

COMPETITION TRIBUNAL

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

AND IN THE MATTER of an Application by the Used Car Dealers Association of Ontario under section 75 of the *Competition Act*.

AND IN THE MATTER of an Application by Insurance Bureau of Canada under section 106 of the *Competition Act*.

BETWEEN:

USED CAR DEALERS ASSOCIATION OF ONTARIO

Applicant (Respondent)

- and -

INSURANCE BUREAU OF CANADA

Respondent (Applicant)

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT CT-2011-009 December 7, 2011 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 1

(Interim Supply Order on consent filed in CT-2011-008 as document #8)

NOTICE OF APPLICATION OF INSURANCE BUREAU OF CANADA UNDER SECTION 106 OF THE *COMPETITION ACT*

1. **TAKE NOTICE THAT** the Applicant, Insurance Bureau of Canada (“IBC”), will make an application to the Competition Tribunal (the “Tribunal”) pursuant to section 106 of the *Competition Act*, R.S.C. c. C-34, as amended (the “Act”) for an order rescinding the Interim Supply Order of the Tribunal dated October 20, 2011 (the “Interim Supply Order”), which requires IBC to supply UCDA with access to IBC’s Web Claims Search application on the basis previously supplied prior to June 17, 2011, and in accordance with the Access Agreement made as of March 17, 2006, between IBC and the UCDA until the disposition of the UCDA’s application under section 75 of the Act by the Tribunal, or the withdrawal, cessation, settlement or termination of that application by other means.

2. **AND TAKE NOTICE THAT** IBC will rely on the Statement of Grounds and Material Facts attached hereto as **Schedule A** and on the Affidavit of Randall Bundus sworn December 7th, 2011, and on such further and other material as counsel may advise and the Tribunal may permit.

3. **AND TAKE NOTICE THAT** IBC seeks the direction of the Tribunal for an expedited hearing of this Application.

4. **AND TAKE NOTICE THAT** IBC requests that this hearing be heard in the English language.

5. **AND TAKE NOTICE THAT** IBC requests that the documents for this Application be filed in electronic form.

6. **AND TAKE NOTICE THAT** IBC requests that the hearing of this Application be held in Toronto, Ontario.

7. **AND TAKE NOTICE THAT** the person against whom the order is sought is UCDA. UCDA's address is: Used Car Dealers Association of Ontario, 230 Norseman St. Toronto, Ontario M8Z 6A2.

Dated this 7th day of December, 2011.

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**SCHEDULE A
STATEMENT OF GROUNDS AND MATERIAL FACTS**

PART I. OVERVIEW

1. IBC brings this Application to rescind the Interim Supply Order of the Tribunal because it has received a direction from State Farm Mutual Automobile Insurance Company (“State Farm”), which is a member of IBC, that IBC cease supply of State Farm’s data to all commercial third-parties, including UCDA. While IBC continues to comply with the Interim Supply Order, IBC now finds itself “between a rock and a hard place” in relation to its obligation to comply with a direction of State Farm in the face of the Interim Supply Order.

2. In light of State Farm’s direction, IBC submits that the Interim Supply Order would not have been made or would have been ineffective in achieving its purpose given the circumstances that now exist at the time of this Application. IBC says that State Farm’s direction shifts the balance of convenience against an order for interim supply under section 104 of the Act. Both IBC and State Farm will suffer significant harm as a result of the continuation of the Interim Supply Order: in IBC’s case, because of the damage to its reputation and relationships with insurers and particularly its membership if it is unable to protect their data; in State Farm’s case, because its data will be supplied to an unauthorized party and because its corporate policy prohibiting the sale of insurance claims data to third parties will be entirely undermined.

3. As detailed below, IBC is unable to segregate State Farm’s data from the database UCDA accesses through Web Claims Search. The only way to comply with State Farm’s direction is to cease supplying UCDA with Web Claims Search altogether. Accordingly, in the circumstances that exist at the time of this Application, the Interim Supply Order should be rescinded.

PART II. FACTS

A. The Parties

4. IBC is a not-for-profit corporation incorporated under the *Canada Corporations Act*, and carries on business as a national trade association of non-government property and casualty insurers. IBC is the product of mergers between its various predecessor entities including the Insurance Crime Prevention Bureau.¹

5. The membership of IBC is comprised of 139 insurance companies who together represent approximately 90% of the private property and casualty insurance business in Canada by premium volume. In addition, IBC also has a number of “Associate Members” who are not themselves insurance companies but who receive certain benefits from IBC. IBC provides insurance information services to its members and others associated with the property and casualty insurance industry and law enforcement agencies, and engages in government relations and educational endeavours on behalf of its members.²

6. IBC also plays a significant role in providing statistical and data consolidation, management and custodial services to its members. In particular, IBC collects, processes and consolidates certain insurance information from and on behalf of insurers and other related organizations and provides that data in various forms to certain users. It is in this capacity that IBC operates the Web Claims Search application, which provides these users limited access to the vast collection of data contributed by insurers.³

¹ Affidavit of Randall Bundus affirmed December 7th, 2011 (the “Bundus Affidavit”), para. 2.

² *Id.*, para. 3.

³ *Id.*, para. 4.

7. According to the Affidavit of Robert G. Beattie sworn June 29, 2011 in relation to the Application by UCDA, UCDA is a trade association representing more than 4,500 used car dealers in Ontario. UCDA appears to provide a range of services to its members in exchange for a membership fee. One such service is UCDA's Auto Check business, for which the Web Claims Search application is a critical input. UCDA's Auto Check business provides vehicle accident history information to its members.⁴

B. Web Claims Search

(i) The Purpose and Use of Web Claims Search

8. Web Claims Search is simply a query tool or 'search engine' that allows users to search a database of information relating to insurance claims. It has operated in various iterations since 1993. IBC began providing UCDA with access to IBC's Web Claims Search application as an Associate Member of IBC in 1998. The database accessible through Web Claims Search is comprised of contributions from a broad spectrum of insurance companies and related entities, including both members and non-members of IBC. IBC manages and compiles the claims data provided from insurers in a central repository.⁵

9. At all times, the purpose of Web Claims Search has been to assist IBC's members in underwriting activities and to detect and prevent fraud, as a part of IBC's investigative services. To this end, Web Claims Search allows users to search by Vehicle Identification Number ("VIN"), License Plate Number, Driver's License Number, Names, Business Names

⁴ Affidavit of Robert G. Beattie sworn June 29, 2011 (the "Beattie Affidavit"), para. 3, Exhibit "A" to the Bundus Affidavit.

⁵ Bundus Affidavit, para. 6.

and other search terms to access over 200 fields of information relating to a wide range of insurance claims information.⁶

10. Though most of the more than 160 entities who use Web Claims Search are insurers themselves, a number of other “Associate Members” of IBC also use the application. Apart from UCDA, these additional users fall into three broad groups: independent insurance adjusters and private investigative agencies, who act under the direction of or in conjunction with insurers to assist in claims activities; provincial and municipal social services agencies; and law enforcement agencies.⁷

11. At the time IBC terminated UCDA’s access in June, 2011, UCDA was the only third party commercial user not within one of the above three groups to have access to Web Claims Search. In other words, it was the only commercial enterprise that used Web Claims Search other than for governmental or law enforcement purposes and for providing services to insurance companies, and was the only user of Web Claims Search that operates a business reselling the data available through Web Claims Search.⁸

12. Because of UCDA’s status as a user of Web Claims Search, UCDA had access to only approximately 60 fields of information and could search only by VIN and License Plate Number.⁹

⁶ *Id.*, para. 7.

⁷ *Id.*, para. 8.

⁸ *Id.*, para. 9.

⁹ *Id.*, para. 10.

(ii) The Web Claims Search Application is Based on Antiquated Technology

13. Web Claims Search suffers from a number of significant technological limitations that directly affect its functionality and IBC's ability to manipulate the data accessible through it. Web Claims Search is an aged application based on antiquated hardware and software. IBC has designated Web Claims Search as a "legacy" application – one that fulfils its functions on an "as-is" basis but that IBC no longer invests in for upgrades or improvements. The last major update to the Web Claims Search system occurred in 2005. The application operates using essentially the same technology today.¹⁰

C. Automobile Statistical Plan Data

14. Beginning April 1, 2006, most Canadian provincial insurance regulatory authorities (including the Financial Services Commission of Ontario) appointed the General Insurance Statistical Agent ("GISA") as their statistical agent for the collection of detailed statistical information relating to automobile insurance claims and other insurance-related statistical information. This comprehensive statistical data is referred to as Automobile Statistical Plan data, or "ASP" data.¹¹

15. GISA is a federally-incorporated, not-for-profit corporation designated to provide governance, accountability and oversight of the mandated statistical plans, including ASP. Concurrent with its appointment as statistical agent, GISA entered into a service agreement with IBC, under which, among other things, IBC collects, processes and consolidates the mandated

¹⁰ *Id.*, para. 11.

¹¹ *Id.*, para. 12.

statistical information from insurers and provides such information to GISA. This service agreement was amended and restated on April 1, 2009 (the “GISA Agreement”).¹²

16. Prior to GISA’s appointment as statistical agent in 2006, IBC and its predecessor trade association served as statistical agent to the provincial insurance regulatory agencies beginning in 1964.¹³

17. ASP data comprises the vast majority of the data accessible through Web Claims Search. Thus, contrary to the position expressed by UCDA in paragraph 14 of its Reply, ASP data cannot be dismissed as “another product” but rather is the integral ingredient for Web Claims Search.¹⁴

18. ASP data may also be provided in a “flatfile” format. This involves IBC providing a user with a discrete file or “package” of selected ASP data, completely separate and apart from Web Claims Search, and allows users to navigate through the data using whatever search platform they choose. The frequency with which the flatfile data is provided depends upon the agreement between IBC and a given member. Notably, certain data that is available in the ASP flatfile is not available when ASP data is accessed through Web Claims Search. For example, information relating to the “dollar value” of automobile insurance claims is available in ASP data through the flatfile, but cannot be accessed by any user through Web Claims Search.¹⁵

¹² *Id.*, para. 13.

¹³ *Id.*, para. 14.

¹⁴ *Id.*, para. 15.

¹⁵ *Id.*, para. 16.

D. Insurers Have Always Had the Right to Direct How IBC Uses their Data

19. There are no written contracts between IBC and insurers regarding the use and dissemination of insurers' data. However, there is an understanding on use and dissemination based on the long- standing relationship between IBC and its predecessors and insurers, which predates the creation of GISA and the initial access to Web Claims Search by UCDA. In that relationship, IBC and its predecessors received insurers' data which enabled IBC and its predecessors to create and maintain an enhanced and comprehensive source of information. IBC uses this information to engage in government relations and educational activities and to produce products for the use and benefit of its members. Insurers in return are able to receive services from IBC which is engaged in collecting, processing, and consolidating those data under confidential circumstances so as to enable insurers to fulfil their statutory obligations and detect instances of fraudulent conduct (among other things).¹⁶

20. Since IBC and its predecessors began collecting insurance claims data from insurers, it has always been understood by insurers and by IBC and its predecessors that insurers retained the right to direct IBC as to how their data is used and to whom it is disseminated.¹⁷

E. Eight Insurers Direct IBC to Cease Supply of their Data to UCDA

21. Starting in December, 2010 and continuing until March, 2011, IBC received directions from eight insurers that IBC was not to supply UCDA with those insurers' ASP data. Certain of those directions indicated that the particular insurer had entered into commercial relationships with a third party with respect to the use of the insurer's ASP data, and by consequence directed IBC to terminate UCDA's (and other parties') access to that data through

¹⁶ *Id.*, para. 17.

¹⁷ *Id.*, para. 18.

the Web Claims Search application but permit the insurer's ASP data to continue to be made available through Web Claims Search to government institutions, law enforcement agencies, National Insurance Crime Bureau, and insurance companies and their respective agents.¹⁸

22. IBC ultimately extended UCDA's access to Web Claims Search until UCDA began receiving ASP data in the flatfile format in June, 2011. This extension was an accommodation to UCDA to assist in its transition to using ASP data which contained information required by Ontario legislation effective January 1, 2010 mandating the disclosure of automobile repair costs exceeding \$3000.00 when selling a vehicle. This information is not available to users of Web Claims Search.¹⁹

23. In order to enable UCDA to obtain access to insurers' ASP data in the flatfile format, IBC advised UCDA that UCDA was required to obtain the directions of insurers to have IBC share the insurers' ASP data with UCDA. IBC assisted UCDA in that process by providing draft directions and a model agreement between UCDA and insurers that would authorize IBC to forward insurers' ASP data to UCDA, and other measures as outlined in paragraphs 56 through 59 of IBC's Response to UCDA's application. However, in light of the directions IBC received from insurers requiring IBC to terminate UCDA's access to those insurers' data coupled with the technological limitations of Web Claims search referred to above, IBC determined that it was required to finally terminate UCDA's access to Web Claims Search in June 2011.²⁰

¹⁸ *Id.*, para. 19.

¹⁹ *Id.*, para. 20.

²⁰ *Id.*, para. 21.

F. Because of the Technological Limitations of Web Claims Search, IBC is Unable to Remove Data from a Particular Insurer

24. Setting aside all of the other objectively justifiable business reasons for terminating UCDA's access to Web Claims Search outlined in IBC's Response to UCDA's Application under section 75 of the *Competition Act*, IBC determined that it had no choice but to cease supply of UCDA's access to Web Claims Search altogether as a result of these directions.²¹

25. IBC made this determination because one of the consequent limitations of the antiquated technology on which Web Claims Search operates is that IBC is technologically unable to prevent a particular user from accessing data that originates from a particular insurer. There is no current functionality that permits IBC to filter out data from insurers who direct IBC to cease supply. Modifying Web Claims Search to allow for such functionality would require a complete overhaul of the hardware and software on which Web Claims Search is built. Such an upgrade would cost hundreds of thousands of dollars and take months to complete. By contrast, IBC's average total revenue between January and December, 2010 from UCDA for its use of Web Claims Search was approximately \$4,000 per month, including all membership fees and "per hit" fees.²²

26. Accordingly, due to these technological limitations of Web Claims Search, there are only two ways to prevent a given user from receiving a particular insurer's data through Web Claims Search.²³

27. First, since IBC has no ability to filter a given insurer's data once it becomes accessible through Web Claims Search, IBC can terminate the access to Web Claims Search of

²¹ *Id.*, para. 22.

²² *Id.*, para. 23.

²³ *Id.*, para. 24.

the given user altogether. IBC will thereby be in compliance with the particular insurer's direction, since the user will no longer be able to access the insurer's data - or any other data - through Web Claims Search. The result is that a direction from even a single insurer not to supply data to a given user will effectively prevent that user from accessing the entire database.²⁴

28. Second, IBC has the ability to remove a particular insurer's data from Web Claims Search altogether. The result of this course of action would be that no users of Web Claims Search would be able to access those data. Given that certain insurers comprise significant proportions of the data accessible through Web Claims Search, the effect of removing these data from the database entirely would be to diminish the overall effectiveness of the application for all users. Moreover, if multiple insurers directed IBC to remove their data from the database accessible through Web Claims Search, the effectiveness of Web Claims Search would be further eroded. In light of these deleterious effects on Web Claims Search as a whole, IBC has determined that the removal of insurers' data from the database accessible through Web Claims Search would be an inappropriate solution in the circumstances.²⁵

29. In any event, removing a given insurer's data from the database accessible through Web Claims Search would be a difficult, costly and time-consuming undertaking.²⁶

G. The Tribunal issues its Order for Interim Supply of October 20, 2011

30. After the decision of the Tribunal of September 9, 2011 granting UCDA leave to proceed with its application pursuant to section 75 of the *Competition Act* and with a view to moving this matter forward to a hearing on the merits as expeditiously as possible, IBC diligently

²⁴ *Id.*, para. 25.

²⁵ *Id.*, para. 26.

²⁶ *Id.*, para. 27.

investigated whether it was possible to enter into an interim supply order on consent. Accordingly, IBC sought to obtain consents to supply UCDA with access to Web Claims Search on an interim basis from each of the eight insurers who had previously directed IBC to cease supply of their data to UCDA.²⁷

31. Further to these efforts, IBC communicated with representatives of each of the eight insurance companies and successfully obtained directions from them to continue to supply their data to UCDA through Web Claims Search on an interim basis.²⁸

32. On October 7, 2011, IBC's counsel advised counsel for UCDA that IBC's consent to the Interim Supply Order was contingent on the continued consent of all insurers to the provision of their data to UCDA through Web Claims Search, and that IBC would apply to the Tribunal for directions in the event that an insurer directed IBC to cease supply.

33. By letter dated October 11, 2011, counsel for UCDA advised that this arrangement was acceptable: "I also confirm that the approach you outlined for seeking directions from the Tribunal, in the event of possible changes of position by IBC member insurers, is acceptable to UCDA."²⁹

34. Accordingly, on October 20, 2011, the Competition Tribunal issued the Interim Supply Order on consent of the parties

²⁷ *Id.*, para. 28.

²⁸ *Id.*, para. 29.

²⁹ Exhibit "G" to the Bundus Affidavit.

H. State Farm Directs IBC to Cease Supply of its Data to UCDA through Web Claims Search

35. On November 2, 2011, Mr. Ray G. Kearns, Canadian Compliance Director at State Farm, informed Mr. Bundus that State Farm was directing IBC not to supply its data to UCDA.³⁰

36. Following receipt of the communication from Mr. Kearns, IBC engaged in discussions with State Farm to clarify and determine whether State Farm was firm in its direction to IBC. By letter dated November 9, 2011, Mr. Kearns confirmed that State Farm does not consent to providing its data that forms part of the Web Claims Search database to UCDA:

We are writing to confirm that State Farm Mutual Automobile Insurance Company (“State Farm”) does not consent to the provision of its data that forms part of the Web Claims Search database operated by the Insurance Bureau of Canada (“IBC”) to the Used Car Dealers Association of Ontario (“UCDA”) or to any operator of a similar commercial database. As previously communicated, State Farm hereby directs that IBC immediately cease providing its data. We are writing this letter to set out formally the basis for our direction.³¹

37. Mr. Kearns went on to explain in this letter that:

State Farm as a matter of business policy has chosen not to make claims information available to third-party commercial operations. This policy is applied across State Farm’s operations in Canada and the United States, and has been relied upon on a number of occasions to turn down potential business opportunities with third-party commercial operations regarding the sale of claims information. Such information belongs to State Farm as an enterprise, and it is a unique, confidential, competitively-sensitive and valuable asset. The provision by IBC of State Farm’s data to UCDA is not consistent with State Farm’s business policy on this matter. State Farm is not willing to permit IBC to be a conduit for

³⁰ Bundus Affidavit, para. 35.

³¹ Exhibit “J” to the Bundus Affidavit.

the provision of this information to UCDA or any other operator of a similar commercial database.³²

38. It is IBC's position that it is bound to follow the direction of State Farm. IBC has no reason to believe that State Farm is not in a position to direct IBC as to how its data may be used.³³

39. IBC would not have consented to the Interim Supply Order if, at the time IBC so consented, State Farm or any other insurer had directed IBC not to provide its data to UCDA.³⁴

40. As indicated above, removing State Farm's data from the database accessible through Web Claims Search will limit the amount of information available to the other users of that service. State Farm's data comprises approximately 10% of the data accessible through Web Claims Search. State Farm has indicated that it does not view the removal of its data from Web Claims Search as an acceptable solution in these circumstances - even if such removal were a practical option - given that such a measure would deprive all users of Web Claims Search of State Farm's data.³⁵

I. IBC would suffer significant harm if it is unable to comply with the directions of its insurers

41. Insurers view the insurance data that they send to IBC as a significant and valuable proprietary asset. IBC's members have entrusted IBC with ensuring that their data is

³² *Id.*

³³ Bundus Affidavit, para. 38.

³⁴ *Id.*, para. 39.

³⁵

managed effectively and responsibly, and that it is not disseminated to third parties without their consent.³⁶

42. An Order that requires IBC to disregard an express direction of one of its members would potentially cause significant and permanent damage to IBC's relationship with that member. Such an Order could also irreparably erode IBC's members' faith in IBC's ability to represent their best interests and to effectively manage one of their valuable proprietary assets. IBC has a serious and significant interest in ensuring that it is not in conflict with its members, and it will suffer significant reputational harm to the extent that it cannot avoid such conflict.³⁷

43. Moreover, membership in IBC is voluntary for all insurers, and all insurers are free to terminate their membership with IBC. As a not-for-profit, national trade organization that is funded exclusively by its membership, IBC has a critical interest in maintaining strong relationships with its members. That interest will be significantly undermined if the Tribunal does not rescind the Interim Supply Order in the face of State Farm's clear direction to IBC.³⁸

PART III. GROUNDS FOR THIS APPLICATION

A. The Circumstances that Led to the Making of the Interim Order have Changed

44. Section 106 of the Act provides that an interim order may be varied or rescinded if the circumstances that led to the making of the order have changed and if, in those changed circumstances, the order would not have been made. Section 106(1) of the Act states:

³⁶ *Id.*, para. 42.

³⁷ *Id.*, para. 43.

³⁸ *Id.*, para. 44.

Rescission or variation of consent agreement or order

106. (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

45. In *Canada (Director of Investigation & Research) v. Air Canada*, the Federal Court of Appeal rejected the Tribunal's "restrictive interpretation" of paragraph 106(a).³⁹ The Tribunal had held that the provision encompassed only changed circumstances that "directly and demonstrably" caused the order to be issued. Instead, the Federal Court of Appeal stated that the words of s. 106 were to be given their ordinary grammatical meaning:

In my view, there is no warrant in the language of section 106 itself or in the scheme of the statute generally for reading the words "the circumstances that led to the making of the order" in other than their ordinary grammatical sense. This involves a determination by the Tribunal of the existence of a simple causal relationship between the circumstances and the order, but no more. It is not necessary that such relationship be "direct" or "demonstrable" other than in the very limited sense that the Tribunal must be satisfied that it exists. Nor is it necessary to relate the circumstances to the purposes sought to be achieved by the order, although it is of course always legitimate to look to such purposes as a guide to identifying some of the circumstances

³⁹ *Canada (Director of Investigation & Research) v. Air Canada* (1994), 49 C.P.R. (3d) 417 at para. 14 (C.A.) per Hugessen J.A., rev'ing (1993) 49 C.P.R. (3d) 7 (Comp. Trib.), leave to appeal to S.C.C. refused.

leading to it. There has been a clear change in the circumstances in this case, as contemplated under s. 106 of the Act.⁴⁰

46. As outlined above, the circumstances that led to the making of the Interim Supply Order were that no insurer was, at the time IBC consented to the Order, directing IBC not to supply UCDA with access to Web Claims Search. The GISA Agreement acknowledges the rights of insurers to direct IBC as to the disclosure and delivery of their data.⁴¹ Thus, IBC's ability to provide its consent to the Interim Supply Order depended upon there being no objections by insurers to IBC's ability to disclose their data to UCDA.⁴²

47. In fact, in the interests of being able to consent to the Interim Supply Order, IBC made diligent efforts to obtain the consent of the eight insurers who had previously directed IBC not to supply UCDA with access to Web Claims Search. It was only after IBC was able to obtain these insurers' directions permitting IBC to provide UCDA with access to Web Claims Search that IBC was in a position to consent to the Interim Supply Order.⁴³

48. IBC would not have consented to the Interim Supply Order if State Farm – or any other insurer – had directed IBC not to supply its data to UCDA through Web Claims Search.⁴⁴ In fact, IBC expressly contemplated that it could only provide UCDA with access to Web Claims Search as long as no insurer subsequently directed IBC to cease such supply. As IBC's counsel indicated to UCDA's counsel in a letter dated October 7, 2011:

As also indicated to you in our telephone discussion of September 22nd, our Client has advised us that Web Claims Search is a legacy

⁴⁰ *Id.*

⁴¹ See sections 13.4 and 13.6 of the GISA Agreement, Exhibit "B" to the Bundus Affidavit.

⁴² Bundus Affidavit, para. 17-18

⁴³ *Id.*, paras. 28-30.

⁴⁴ *Id.*, para. 39.

application with significant technological limitations; if an insurer directs IBC to cease supply of its data to UCDA through Web Claims Search, it will be technically and economically prohibitive for IBC to remove that insurer's data from the database and continue to grant access to UCDA to the remaining data. As a result in such a case, IBC would not be in a position to continue to supply UCDA with access to Web Claims Search.

Our client has advised us that if such a circumstance were to arise, it would immediately apply to the Tribunal for directions and that it would be prepared to provisionally maintain UCDA's access to Web Claims Search pending the Tribunal's directions.⁴⁵

49. When State Farm directed IBC to cease supplying UCDA with access to Web Claims Search, the circumstances that led to the making of the Interim Supply Order on consent – namely, the fact that no insurer had directed IBC not to supply UCDA with access to their data through Web Claims Search – changed.

B. In the Circumstances that Exist at the Time of this Application, the Interim Supply Order Would Not have been Made

50. The Interim Supply Order was made pursuant to section 104 of the Act. Section 104 states:

Interim Order

104. (1) Where 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 person who has made an application under section 75 or 77, may issue such interim order as 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.

⁴⁵ Exhibit "F" to the Bundus Affidavit.

51. In order to determine whether the Interim Supply Order would have been made in the circumstances that exist at the time of this Application, the Tribunal must apply “the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.” As the Tribunal held in *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, “the Tribunal has consistently applied the principles found in the decision of the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*.”⁴⁶

52. In *RJR-MacDonald*, the Supreme Court held that the following factors were to be applied in determining whether or not to grant an injunction: 1) whether there is a serious issue to be tried; 2) whether the applicant will suffer irreparable harm if the injunction were refused; and 3) whether the balance of convenience favours the applicant.⁴⁷

53. As a result of the change in circumstances here – namely, the direction of State Farm that IBC is not to supply UCDA with access to State Farm’s data through Web Claims Search – IBC submits that the balance of convenience consideration now weighs in favour of IBC and against an interim supply order under section 104.

(i) The Balance of Convenience Favours IBC in These Circumstances

54. The balance of convenience factor of the *RJR-MacDonald* test involves “a determination of which of the two parties will suffer the greater harm from the granting or refusing of an interlocutory injunction, pending a decision on the merits”.⁴⁸

55. In the circumstances of this Application, the balance of convenience now weighs against granting an order for interim supply. Insurers are entitled to direct IBC as to whether or

⁴⁶ *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 16 at para. 8.

⁴⁷ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, p. 348.

⁴⁸ *Id.*, p. 342.

not IBC may provide claims data to third parties. Accordingly, the reputational and business harm that IBC will suffer if it is unable to comply with State Farm's direction outweighs any harm that UCDA will suffer if the interim supply order is rescinded. Moreover, an interim supply order will affect the rights of State Farm – who is not a party to this proceeding – to control access to its data.

(a) *Insurers have the right to direct IBC as to the provision of claims data to third parties*

56. State Farm has directed IBC not to supply State Farm's data to UCDA through IBC's Web Claims Search application. State Farm was entitled to issue such a direction, and IBC is bound to follow it. While insurers are not parties to the GISA Agreement, sections 13.4 and 13.6 thereof acknowledge that each insurer – including State Farm – is entitled to direct IBC as to the disclosure and delivery of their data. State Farm's explicit direction to IBC not to provide State Farm's data to UCDA does exactly that.⁴⁹

57. As indicated in the Bundus Affidavit, the insurance industry has long acknowledged that insurers have the right to determine the disclosure and delivery of their data.⁵⁰ While insurers have for several years been required by statute to provide information prescribed by regulation to the Superintendent or a designated agency regarding applications for insurance and claims made to the insurer,⁵¹ the relationship between insurers and IBC and its predecessors is of long standing and predated the appointment of GISA.

58. In this relationship, IBC and its predecessors received insurers' data which enabled IBC to create and maintain an enhanced and comprehensive source of information and

⁴⁹ Bundus Affidavit, paras. 35-38.

⁵⁰ *Id.*, paras. 17-18.

⁵¹ *Insurance Act*, R.S.O. 1990, C. I.8, s. 101.1.

thereby produce products for the use of its members. Insurers in return received IBC's services in collecting, processing, and consolidating that data under confidential circumstances so as to enable insurers to fulfil their statutory obligations and detect instances of fraudulent conduct. Notwithstanding the absence of formal agreements, these circumstances demonstrate a contractual relationship based upon the course of conduct between insurers and IBC such that insurers have the right to control how their data is to be used and to whom it may be disseminated. IBC is bound to follow these directions.⁵²

59. Contrary to the position expressed by UCDA in paragraph 15 of its Reply to IBC's Response on the Application that "[s]uch data has been disclosed pursuant to a statutory reporting obligation under the Ontario *Insurance Act*, and is not owned or controlled by the insurers", insurers have not thereby relinquished their rights to determine the disclosure and delivery of their data to third parties.⁵³ Both the course of conduct maintained by the insurers with IBC and its predecessor entities over the years and the recognition in sections 13.4 and 13.6 of the GISA Agreement that insurers have the right to determine the disclosure and delivery of their data clearly indicate otherwise.

60. IBC is therefore obligated to conduct itself in a manner consistent with the directions of its insurers, and particularly to follow a direction by a particular insurer (in this case, State Farm) that its data not be disclosed or delivered to a third party (in this case, UCDA).

⁵² See G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at p. 15; *Rae v. Leighton*, 2002 ABQB 186 at para. 43; John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 211, 216-217.

⁵³ Reply of UCDA in UCDA's Application under section 75 of the *Competition Act*, para. 15, Exhibit "C" to the Bundus Affidavit (emphasis added).

(b) Significant harm to IBC

61. As detailed above, IBC will suffer serious harm to its reputation among insurers and to its relationships with its members if it is unable to comply with State Farm's direction. As a national, not-for-profit business association, IBC has a critical interest in maintaining strong relationships with its members

62. Courts have recognized that both harm to a business' reputation and damage to its important relationships constitute irreparable harm. In *1307347 Ontario Inc. v. 1243058 Ontario Inc. (c.o.b. Golden Seafood Restaurant)*, the plaintiff landlord moved for an injunction against the tenant to restrain it from operating a 24-hour restaurant in a plaza.⁵⁴ The plaintiff argued that the tenant's continued operation of the restaurant in this manner would, among other things, violate the plaza site plan. Justice Nordheimer agreed and granted the injunction, holding:

There is a legitimate concern expressed by the plaintiff that permitting the defendant to operate in a manner that violates the site plan, and therefore the order of the OMB, could cause serious impairment to the plaintiffs relationship with the City of Toronto as well as exposing it to legal action at the instance of the City. [...] Where, as here, there is an agreement with a government authority which will clearly be violated by the actions of the defendant, I consider the potential for damage to the plaintiffs relationship with the City to be a realistic and legitimate matter to consider on the motion. I also consider that such potential for damage to its relationship with a level of government constitutes irreparable harm.⁵⁵

63. IBC's continued provision of State Farm's data to UCDA in the face of State Farm's direction to the contrary is causing direct harm to IBC's reputation and its relationships with State Farm and its other members.

⁵⁴ *1307347 Ontario Inc. v. 1243058 Ontario Inc. (c.o.b. Golden Seafood Restaurant)*, [2001] O.J. No. 31 (S.C.J.).

⁵⁵ *Id.*, para 14.

64. At the same time, IBC's provision of Web Claims Search to UCDA generates only a very small amount of revenue for IBC. UCDA paid IBC an average total of approximately \$4,000 per month for access to Web Claims Search.⁵⁶ UCDA is the last remaining commercial user of Web Claims Search other than for law enforcement purposes or for providing services to insurance companies.⁵⁷ IBC made a business decision in May 2010 that it would terminate UCDA's access to Web Claims Search and informed UCDA accordingly. This decision was made before IBC received directions from insurers to cease supplying their data to UCDA through Web Claims Search. IBC took the position at that point in time that making Web Claims Search available to commercial third party users such as UCDA was more trouble than it was worth. From a commercial perspective, this continues to be the case. IBC now risks significant and permanent reputational and other harm if it is required to supply UCDA with Web Claims Search in the face of State Farm's direction.

65. By contrast, UCDA has argued in its Application for Interim Relief under section 104 of the *Competition Act* that UCDA will suffer irreparable harm if interim relief is not granted, since Auto Check will be "put out of business".⁵⁸ However, Auto Check is not a corporation or other entity that can go "out of business". Rather, as stated in the Beattie Affidavit, it is simply a "service" that UCDA sells to its members.⁵⁹ UCDA has tendered no evidence that UCDA itself will go out of business if interim relief is not granted. In this regard, the situation in this case is analogous to *Merck & Co. v. Nu-Pharm Inc.*, where Justice Rothstein held for the Federal Court of Appeal that:

⁵⁶ Bundus Affidavit, para. 23.

⁵⁷ *Id.*, para. 9.

⁵⁸ Exhibit "D" to the Bundus Affidavit, para. 37.

⁵⁹ Exhibit "A" to the Bundus Affidavit, para. 3.

This is not a case of a one-product firm in which, if the firm is not allowed to continue to market that product, it will go out of business. Nu-Pharm was a profitable, generic drug participant in the marketplace before it began marketing Nu-Enalapril a little over a year ago. Nu-Enalapril is an important product for Nu-Pharm but Nu-Pharm continues to market other products and derives a significant cash-flow from them. I have not heard evidence that Nu-Pharm must continue to market Nu-Enalapril indefinitely in order not to go out of business.⁶⁰

66. Moreover, UCDA asserts that it will suffer “credibility and reputational harm” among its members by being unable to continue to supply access to Web Claims Search.⁶¹ Any harm that UCDA will suffer by being unable to provide a service to its members (who can purchase substitute products from other providers) is surely outweighed by the harm IBC will suffer if the Interim Supply Order is not rescinded. As set out above, the reputational harm IBC will suffer does not arise because IBC will be unable to provide a service to its members. Rather, as a result of the Interim Supply Order and State Farm’s direction, IBC is now in *conflict* with one of its members.

(c) An interim supply order that would affect the rights of State Farm should not be granted in these circumstances

67. State Farm is not a party to this proceeding, yet its rights will be directly affected if the Tribunal does not rescind the Interim Supply Order in these circumstances. Such an order would effectively compel State Farm to provide its data to UCDA despite the fact that State Farm has indicated that, as a matter of corporate policy, it does not make claims information data available to third-party commercial users. This policy appears to apply to all third-party commercial users, and not just to UCDA.⁶²

⁶⁰ *Merck & Co. v. Nu-Pharm Inc.* [2000] F.C.J. No. 534 at para. 22 (F.C.A.).

⁶¹ Exhibit “D” to the Bundus Affidavit, para. 34.

⁶² Exhibit “J” to the Bundus Affidavit.

68. In *Matthew v. Guardian Assurance Co.*, the Supreme Court of Canada considered whether to grant an injunction that would affect the rights of a non-party.⁶³ The plaintiff attempted to bar a United States-based insurer from doing business in British Columbia by seeking an injunction against the insurer's agent. The Supreme Court of Canada refused to grant the injunction restraining the agent, in part because the rights of the non-party insurer would be adversely impacted:

If not a necessary party -- as I incline to think it was -- the Guardian Fire Insurance Company (of Utah) would certainly have been a proper party; and I think judicial discretion would have been soundly exercised by declining to entertain this action until it had been added as a defendant. *Where the injunction sought will injuriously affect the rights of a person or body not before the court it will not ordinarily, and without special circumstances, be granted.*⁶⁴

69. Here, an Interim Supply Order would injuriously affect the rights of State Farm because such an order would vitiate State Farm's ability to control its data and entirely undermine its stated corporate policy against providing policyholder data to commercial third parties.

(ii) The Tribunal Should Not Exercise its Discretion to Order Interim Supply in These Circumstances Because the Data Are Not in Ample Supply

70. In *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, the Tribunal refused to order the respondent motorcycle distributor to supply the applicant motorcycle dealer with Harley-Davidson motorcycles because the respondent had already allocated its motorcycle inventory to other dealers.⁶⁵ The Tribunal held that:

⁶³ *Matthew v. Guardian Assurance Co.* (1918), 58 S.C.R. 47.

⁶⁴ *Id.* (emphasis added).

⁶⁵ *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28.

section 75 and, therefore, interim orders under section 75, are meant to deal with situations in which the product is readily available and unencumbered in the sense that it has not been sold or promised to another purchaser.⁶⁶

71. As a result, the Tribunal found that, in the circumstances, it would not be an appropriate exercise of the Tribunal's discretion to order interim supply of the motorcycles because they were not in ample supply.⁶⁷

72. Similarly, State Farm's data are no longer in ample supply in this case, since State Farm has directed IBC not to supply those data to UCDA. In this regard, the circumstances that now exist here are analogous to the situation that the Tribunal considered in *Canada (Competition Act, Director of Investigation and Research) v. Warner Music Canada Ltd.*⁶⁸ In that case, the Commissioner alleged a refusal to deal by Warner under section 75 of the Act. Warner had refused to grant copyright licenses to make sound recordings from their master recordings to BMG (Canada), which needed the licences to compete in the mail-order record club business in Canada.⁶⁹ The Tribunal held that section 75 of the Act did not apply in the circumstances, since "there cannot be an 'ample supply' of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld."⁷⁰

⁶⁶ *Id.*, para. 19.

⁶⁷ *Id.*, para. 21.

⁶⁸ *Canada (Competition Act, Director of Investigation and Research) v. Warner Music Canada Ltd.*, [1997] C.C.T.D. No. 53 ("Warner Music"). Note that this aspect of the decision was considered *obiter* by the Federal Court in *Cinemas Guzzo Inc. v. Canada (Attorney General)* (2005), 47 C.P.R. (4th) 250 at para. 56 (F.C.). Rouleau J. distinguished *Warner Music* on the facts, but stated that "in my view, the term 'product' does, within the meaning of the Act, include licences, since to conclude otherwise would prevent the Act from having any application at all in the area of intellectual property." However, the Federal Court of Appeal ([2006] F.C.J. No. 721) characterized Rouleau J.'s statement in respect of *Warner Music* to be "mere *obiter*" since "no serious debate was undertaken concerning the correctness and the application of *Warner*" (para. 7).

⁶⁹ *Warner Music*, para 1.

⁷⁰ *Warner Music*, para. 30.

73. While IBC does not assert, for purposes of this Application, that insurers' data constitutes intellectual property or that this Tribunal does not have jurisdiction to deal with such subject matter, the circumstances here are nonetheless strongly analogous to the *Warner Music* case. Here, IBC's ability to supply UCDA with access to Web Claims Search is dependent upon State Farm's consent. Insurers' rights to determine to whom their data may be disclosed or delivered have the effect of creating an ability to withhold data, notwithstanding any statutory reporting obligations or other contractual arrangements to which the insurers are not privy. While IBC acknowledges that the Tribunal determined in *Warner Music* that legal rights over intellectual property are by their "very nature" exclusive,⁷¹ it is submitted that the insurers' rights to determine to whom their data may be disclosed or delivered represents a strongly similar exclusivity which by consequence means that the product in this case, being insurer data, cannot therefore be in ample supply.

74. In its Reply to IBC's Response to UCDA's Application, UCDA mischaracterizes the implications of *Quinlan's* to this case. UCDA says that "supplying output from the Web Claims Search application to any particular user, such as UCDA, does not render it unavailable for supply to others". This likens the insurer data in this case to a physical object, which it is not; rather, it is the insurers' rights as stated above that create circumstances where the data is not in ample supply, or to use the analogous phrase in *Quinlan's*, not "readily available and unencumbered".

75. Thus, when State Farm directed IBC not to supply State Farm's data to UCDA, State Farm's data ceased to be in ample supply. Accordingly, as in *Quinlan's*, the Tribunal should not exercise its discretion to order interim supply in these circumstances.

⁷¹ *Warner Music*, para. 30

PART IV. ORDER SOUGHT

76. IBC would be amenable to a variation of the Interim Supply Order that would respect the direction of State Farm and allow UCDA to continue to access the remaining data available through Web Claims Search. However, as a result of the technological limitations detailed in the Bundus Affidavit, IBC is unable to remove State Farm's data from the database accessible through Web Claims Search. Thus, such a variation of the Interim Supply Order is impossible in the circumstances.

77. Accordingly, IBC requests that the Interim Supply Order be rescinded.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of December, 2011.

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PART V. LIST OF AUTHORITIES

A. Case Law

1307347 Ontario Inc. v. 1243058 Ontario Inc. (c.o.b. Golden Seafood Restaurant), [2001] O.J. No. 31 (S.C.J.)

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Matthew v. Guardian Assurance Co. (1918), 58 S.C.R. 47.

Merck & Co. v. Nu-Pharm Inc. [2000] F.C.J. No. 534 (F.C.A.)

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B. Texts

G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011)

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