

Competition Tribunal File No. CT-2013-007

The Competition Tribunal

In the matter of an Application by Safa Enterprises Inc.

doing business as My Convenience Store

for an order pursuant to Section 103.1

of the Competition Act, RSC 1985 c. C-34, as amended

granting leave to bring an application pursuant to

Section 76 of the Competition Act

BETWEEN:

Safa Enterprises Inc.

Applicant

AND:

Imperial Tobacco Company Limited.

Respondent

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

CT-2013-007

September 19, 2013

Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

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MEMORANDUM OF FACT AND LAW OF THE APPLICANT

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I. **Concise Statement of Facts**

1. A concise statement of facts is contained in Schedule A to the Application for Leave – Statement of Grounds and Material Facts, which is incorporated by reference into the Memorandum.

II. **Statement of the Point in Issue**

2. The points in issue are whether the Tribunal should grant leave pursuant to Section 103.1 (7.1) for the Safa Enterprises Inc (“SEI”) to proceed with the proposed Notice of Application under Section 76 of the Act.

III. **Concise Statement of Submissions**

(b)The test on Application for Leave is Met in Respect of an Application under Section 76 of the Act

3. The test for granting leave in respect of an Application under Section 76 of the Act is set out in subsection 103.1 (7.1), which provides that:

The Tribunal may grant a leave to make an application under section 76 if it has a 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.

4. There are no prior decisions of the Tribunal have established that leave should be granted under Section 76 of the Act where there is “sufficient credible evidence to give rise to a *bona fide* belief that applicant may have been directly affected in the applicant’s business by a reviewable practice”.
5. The only two applications brought before the Tribunal under section 76 are namely:

The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada, 2011 Comp. Trib. 10 (File No.: CT-2011-06;

6. In above mentioned application the applicant sought an order under Section 75 (Refusal to Deal) and 76 (Price Maintenance) of the Act, the Tribunal concluded that the Applicant was directly affected under section 75, and the application to grant a leave under section 76 was denied.
7. The other Application was brought before the Tribunal by the Commissioner of Competition who does not require bringing an application to grant a leave under section 76 of the Act.

The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated (CT-2010-10)

8. *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated (CT-2010-10)*, the Tribunal found that section 76 of the Competition Act require a resale and the Applicant "Commissioner of Competition" had not established that the Respondents' customers resell the Respondents' products. Thus, the Tribunal dismissed the Application filed by the Commissioner of Competition without costs.
9. The Application brought before the Tribunal by the Applicant SEI have met the conditions described in Section 76.
10. This is a test case for the Tribunal and will set the precedent for the future applications filed under Section 76 of the Act.
11. The Competition Tribunal should consider this Application as it is the first Application filed under section 76 of the Act.

IV. Concise Statement of the Order Sought

12. SEI seeks an order from the Competition Tribunal providing for the following:
 - (i) granting leave pursuant to section 103.1(7.1) for SEI to proceed with its proposed Application under section 76 of the Act;

V. List of Authorities, Statutes and Regulations to be Referred to

13. The Applicant will refer to the following authorities, statutes and regulations:
 - (i) *Competition Act*, R.S.C. 1985, c. C-34, as amended, Section 76 and 103.1.
 - (ii) *The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, 2011 Comp. Trib. 10 (File No.: CT-2011-06)
 - (iii) *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated (CT-2010-10)*
 - (iv) *Commissioner of Competition v. British American Tobacco (CT-1999-01)*

TAB 1



Justice Laws Website

Home > Laws Website Home > Consolidated Acts > R.S.C., 1985, c. C-34 - Table of Contents > R.S.C., 1985, c. C-34

Competition Act (R.S.C., 1985, c. C-34)

Full Document: [HTML](#) | [XML](#) [555 KB] | [PDF](#) [1130 KB]

Act current to 2013-08-12 and last amended on 2010-03-12. [Previous Versions](#)

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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.

Where no order may be made

(4) No order may be made under subsection (2) if the person referred to in subsection (3) and the customer or other person referred to in subparagraph (1)(a)(i) or (ii) are principal and agent or mandator and mandatary, or are affiliated corporations or directors, agents, mandataries, officers or employees of

(a) the same corporation, partnership or sole proprietorship; or

(b) corporations, partnerships or sole proprietorships that are affiliated.

Suggested retail price

(5) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price for the product, however arrived at, is proof that the person to whom the suggestion is made is influenced in accordance with the suggestion, in the absence of

proof that the producer or supplier, in so doing, also made it clear to the person that they were under no obligation to accept the suggestion and would in no way suffer in their business relations with the producer or supplier or with any other person if they failed to accept the suggestion.

Advertised price

(6) For the purposes of this section, the publication by a producer or supplier of a product, other than a retailer, of an advertisement that mentions a resale price for the product is proof that the producer or supplier is influencing upward the selling price of any person to whom the product comes for resale, unless the price is expressed in a way that makes it clear to any person whose attention the advertisement comes to that the product may be sold at a lower price.

Exception

(7) Subsections (5) and (6) do not apply to a price that is affixed or applied to a product or its package or container.

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.

Where no order may be made

(9) No order may be made under subsection (2) in respect of conduct referred to in subparagraph (1)(a)(ii) if the Tribunal is satisfied that the person or class of persons referred to in that subparagraph, in respect of products supplied by the person referred to in subsection (3),

(a) was making a practice of using the products as loss leaders, that is to say, not for the purpose of making a profit on those products but for purposes of advertising;

(b) was making a practice of using the products not for the purpose of selling them at a profit but for the purpose of attracting customers in the hope of selling them other products;

(c) was making a practice of engaging in misleading advertising; or

(d) made a practice of not providing the level of servicing that purchasers of the products might reasonably expect.

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.

Where proceedings commenced under section 45, 49, 79 or 90.1

(11) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought under section 79 or 90.1.

Definition of "trade terms"

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

R.S., 1985, c. C-34, s. 76; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2009, c. 2, s. 426.

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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

(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 applicant's business by an

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.

2002, c. 16, s. 12; 2009, c. 2, s. 431.

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*,
2011 Comp. Trib. 10
File No.: CT-2011-06
Registry Document No.: 29

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of an Application by the Used Car Dealers Association of Ontario for
an Order pursuant to section 103.1 granting leave to make application under sections 75 and 76
of the *Competition Act*.

BETWEEN:

Used Car Dealers Association of Ontario
(applicant)

and

Insurance Bureau of Canada
(respondent)



Decided on the basis of the written record
Before Judicial Member: Simpson J. (Chairperson)
Date of Reasons and Order: September 9, 2011
Reasons and Order signed by: Madam Justice Sandra J. Simpson

**REASONS FOR ORDER AND ORDER GRANTING THE APPLICANT LEAVE TO
FILE AN APPLICATION PURSUANT TO SECTION 75 OF THE COMPETITION ACT**

THE APPLICATION

[1] The Used Car Dealers Association of Ontario (the "UCDA") seeks leave from the Competition Tribunal (the "Tribunal") to commence an application pursuant to section 75 and subparagraph 76(1)(a)(ii) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"). The proposed application names the Insurance Bureau of Canada as the respondent.

THE DECISION

[2] For the following reasons leave has been granted to commence an application under section 75 of the Act. However, leave to proceed under section 76 has been denied.

THE APPLICANT

[3] The UCDA was founded in 1984. It is a not-for-profit trade association which represents more than 4500 motor vehicle dealers in Ontario. The UCDA provides a variety of services to its members including one called Auto Check™ ("Auto Check"). It provides dealers who are selling used cars with information about the accident history of the vehicles they intend to sell. Using a vehicle's VIN number, a dealer who is a member of the UCDA pays a fee of \$7.00 (before taxes) to conduct an Auto Check vehicle accident history search.

[4] The UCDA's evidence for this application is found in an affidavit sworn by Robert G. Beattie on June 29, 2011 (the "Beattie Affidavit"). Mr. Beattie is the UCDA's Executive Director.

THE RESPONDENT AND ITS DATABASES

[5] The Insurance Bureau of Canada (the "IBC") is a national not-for-profit industry association which represents home, vehicle and business insurers. The IBC is, according to the UCDA, the only source of integrated industry wide data collected from all insurers who sell auto insurance as well as from independent adjusters and investigators. The data are located on a database which IBC describes as its Web Claims Search Application. However, that database does not include information about the dollar value of claims made when vehicles are in accidents. Those values are found in information provided to IBC by its members and collected in a second IBC database called the Automotive Statistical Plan ("ASP Database").

THE BACKGROUND

[6] In 1998, the UCDA became an Associate Member of the IBC primarily to gain access to the information in IBC's Web Claims Search Application. That information is a critical input into UCDA's Auto Check business.

their use, it is reasonable to conclude Ontario is the geographic market and that an order could therefore be made.

[37] Finally, with respect to usual trade terms, the evidence shows that the UCDA is willing to continue to pay IBC and since the Web Claims Search Application data is only available from IBC, this aspect of the test is met and an order could be made.

INSUFFICIENT COMPETITION AMONG SUPPLIERS – 75(1)(b)

[38] In my view, because IBC is the sole supplier, the Tribunal could conclude that the UCDA's inability to secure the data on IBC's Web Claims Search Application is due to insufficient competition.

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 – 75(1)(c)

[39] There is no question that the UCDA is prepared to continue to pay for the Web Claims Search Application data. In these circumstances, I find that the Tribunal could conclude that this test has been met.

THE PRODUCT IS IN AMPLE SUPPLY – 75(1)(d)

[40] The Beattie Affidavit shows that IBC was able to reinstate the UCDA's associate membership and its access to the Web Claims Search Application after the initial termination of the UCDA's membership on May 26, 2010. Thereafter, it continued supplying the data on a month to month basis until the Termination. Based on this evidence, the Tribunal could conclude that the product is in ample supply.

THE REFUSAL TO DEAL IS HAVING OR IS LIKE TO HAVE AN ADVERSE EFFECT ON COMPETITION IN A MARKET – 75(1)(e)

[41] In my view, the Tribunal could find that IBC's refusal to supply the Web Claims Search Application has caused Auto Check's exit from the market. Since Auto Check was the low cost provider of accident claims searches to approximately 4500 used car dealers and, since it is reasonable to conclude that these dealers will now be forced to purchase more expensive searches from CarProof or Carfax, the Tribunal could find that the test is met.

PART II – PRICE MAINTENANCE – 76(1)(a)(ii)

[42] The test for leave to bring applications under section 76 of the Act is found in subsection 103.1(7.1). It says that the Tribunal must have reason to believe that an applicant is directly affected by any conduct that could be the subject of an order.

[43] For the reasons given in paragraph 31 above, I have concluded that the UCDA is directly affected by the closure of its Auto Check business.

[44] The more difficult question is whether I can conclude that an order “could” be made under subparagraph 76(1)(a)(ii) in the absence of any direct evidence in the Beattie Affidavit showing that IBC’s refusal to supply its Web Claims Search Application data to the UCDA is a result of Auto Check’s low pricing. The only evidence before the Tribunal is circumstantial.

[45] Some of the circumstantial evidence described below relates to the actions and affiliations of two companies called CGI Group Inc. (“CGI”) and i2iQ Inc. (“i2iQ”)

[46] In its submissions the UCDA says at paragraph 25:

UCDA is unable to establish definitively, without discovery pursuant to the Tribunal’s rules, whether IBC’s refusal to supply occurred because of concerns about Auto Check™’s low pricing policy. However, there is significant circumstantial evidence related to the large difference between Auto Check™ and CarProof prices, the actions of CarProof, connections between CarProof and i2iQ and communications between i2iQ and IBC, that provides reason to believe that IBC’s refusal to supply occurred because of Auto Check™’s low pricing policy.

[47] Further in its reply submissions the UCDA said at paragraph 39:

In this situation, the circumstantial evidence that IBC was acting to benefit CGI, with whom it has a preferred business relationship, and which in turn has a close business relationship with i2iQ and CarProof, is the only evidence on the record related to the reasons for IBC’s refusal to supply. It is noteworthy that, as Mr. Beattie indicated in his affidavit, IBC did not provide reasons when it terminated supply to UCDA, and again in its Representations IBC has remained silent about any other reasons for the termination. UCDA submits that in such a situation an adverse inference should be drawn from IBC’s silence and/or the “sufficient credible evidence” test should be applied in a manner which allows potentially viable claims to proceed and be tested on the merits rather than be frustrated by the Applicant’s inability to access relevant evidence in the possession of the Respondent during the leave stage.

[48] While I accept that circumstantial evidence and reasonable inferences may be relied on, the question is whether the circumstantial evidence in this case meets the requirement that there be sufficient credible evidence to give rise to a *bona fide* belief that the conduct could be subject to an order.

[49] The UCDA relies on four pieces of circumstantial evidence to show that the Termination was because of UCDA’s \$7.00 price contrasted with CarProof’s price of \$34.95. I will deal with each in turn.

(i) **The Price Difference**

[50] The evidence shows that CarProof has twice approached the UCDA with a view to acquiring its dealers as its customers. These approaches failed because the UCDA believes that

its members prefer Auto Check's low priced searches. Accordingly, CarProof's searches will only be attractive to the UCDA's members if Auto Check's low cost searches are no longer available.

[51] The evidence, which is said to suggest that the Termination was due to Auto Check's low price, is as follows:

- CarProof doesn't deal directly with IBC to obtain its ASP data. It deals through an intermediate company. Mr. Beattie speculates that that company is either i2iQ or CGI or perhaps both. CGI is contractually linked to IBC because CGI operates the ASP Database for IBC and provides other data services to IBC members. One service is called Auto Plus and it provides information to assist insurers when making decisions about coverages and premiums. Another service is Enhanced Auto Plus. It includes vehicle claim histories from CarProof.
- I2iQ's website also offers CarProof's vehicle claim history searches and says that i2iQ has a partnership or strategic alliances with CarProof and with a division of CGI called CGI Insurance Information Services. However, there is no evidence about whether i2iQ has a contractual relationship with IBC.

[52] If CGI is the intermediary between CarProof and IBC, the Tribunal is asked to speculate that, because CGI provides important data services to IBC, IBC will be inclined to do a favour for CGI by helping its customer, CarProof. This would be accomplished by refusing to supply data to its low cost competitor Auto Check.

[53] Regarding i2iQ, the evidence shows (i) that i2iQ's CEO is able to say to IBC that UCDA's dealers could purchase data from CarProof, (ii) that i2iQ and IBC were in prompt telephone contact about the UCDA's request for dollar claims information and (iii) that i2iQ has a partnership or strategic alliance with a division of CGI. This information suggests to me that i2iQ has a degree of control over CarProof and that i2iQ has a close relationship with IBC and may be the intermediary selling IBC's data to CarProof. If those facts were true, I must infer that IBC would be inclined to do a favour for i2iQ by, in turn, helping its customer CarProof. Again, this would involve refusing to supply the Web Claims Application Search data to Auto Check.

(ii) CarProof's Actions

[54] These are described in the following paragraphs taken from paragraphs 13-15 of the Beattie Affidavit:

CarProof has grown substantially and is the market leader in the supply of vehicle accident history searches in Ontario. In 2004, CarProof began distributing false and misleading promotional materials to motor vehicle dealers in Canada, which misrepresented the nature and scope of UCDA's lien search and other services. Following written warnings from UCDA's legal counsel, CarProof abandoned this negative campaign. It again began distributing false and misleading promotional material in 2007 in connection with UCDA's services including its Auto Check™ service. I believe that this may have been motivated in whole or in

part by UCDA's position as the low-price supplier in the market. UCDA's efforts to resolve the situation out of court were unsuccessful, leading it to commence litigation against CarProof. That litigation was ultimately settled in 2009, with CarProof and UCDA issuing a joint statement in which CarProof acknowledged that UCDA provides accident claim information through its Auto Check™ service and undertook not to make misleading statements in the future.

In early 2009, representatives of CarProof approached UCDA and proposed that UCDA partner with CarProof to provide CarProof vehicle accident histories to UCDA members rather than doing so directly through the Auto Check™ business. Such a proposal, if adopted, would have meant the end of the Auto Check™ business. Bearing in mind CarProof's aggressive business tactics and the significantly higher prices at which it provides vehicle accident history searches, UCDA concluded that a relationship with CarProof was not in the best interests of its members and declined the CarProof proposal.

In early 2010, representatives of CarProof again approached UCDA and requested that UCDA partner with CarProof to provide CarProof vehicle accident histories to UCDA members, rather than doing so directly through the Auto Check™ business. UCDA's views on such a relationship had not changed, and we again rejected CarProof's overtures.

[55] In sum, the evidence indicates that CarProof appears to have misrepresented Auto Check's business and has suggested closing it down. However, these efforts have failed because of Auto Check's low price.

(iii) Connections Between CarProof and i2iQ

[56] This topic is dealt with above in paragraphs 51 and 53.

(iv) Communications Between i2iQ and IBC

[57] In June 2009, the UCDA contacted Ms. Pehar of IBC to ask for access to the dollar value claims information in the ASP Database. Shortly thereafter, the CEO of i2iQ spoke to Ms. Pehar and advised her that UCDA could purchase CarProof vehicle history reports and confirmed that he could be contacted if the UCDA wanted to pursue the idea. In the alternative, he suggested that the UCDA could speak directly to CarProof.

[58] The Beattie Affidavit speculates that IBC must have told i2iQ or CarProof of UCDA's request and that the only reason IBC, CarProof and i2iQ were in contact, after the UCDA asked for access to the dollar value claims information, was because they were concerned that, with this information, Auto Check would be a more effective low cost competitor.

CONCLUSIONS

[59] Against this background, it is clear that IBC has a close direct relationship with CGI (through its provision of services and maintenance of the ASP Database) and with i2iQ (it spoke to it about the UCDA's request for dollar value claims data). It is also clear that CGI and i2iQ have close ties to CarProof. Its searches are provided to IBC's members through CGI, and i2iQ appears to have some control over CarProof's operations and sells its searches through its website.

[60] Finally, it is reasonable to conclude based on its past conduct, that CarProof would like to see Auto Check's low cost business closed so that the UCDA's dealers could become potential customers for CarProof's searches.

[61] However, while I can conclude that it is possible that the Termination occurred as a result of IBC's wish to support CarProof's business objectives as a favour to either CGI or i2iQ, I cannot conclude that there is sufficient credible evidence to show the possibility that the Termination by IBC was due to Auto Check's low pricing policy. In these circumstances, an order could not be made.

ORDER

[62] The UCDA is hereby granted leave, pursuant to subsection 103.1(7) of the Act, to commence an application under section 75 of the Act. However, leave to apply under section 76 of the Act is denied.

[63] The UCDA is to have its costs fixed as a lump sum amount payable forthwith based on Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106. The UCDA is to prepare a bill of costs for review by IBC and, if an amount cannot be agreed, the Registry may be contacted and I will fix the amount once a procedure has been agreed.

DIRECTION

[64] The parties are to consult to see if they can agree about whether an interim supply order can be made and, if so, on what terms. Failing agreement, the Registry may be contacted to discuss arrangements for the hearing of the UCDA's application for interim relief.

DATED at Ottawa, this 9th day of September, 2011

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

COUNSEL:

For the applicant:

Used Car Dealers Association of Ontario

A. Neil Campbell
Casey W. Halladay

For the respondent:

Insurance Bureau of Canada

Peter Glossop
Graham Reynolds
Geoffrey Grove



A decision was issued today by the Competition Tribunal in *Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated* (CT-2010-10). The Tribunal panel was composed of the Honourable Justice Michael L. Phelan, Dr. Wiktor Askanas and Mr. Keith C. Montgomery.

Summary: The Competition Tribunal dismissed the Application filed by the Commissioner of Competition without costs. The Tribunal found that section 76 of the *Competition Act* requires a resale and that the Commissioner of Competition had not established that the Respondents' customers resell the Respondents' products. The Tribunal further held that the Commissioner's proposed interpretation of section 76 was not supported by the legislative history of the provision or other decisions.

However, in the event that the Tribunal was wrong with respect to the legal interpretation of section 76, it continued with its analysis. Under this alternative analysis, it assumed that each of the Respondents engaged in price maintenance (as the Commissioner had attempted to define the term) by implementing the no-surcharge rule, a rule which prohibits merchants from applying a surcharge for those customers paying with credit cards. The Tribunal found in that situation that there had been an adverse effect on competition.

However, the Tribunal found that even under this alternative analysis, it would have declined to issue an order and noted that the proper solution to the concerns raised by the Commissioner is a regulatory framework. In that regard, it noted that the experience in other jurisdictions showed that concerns would be raised by consumers regarding surcharging and that rather sooner than later, intervention would have to take place by way of regulation.

The Tribunal made no award of costs and noted that the Commissioner advanced a case which should have been brought, even if the Commissioner was not entirely successful.

The Tribunal's reasons are confidential at this time in order to protect properly confidential evidence. A public version of the decision will issue as soon as possible after a determination as to what information must remain confidential has been made.

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Commissioner of Competition pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF the merger of British American Tobacco p.l.c. and Rothmans International B.V. whereby British American Tobacco p.l.c. will acquire, *inter alia*, indirect control of Rothmans Inc. and thereby the controlling interest of Rothmans Inc. in Rothmans, Benson & Hedges Inc.;

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

BRITISH AMERICAN TOBACCO p.l.c.

Respondent

STATEMENT OF GROUNDS AND MATERIAL FACTS

I. INTRODUCTION

1. The Commissioner of Competition (the "Commissioner") brings this application for a consent order on the grounds that the merger of British American Tobacco p.l.c. ("BAT") and Rothmans International B.V. ("Rothmans International"), whereby BAT will acquire, *inter alia*, indirect control of Rothmans Inc. ("Rothmans") and thereby its controlling interest in Rothmans, Benson and Hedges Inc. ("RBH") (the "merger") would, in the absence of the

draft consent order (the "DCO"), be likely to prevent or lessen competition substantially in the market for manufactured cigarettes and in the market for fine cut tobaccos throughout Canada.

2. The Commissioner, with the consent of BAT, respectfully submits for approval a DCO that, if implemented, will eliminate any such effect upon competition arising from the merger.
3. The statement of grounds and material facts herein forms the basis of the application brought by the Commissioner with the consent of BAT. The Commissioner has alleged certain material facts, and the respondent does not agree with all the facts alleged but does not contest the statement of grounds and material facts for the purposes of these applications and any proceeding initiated by the Commissioner relating to this consent order including an application to vary or rescind. The respondent consensually attorns to the jurisdiction of the Competition Tribunal solely for the purpose of these applications.

II. THE PARTIES

THE COMMISSIONER

4. The applicant is the Commissioner of Competition, appointed under s. 7 of the *Competition Act*, R.S.C. 1985, c. C-34 and, as such, is the person authorized to make this application.

BRITISH AMERICAN TOBACCO p.l.c

5. BAT is a corporation registered in England and Wales. BAT is a holding

company with interests in a number of companies which manufacture, distribute and sell more than 240 brands of cigarettes and other tobacco products in Canada, Europe, the United States, Asia and other territories throughout the world. Major international brands include *State Express 555*, *Lucky Strike*, *Kent* and *Benson & Hedges*. As BAT is a holding company, it is not engaged in operational activities.

IMASCO LIMITED

6. BAT's interest in the Canadian tobacco business is through its indirect ownership of 42% of the voting shares of the publicly traded company Imasco Limited ("Imasco") of Montréal, which is listed on The Toronto Stock Exchange, The Montréal Exchange and the Vancouver Stock Exchange. Imasco has three principal businesses with operations in Canada: (i) Imperial Tobacco, a division of Imasco, and its subsidiary Imperial Tobacco Limited (collectively "Imperial" of which Imasco owns 100%); (ii) Imasco Financial Corporation, through which Imasco holds its interest in The Canada Trust Company; and (iii) Shoppers Drug Mart Limited.

7. As a major Canadian consumer products and services company, Imasco operates through a number of divisions, including Imperial, which is Canada's largest tobacco enterprise. Imasco also has a number of significant businesses unrelated to tobacco. Headquartered in Montréal, Imperial manufactures and distributes a full range of tobacco products, including manufactured cigarettes, cigars and fine cut tobacco. Imperial Leaf Tobacco, a company division based in Aylmer, Ontario, purchases and processes leaf tobacco for Imperial and for export. Other processing facilities are located in Joliette and LaSalle, Québec, while tobacco production and packaging facilities are located in Montréal and Guelph, Ontario.

8. For the year ended December 31, 1998, Imperial's sales revenue, net of tobacco taxes and duties, was \$1.8 billion and earnings from operations were \$815 million.
9. Imperial has a large customer base in Canada. As its principal market, sales in Canada accounted for 96.2% of revenues in 1997. The company also exports leaf tobacco to 20 foreign customers located mainly in England and the U.S.. It also exports tobacco products to the U.S. through its two distributors in the U.S., Philip Morris and ITL (USA) Limited (an affiliate of Imperial).
10. The best known manufactured cigarette brands produced and distributed by Imperial are *du Maurier* and *Player's*. Combined sales of these two brands (numbers one and two in popularity) account for almost 60% of the Canadian manufactured cigarette market. Other manufactured cigarette brands of Imperial include *Matinée* (the fourth largest selling brand in Canada), *Cameo*, *Avanti*, *Medallion* and *Peter Jackson*, which when combined with *du Maurier* and *Players* gives Imperial a total share of the manufactured cigarette market of some 70%. Fine cut tobacco brands include *Matinée*, *Peter Jackson*, *Player's*, *Sweet Caporal* and *Vogue*; pipe tobacco brands include *Old Port*, *Old Chum*, *Old Virginia* and *Sir Walter Raleigh*, and cigar brands include *Old Port*, *House of Lords*, *White Owl*, *Reas* and *Colts*. General Cigar Company in Montréal, a wholly-owned subsidiary of Imperial, manufactures and distributes cigars which are exported to some 30 countries.
11. Imperial purchases tobacco grown in Ontario and Québec and purchases approximately 1,500 packaging commodities from 60 suppliers located primarily in Canada, with some specialty items being purchased in the U.S. or