobile for sale. Such advertisements almost always include the year, make and model of the automobile, as well as the asking price. Mileage, features, transmission type and colour of the automobile, amongst other details, are typically also included.

6. Naturally, businesses that provide a platform for automobile listings, such as Auto Trader and Kijiji, hold automobile listings data.

III. Importance of Canadian Automobile Listings Data to Audatex's Business

7. Audatex relies on Canadian automobile listings data in order to determine the market values of damaged automobiles, referred to in the industry as the "total loss" valuation service, for its insurance company customers. When an automobile is damaged in an accident, Audatex reviews automobile listings data for advertisements of automobiles that have similar characteristics as the damaged automobile and are within a close geographic proximity. Using proprietary algorithms, which generally require [REDACTED], Audatex generates a total loss valuation for the damaged automobile. Audatex then prepares a report for the insurance company that can also be shared with the policyholder of the damaged automobile, and which includes information from the listings that underpin the total loss valuation (the "Valuation Report"). Where the insurance company elects to provide a policyholder with the cash total loss value of the automobile rather than repairing it, the Valuation Report serves as justification for the amount paid. Further, the Valuation Report gives credibility to the market value offered by the insurer, allowing it to settle the claim quickly.

8. The automobile listings data is a critical aspect of the Valuation Report, serving as the due diligence supporting the determination of fair market total loss value. Further, as prices attributable to specific second-hand vehicles change over time, the currency of the listings is key to the value assessment. With very limited exceptions, Audatex's insurance company customers will not accept Valuation Reports that are based on automobile listings data that are more than [REDACTED] old. The older the listings used, the more difficulties that arise with policyholders and, in turn, with Audatex's insurance company customers.

9. The total loss valuation generated by Audatex is also the criterion by which insurers determine whether it is preferable to make repairs to an automobile or, if the repair cost is greater than the market value of the automobile, to provide the policyholder with the total loss cash value.

10. [REDACTED]

11. Automobile repair shop customers only procure the partial loss estimating service as their services are limited to offering vehicle repairs. Frequently repair shops become Audatex customers because they were mandated to do so by Audatex's insurance company customers in order to facilitate the efficient coordination of automobile repairs. [REDACTED]

12. [REDACTED] % of Audatex's revenues from its automobile accident claims business are from insurance company customers, including independent appraisers, with revenues from the automobile repair shops making up the balance. [REDACTED] % of Audatex's insurance company revenues are generated from its total loss valuation services. In other words, with respect to total revenues from Audatex's primary business, approximately [REDACTED] is made up of insurance company customers with respect to total loss valuation services, [REDACTED] is made up of insurance company customers with respect to partial loss estimating services, and [REDACTED] % is made up of automobile repair shops with respect to partial loss estimating services. However, since insurance companies [REDACTED]

[REDACTED]

[REDACTED]

13. The proportion of Audatex's profits generated from each service closely corresponds with its proportion of revenues, [REDACTED]

IV. Importance of Auto Trader and Kijiji Canadian Automobile Listings Data to Audatex

14. Audatex generated over [REDACTED] Valuation Reports in the 2015 fiscal year. As Audatex's algorithm requires [REDACTED] in order to generate each Valuation Report, Audatex requires access to approximately [REDACTED] Canadian automobile listings per month (of which approximately [REDACTED] would be new). Auto Trader posts approximately 1.1 million listings per month (of which are approximately 75,000 are new) and Kijiji posts approximately 760,000 listings per month (of which approximately 90,000 are new). [REDACTED]

15. Further, Auto Trader and Kijiji also have the most brand recognition among Canadians. Accordingly, being able to include automobile listings from at least one of the two in Audatex's Valuation Reports increases their value to both insurers and policyholders. [REDACTED]

V. Audatex's Attempts to Access Canadian Automobile Listings Data

16. Until recently, Audatex [REDACTED] Canadian automobile listings data, which is no longer available to it. In short, CarProof has entered into exclusive contracts with Trader, eBay and other companies, which have, despite Audatex's efforts, prevented it from negotiating access to such data going forward. Audatex has been able to negotiate agreements

for access to Canadian automobile listings data from a few smaller suppliers, but those arrangements [REDACTED], especially given that CarProof has also entered into exclusive agreements with many of the smaller suppliers. The particulars of Audatex's attempts to retain and gain access to Canadian automobile listings data are as follows.

(a) *Trader Automobile Listing Data*

17. On September 1, 2009, an affiliate of Audatex, Audatex North America, Inc. ("Audatex North America") entered into an agreement with Trader pursuant to which Audatex received Canadian automobile listings data from Trader ("Trader Agreement"). The Trader Agreement had a [REDACTED] term, which automatically renewed for additional [REDACTED] terms unless either party gave at least [REDACTED] notice of termination prior to the end of the current term. Pursuant to the Trader Agreement, Audatex paid \$[REDACTED] per month for a minimum of [REDACTED] automobile listings per month (with no commitment for new listings). Since Auto Trader posts 1.1 million listings per month on average, the price per listing was less than [REDACTED]¢ per listing.

18. On March 24, 2015, Trader sent Audatex North America a letter advising of its termination of the Trader Agreement, which became effective on August 31, 2015.

19. Trader personnel advised Audatex that the reason for terminating the Trader Agreement was because Trader had entered into a long-term, exclusive agreement to provide Canadian automobile listings data to CarProof, which prevented it from further dealing with Audatex in regards to such data.

(b) *Kijiji Automobile Listings Data*

20. Given its volume of Canadian automobile listings specifically from private individuals, Kijiji is an important source of Canadian automobile listings data. In November 2014, Audatex unsuccessfully attempted to enter into an agreement with eBay for Kijiji's Canadian automobile listings data.

21. [REDACTED]
[REDACTED]
[REDACTED]

22. Thereafter, on a number of occasions, Audatex contacted Kijiji to pursue a discussion around the possibility of an agreement to acquire Kijiji's automobile listings data on commercial terms. Ultimately, in August 2015, Kijiji replied stating that it was "unable to consider that possibility at this time." Audatex learned that the reason Kijiji repeatedly rebuffed a commercial arrangement with it, was because it entered into an exclusive supply agreement with CarProof.

(a) *Boost Motor Group Automobile Listings Data*

23. In August of 2015, Audatex entered into negotiations with Boost Motor Group ("Boost"), which owns www.boostmotorgroup.com, regarding the provision of Canadian automobile listings data to Audatex. Boost personnel advised Audatex that Boost had entered into a long-term, exclusive agreement to provide automobile listings data to CarProof. CarProof told Boost that their exclusive agreement precluded Boost from entering into an agreement with Audatex.

(d) *Other Automobile Listings Data*

24. On March 1, 2015, Audatex entered into a [REDACTED] agreement with [REDACTED], which owns [REDACTED], pursuant to which Audatex receives Canadian automobile listings data for a fee of \$ [REDACTED] per month (with no commitment for new listings) (" [REDACTED] Agreement"). The [REDACTED] Agreement automatically renews for successive [REDACTED] terms. In the first nine weeks of the [REDACTED] Agreement, Audatex has received [REDACTED] automobile listings, for an average of less than [REDACTED]¢ per listing.

25. On August 18, 2015, Audatex entered into a [REDACTED] agreement with [REDACTED], which owns [REDACTED], pursuant to which Audatex receives Canadian automobile listings data (" [REDACTED] Agreement"). The [REDACTED] Agreement automatically renews for successive [REDACTED] terms. Pursuant to the [REDACTED] Agreement, Audatex pays \$ [REDACTED] per month for a minimum of [REDACTED] automobile listings per month with an additional \$ [REDACTED] per month at each increment of [REDACTED] listings above [REDACTED] (with no commitment for new listings). Under this formula, there is a price ceiling of 10¢ per listing.

26. On August 24, 2015, Audatex entered into a [REDACTED] agreement with [REDACTED], which owns [REDACTED], (" [REDACTED] Agreement"). The [REDACTED] Agreement automatically renews for successive [REDACTED] terms. Pursuant to the [REDACTED] Agreement, Audatex receives Canadian automobile

listings data in exchange for a one-time fee of \$ [REDACTED] and \$ [REDACTED] per month for a minimum of [REDACTED] new automobile listings per month with an additional \$ [REDACTED] per month at each increment of [REDACTED] listings above [REDACTED] (with no commitment for new listings).. Under this formula, there is a price ceiling of just under [REDACTED]¢ per listing.

27. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Audatex is substantially affected in its business by its inability to obtain such data from Auto Trader, Kijiji and the other data providers with whom CarProof has exclusive arrangements.

28. [REDACTED]
[REDACTED]
[REDACTED]. As further described below, CarProof is responsible [REDACTED]

VI. CarProof's Ongoing Conduct Aimed at Thwarting Audatex

29. CarProof has undertaken a systematic course of conduct by entering into exclusive agreements for Canadian automobile listings data with as many suppliers as possible, and most crucially with Trader and eBay, in an effort to block Audatex from having access to such data. Moreover, as described further below, CarProof has stated in writing that it did not acquire such data in order to compete with Audatex; its actions are an attempt to harm Audatex, and thereby leverage concessions in unrelated dealings. However, CarProof has also sent mixed signals by issuing a press release that it plans to begin offering automobile valuations to automobile dealers using sold data and contacting certain of Audatex's customers [REDACTED]
[REDACTED].

30. Through its actions, CarProof has eliminated competition among owners of Canadian automobile listings data, which will ultimately eliminate competition among the automobile estimating solutions providers.

31. In a letter from CarProof to Audatex North America, dated July 13, 2015, CarProof explained that it had "already secured the rights to automobile listings data from the vast majority of sources in

Canada,” including exclusive rights to Auto Trader and Kijiji data, which CarProof stated it “understand[s] is important to Audatex's on-going insurance products business”. CarProof further advised that “we are looking to monetize our investment in acquiring the rights to the listings data and not to compete.” CarProof does not need nor intend to use this data for its direct business. Its purpose in acquiring access to this important data, is to leverage its position vis-à-vis other dealings with Audatex affiliates.

32. In particular, CarProof has expressly sought unrelated concessions in exchange for providing its Canadian automobile listings data to Audatex. In its July 13th letter, CarProof wrote that “we have not heard back from you with respect to the Term Sheet we forwarded in April of this year... *If Audatex is to continue its insurance loss valuation business using comparable listings or listings based algorithms, we will need to finalize our definitive agreement paperwork.*”

33. The term sheet that CarProof sent to Audatex North America in April 2015 (“Term Sheet”) and which is referred to in its letter, was in respect of a proposed agreement, whereby CarProof would provide Audatex with Canadian listing data on the condition, among other concessions that (1) Audatex and Audatex North America extend an agreement for a [REDACTED] term whereby they provide [REDACTED] data, respectively, to CarProof [REDACTED] at a fixed price [REDACTED]; and (2) HyperQuest, Inc. , an American affiliate of Audatex, begin to provide its data to CarProof for [REDACTED] (CarProof takes the position that there is an existing agreement for HyperQuest, Inc. to provide its data to CarProof; Audatex and its affiliates dispute that contention. The issue is now the subject of legal proceedings in the United States.). The conditions that CarProof has demanded in exchange for the provision of Canadian automobile listings data are in respect of wholly unrelated matters. It is clear that CarProof is using its exclusive access to automobile listings data, with the express understanding that this data is integral to Audatex’s business, in order to leverage its bargaining position in these unrelated matters.

34. The Term Sheet stipulates that CarProof will provide its Canadian automobile listings data to Audatex on a non-exclusive basis for [REDACTED] until September 1, [REDACTED], but at a cost of \$ [REDACTED] annually (i.e., \$ [REDACTED] per month) thereafter until September 1, [REDACTED]. The Term Sheet actually states a \$ [REDACTED] annual fee, which was negotiated to \$ [REDACTED] verbally. Audatex estimates that CarProof would provide approximately 2,000,000 Canadian automobile listings per month, meaning that it would be paying [REDACTED]¢ per listing (\$ [REDACTED] dollars paid over [REDACTED] divided

by [REDACTED] listings provided over [REDACTED] years), over [REDACTED]% more than the price per listing under the Trader Agreement, which is Audatex's only prior agreement that provided a relatively comparable volume of data. These expensive fees are in addition to the favourable terms on unrelated matters that CarProof is seeking to extract from Audatex and its affiliates in the United States.

35. Given the critical importance of the data to Audatex's business, on August 3, 2015 Audatex North America wrote to CarProof offering to pay [REDACTED], namely, \$ [REDACTED] annually for the entire [REDACTED] period, as opposed to only the final [REDACTED]. The condition of this offer was that the provision of data to Audatex was standalone, that is, uncoupled from the provision of unrelated data to CarProof. On August 4, 2015, CarProof responded declining the offer, and stating that it was only willing to provide the Canadian automobile listings data as "part of a broader package deal" in conjunction with the provision of unrelated data to CarProof.

36. Incongruously with CarProof's communications with Audatex, CarProof issued a press release on October 14, 2014, stating that it "plans to launch a vehicle valuation tool". The press release is vague, but it appears to insinuate that CarProof plans to market this service to car dealerships for vehicle sales rather than insurance companies for insurance claims.

37. Additionally, CarProof has reached out to Audatex's customers, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] CarProof's conduct is damaging Audatex's customer relationships [REDACTED]
[REDACTED]

38. [REDACTED]
[REDACTED]
[REDACTED]

39. CarProof's conduct is part of a pattern of aggressive and anticompetitive behaviour by CarProof, as evidenced by its litigation and settlement with the Used Car Dealers Association of Ontario ("UCDA"), the subject of which was CarProof's alleged misrepresentations regarding UCDA's services.

VII. Basis for Application Pursuant to Section 75 (Refusal to Deal)

40. Subsection 75(1) of the Act provides that:

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.

Audatex is Substantially Affected in its Business

41. [REDACTED]

42. [REDACTED]

43. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

44. [REDACTED]

45. [REDACTED]
 [REDACTED]

46. In addition, Audatex’s reputation with customers is very important to its continued success. CarProof’s practice of contacting Audatex’s customers t [REDACTED]
 [REDACTED]
 [REDACTED] has damaged Audatex’s reputation. The reputational harm CarProof created by contacting Audatex’s clients will linger [REDACTED]
 [REDACTED]

Audatex Cannot Obtain Adequate Supplies Due to Insufficient Competition

47. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED] CarProof’s actions have almost completely eliminated competition in the supply of Canadian automobile listings data given that both major suppliers, as well as other smaller suppliers, exclusively supply their data to CarProof. [REDACTED]
 [REDACTED]

Audatex is Willing and Able to Meet Usual Trade Terms for a Product in Ample Supply

48. As CarProof has repeatedly offered to provide Canadian automobile data listings to Audatex, the data is clearly in ample supply, but not on the usual trade terms. Rather, CarProof is demanding

costly trade terms, in addition to bundling the provision of unrelated services by Audatex and its affiliates to any agreement to supply.

49. [REDACTED] Audatex offered to meet and exceed CarProof's trade terms, but CarProof is focused on extracting unconnected concessions.

50. Audatex remains willing and able to obtain Canadian automobile listings data from Trader and eBay on usual trade terms, in accordance with the range of market values attributed to such data. Alternatively, Audatex is willing and able to obtain such data from CarProof on the same terms.

Adverse Effect on Competition in a Market from Refusal to Deal

51. Audatex's only material competitor is Mitchell International, Inc. ("**Mitchell**"), who is also a significant competitor. If Audatex is not able to compete effectively, Mitchell will lose its most important competitive constraint. Competition will be adversely affected if the market is reduced to only one major competitor.

52. In providing its total loss valuation service, Mitchell uses automobile sales price data from J.D. Power and Associates ("**J.D. Power**"). Audatex's proprietary algorithms use automobile *listings* data, not automobile *sales* data, which is what J.D. Power provides.

53. Further, CarProof has stated that it does not intend to compete with Audatex. While CarProof has also provided conflicting indications that it may seek to compete with Audatex, whether that will occur in the short-term or at all is unpredictable. Even if CarProof were to enter the market, the uncertainty faced by customers will already have harmed competition in the market and Mitchell will be able to significantly strengthen its market position.

54. In support of this application and the Statement of Grounds and Material Facts set out above, Audatex relies on the Affidavit of Gabor Toth, sworn on October 1, 2015.