

File No. CT-2011-009

**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

# 3

**AFFIDAVIT OF RANDALL BUNDUS**  
**(Affirmed December 7, 2011)**

I, RANDALL BUNDUS, of the City of Mississauga, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am the Vice President Operations and General Counsel for the Respondent, Insurance Bureau of Canada (“IBC”). As such, I have knowledge of the matters contained in this Affidavit. Where I have relied on other sources for information, I have specifically referred to such sources and verily believe the information to be true. This Affidavit is made for the sole purpose of supporting IBC’s application under section 106 of the *Competition Act* to rescind the Consent Interim Supply Order dated October 20, 2011 (the “Interim Supply Order”).

**A. The Parties**

2. 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.

3. As of the date of this Affidavit, 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.

4. 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.

5. According to the Affidavit of Robert G. Beattie sworn June 29, 2011 in relation to the Application by UCDA (**Exhibit “A”**), 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.

**B. Web Claims Search**

**(i) The Purpose and Use of Web Claims Search**

6. 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.

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

8. 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.

9. 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 for a purpose 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.

10. 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.

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

11. 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. I am advised by Maria Dal Cin, IBC's Chief Information Officer, and verily believe that the last major update to the Web Claims Search system occurred in 2005. The application operates using essentially the same technology today.

**C. Automobile Statistical Plan Data**

12. 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.

13. 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 statistical information from insurers and provides such information to GISA. This service agreement was amended and restated on April 1, 2009 (the “GISA Agreement”). A copy of the GISA Agreement is attached as **Confidential Exhibit “B”**.

14. 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.

15. 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 that ASP data is “another product”, ASP data is rather the integral ingredient for Web Claims Search. UCDA’s Reply to IBC’s Response in UCDA’s application under section 75 of the *Competition Act* is attached as **Exhibit “C”**.

16. 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.

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

17. 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).

18. 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. Through all of my extensive dealings involving insurance claims data in my capacity as Vice President and General Counsel of IBC for the past 13 years and for 12 years prior to assuming that position, both prior to and after GISA’s assumption of the role of statistical agent in Ontario from IBC, there has never been any suggestion – whether by GISA, the Financial Services Commission of Ontario, IBC or any other organization – that the insurers could not direct IBC as to the use of their insurance claims data.

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

19. 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 the Web Claims Search application. Certain of these directions specifically permitted 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.

20. 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.

21. 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 in paragraph 11 of this Affidavit, IBC determined that it was required to finally terminate UCDA's access to Web Claims Search in June 2011.

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

22. 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.

23. 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. I am advised by Ms. Dal Cin and verily believe that 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, I am advised by Ms. Dal Cin and verily believe that 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.

24. Accordingly, due to these technological limitations of Web Claims Search, Ms. Dal Cin has advised me and I verily believe that there are only two ways to prevent a given user from receiving a particular insurer's data through Web Claims Search.



25. 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 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.

26. 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.

27. In any event, Ms. Dal Cin has advised me and I verily believe that removing a given insurer's data from the database accessible through Web Claims Search would be a difficult, costly and time-consuming undertaking.

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

28. 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

investigated whether it was possible to enter into an interim supply order on consent in response to UCDA's Notice of Application under section 104 (**Exhibit "D"**). 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.

29. 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.

30. IBC thereafter instructed its counsel to provide IBC's consent to the Interim Supply Order.

31. In advising counsel for UCDA of IBC's consent by letter dated September 30, 2011 (**Exhibit "E"**), IBC instructed its counsel to advise counsel for UCDA that IBC's consent to the Interim Supply Order was conditional on the continued consent of IBC's members to the supply of access to Web Claims Search to UCDA on an interim basis, as follows:

However, I am pleased to inform you that, as of today, all eight insurers have now provided IBC with new directions permitting IBC to provide UCDA with interim access to Web Claims Search. Our client is therefore prepared to provide immediate access for UCDA to Web Claims Search on an interim relief basis, pending the disposition of the matter by the Tribunal or the withdrawal, cessation, settlement, or termination of the application by other means. As you know the existing contract between your client and ours was terminated, and a new contract will first need to be put in place. Please note that, consistent with the proper characterization of the legal relationship between IBC and insurers, IBC's ability to continue to provide access to Web Claims Search is dependent upon matters beyond its control.

32. On October 7, 2011, IBC's counsel sent a follow-up letter to counsel to UCDA in respect of the parties' arrangements for interim supply (**Exhibit "F"**) which stated *inter alia* that

IBC had obtained the consents from the eight insurers and was prepared to recommence access to Web Claims Search for UCDA immediately. However, the letter made clear that:

IBC is legally bound to respect and follow the wishes of the insurers who own the data in question, and that any insurer contributing to Web Claims Search is always entitled to direct IBC as to the manner in which IBC is permitted to grant access to the insurer's data. As also indicated to you in our telephone discussion of September 22<sup>nd</sup>, our Client has advised us that Web Claims Search is a legacy 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.

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." A copy of this letter is attached as **Exhibit "G"**.

34. Accordingly, on October 20, 2011, the Competition Tribunal issued the Interim Supply Order on consent of the parties (**Exhibit "H"**). The Order indicated that:

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, the IBC is to supply the UCDA forthwith with access to the 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 the IBC and the UCDA.

#### 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, State Farm Mutual Automobile Insurance Company (“State Farm”), told me that State Farm was directing IBC not to supply its data to UCDA. He subsequently sent an email confirming this direction. A copy of that email is attached as **Exhibit “I”**.

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 (**Exhibit “J”**), 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.

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

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.

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.

40. As indicated above in my Affidavit, removing State Farm's data from the database accessible through Web Claims Search will limit the amount of information available to all the other users of that service. State Farm's data comprises approximately 10% of the data accessible through Web Claims Search. State Farm has informed me 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.

41. Further to the direction by State Farm, and the indications made to counsel for UCDA by IBC's counsel in the correspondence referred to above, IBC instructed its counsel to bring an application for directions to the Tribunal, which application was commenced by IBC's counsel's communication to the Tribunal of November 14, 2011. A copy of this email is attached as **Exhibit "K"**.

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

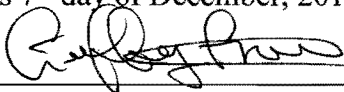
42. Insurers view the insurance data that they send to IBC as a significant and valuable proprietary asset. IBC's members have entrusted IBC with ensuring that their data is managed effectively and responsibly, and that it is not disseminated to third parties without their consent. Until December 2010, no insurer had ever expressed any concern to me about IBC's use

of their data, and I had no reason to believe that IBC did not have the consent of insurers to provide their data to UCDA through Web Claims Search.

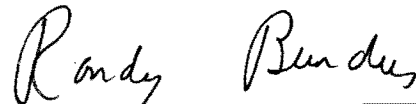
43. An Order that requires IBC to disregard an express direction of one of its members would potentially cause significant and permanent damage to IBC's relationship with that member. Such an Order could also irreparably erode IBC's members' faith in IBC's ability to represent their best interests and 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.

44. 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.

**SWORN BEFORE ME** at the City of  
Toronto, in the Province of Ontario,  
this 7<sup>th</sup> day of December, 2011

  
\_\_\_\_\_  
*A commissioner for taking affidavits*

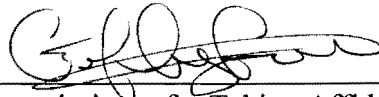
GEOFFREY GROVE



\_\_\_\_\_  
RANDALL BUNDUS

# TAB A

THIS IS EXHIBIT "A" REFERRED TO IN  
THE AFFIDAVIT OF RANDALL BUNDUS,  
SWORN BEFORE ME ON THIS 7<sup>th</sup>  
DAY OF DECEMBER, 2011.



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A Commissioner for Taking Affidavits.



COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  <b>FILED / PRODUIT</b> Date: JUNE 29, 2011 CT- 2011-006  Chantal Fortin for / pour REGISTRAR / REGISTRARE	
OTTAWA, ONT.	# 4

PUBLIC VERSION

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

**BETWEEN:**

**USED CAR DEALERS ASSOCIATION OF ONTARIO**

Applicant

- and -

**INSURANCE BUREAU OF CANADA**

Respondent

**AFFIDAVIT OF ROBERT G. BEATTIE**

**(sworn June 29, 2011)**

1. I, Robert G. Beattie, of the City of Toronto in the Province of Ontario, MAKE OATH AND SAY:
2. I am the Executive Director of the Used Car Dealers Association of Ontario ("UCDA"), the Applicant on this application, and have knowledge of the matters deposed to herein, unless stated to be on information and belief in which cases I state the source of such information and believe it to be true.
3. UCDA is a not-for-profit association founded in 1984 and incorporated under the *Canada Corporations Act*. As an active trade association in the used vehicle industry, UCDA represents more than 4500 motor vehicle dealer members located throughout Ontario, who deal with thousands of individual consumers on a daily basis. UCDA provides various

## PUBLIC VERSION

- 2 -

services to its members. One of the most important of these services is our Auto Check™ business, which provides used vehicle accident history searches.

4. I am presently the Executive Director of the UCDA, and have served in this role since 1984. Over this period, I have accumulated extensive experience in various aspects of the Ontario motor vehicle sector including the market for vehicle accident history searches.
5. Vehicle accident history searches are an important source of information about the history of a used vehicle. A dealer need only provide an automobile's Vehicle Identification Number ("VIN") in order to search its accident history. The types of information reported may vary but typically will include one or more of the following: the existence of a prior collision or accident insurance claim made against a vehicle, the number of such claims, the date on which the collision(s) or accident(s) occurred, the amount of the insurance claim paid, and the point of impact on the vehicle where the damage occurred.

#### **IBC's Web Claims Search Application**

6. In 1998, UCDA became an Associate Member of the Insurance Bureau of Canada ("IBC"). IBC was, and remains, the only available source for integrated industry-wide data from all insurers supplying auto insurance coverage in Ontario. As an Associate Member, UCDA obtained information in the IBC's database of vehicle claims (now referred to by IBC as the "Web Claims Search" application). This information is a critical input into UCDA's Auto Check™ business, and obtaining this information was the primary motivation for UCDA joining the IBC and paying the annual associate membership fee of \$5000.
7. The Web Claims Search application is accessed online through IBC's web portal, and allows users to search IBC's claims database for damage claims made against the searched VIN. According to IBC's website, "Web Claims Search provides insurers, claims adjusters/underwriters and investigators with on-line access to Insurance Bureau of Canada's claims information database. IBC's claims database consists of combined records from insurers, independent adjusters and investigators." The Web Claims Search application provides information about the existence of vehicle claims but not the dollar value of such claims.

## PUBLIC VERSION

- 3 -

8. A long and mutually-beneficial relationship evolved between UCDA and IBC, with UCDA renewing its Associate Membership annually and gradually expanding its Auto Check™ business based on claims data supplied by IBC. In addition to its annual payment of membership fees, in June 2007 UCDA provided funding in the amount of \$16,000 to IBC in order to help finance upgrades to IBC's database infrastructure. In 2010, IBC added a fee of \$1.00 per "hit" for the information supplied from its Web Claims Search application.

### **The Vehicle Accident History Searches Market**

9. Vehicle accident history searches are typically purchased by motor vehicle dealers who purchase and resell used vehicles. Such services assist dealers to learn more about the vehicle they are proposing to sell. They are also used by dealers to assist in determining whether a vehicle may have suffered previous damage requiring disclosure, pursuant to the *Motor Vehicle Dealers Act, 2002*, when dealers sell the vehicle. They may also be purchased by individual consumers interested in learning more about a used vehicle they are considering purchasing, whether from a dealer or from another individual on the secondary market (although UCDA only makes its Auto Check™ searches available to its members).
10. Over time, two other providers entered the vehicle accident history searches market. In or around 2005, a business called CarProof, which had been supplying lien searches in competition with UCDA since 2000, began providing a service that competes with Auto Check™. The CarProof business is carried on by 3823202 Canada Inc., operating under the name "CarProof" ("CarProof"). In 2008, CARFAX, Inc. ("Carfax"), an American-based provider of vehicle accident histories, also began providing vehicle accident history searches in Ontario. I am not aware of any other providers of vehicle accident history searches in Ontario.
11. IBC has previously acknowledged that both CarProof and Carfax purchase the underlying data for their vehicle accident history searches, directly or indirectly, from IBC.
12. CarProof is presently the largest supplier of such vehicle accident history searches in Ontario. From a review of its website, a standard CarProof vehicle accident history search costs

## PUBLIC VERSION

- 4 -

\$34.95 (exclusive of GST/HST). Carfax charges US\$34.99 (exclusive of GST/HST) per vehicle accident history search according to its website. By comparison, Auto Check™ charges UCDA member dealers \$7.00 (exclusive of GST/HST) for its competing vehicle accident history service.

**Activities of CarProof**

13. 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.
14. 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.
15. 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.

## PUBLIC VERSION

- 5 -

**Relationship Between IBC, CarProof and Intermediaries**

16. I understand, from communications with i2iQ Inc. in or about 2005 as well as the information in paragraphs 17-19 below, and believe that CarProof obtains its vehicle claims history data from IBC indirectly through CarProof's business relationships with i2iQ Inc. ("i2iQ") and/or CGI Group Inc. ("CGI").
17. CarProof's vehicle claim history searches are among the product offerings listed on the website of i2iQ. i2iQ also states on its website that it has a "partnership" or "strategic alliance" with CarProof. i2iQ further claims, through statements made on its website, to have a "partnership" or "strategic alliance" with CGI Insurance Information Services, a division of CGI.
18. CGI has a business relationship with IBC that includes management of the Automotive Statistical Plan "ASP" information of IBC's member insurance companies as well as the provision of various data services to IBC's members. Such services include "AutoPlus" which provides a variety of information that assists insurers in making coverage and premium decisions.
19. In June 2011, CGI announced that it was making available to insurers an "Enhanced AutoPlus" service which includes vehicle claims histories provided by CarProof, "Canada's leading supplier of Vehicle History Reports." I understand from media coverage that IBC personnel attended the CGI-Car Proof launch event at Woodbine Race Track in Toronto.

**Dollar Claims Data**

20. On January 1, 2010 certain changes to the regulations under the Ontario *Motor Vehicle Dealers Act, 2002*, came into force. These changes were widely discussed and anticipated by Ontario motor vehicle dealers. They required, among other things, that motor vehicle dealers disclose to potential purchasers whether a vehicle has ever suffered damage in which the total repair costs exceeded \$3,000.

## PUBLIC VERSION

- 6 -

21. In early June 2009, in anticipation of these changes, Robert Pierce, the UCDA's Director of Member Services, contacted Marti Pehar, Manager, Business Partnerships, of IBC by telephone and requested that IBC expand the scope of the information it provided to Auto Check™ to include dollar value claims information.
22. Shortly after that telephone call, on June 11, 2009, Armie Francescut, CEO of i2iQ, wrote to Ms. Pehar of IBC. Mr. Francescut referred to a June 10<sup>th</sup> telephone conversation with Ms. Pehar, and stated that "further to" that conversation, he "would like to confirm that UCDA can purchase and distribute vehicle history reports from CarProof to its members". Mr. Francescut also stated that "[f]ollowing our discussion, I once again confirmed this with Paul Antony, President of CarProof." Mr. Francescut further indicated that if UCDA was interested in pursuing an arrangement with CarProof, its representatives should contact Mr. Antony of CarProof or "contact me at the number below". A copy of that letter is attached as Exhibit A to this affidavit.
23. It is not clear to me why Mr. Francescut, the CEO of i2iQ, a separate company, held himself out to IBC as a contact person for contractual arrangements between UCDA and CarProof. Even more puzzling is why i2iQ and IBC were discussing the possibility of CarProof selling services to the competing Auto Check™ vehicle accident history searches service. We had made no such request in our communications to IBC and had clearly rejected CarProof's prior overtures of this nature.
24. I have no further knowledge of the contacts that took place between IBC, i2iQ and CarProof on this issue. However, I can see no legitimate reason why representatives of IBC, i2iQ and CarProof should have been discussing a confidential business request made by UCDA to IBC. It suggests to me that CarProof, i2iQ and IBC were concerned about competition to CarProof provided by Auto Check™, whose vehicle accident history service is priced substantially below that of CarProof.
25. I understand from Mr. Pierce that he met with Ms. Pehar on June 16, 2009 to discuss Auto Check™'s request for dollar value claims information. Although UCDA had indicated its willingness to compensate IBC for the provision of this additional information, on June 24,

## PUBLIC VERSION

- 7 -

2009, Ms. Pehar informed Mr. Pierce that IBC had refused UCDA's request. I understand and believe that at that time IBC provided, and presently continues to provide, similar information directly or indirectly to CarProof.

26. On May 17, 2010 Warren Barnard, UCDA's Legal Services Director, and I met with Ralph Palumbo, IBC Vice-President - Ontario, and Randall Bundus, IBC Vice-President - Operations and General Counsel, and renewed Auto Check™'s request for dollar value claims information. Mr. Palumbo stated that he did not see any reason why IBC would not provide this information to UCDA. Mr. Bundus indicated that IBC would need to obtain authorization from its member insurers in order to provide the ASP information to UCDA.
27. The requirement to obtain insurer consents in respect of dollar claims data came as a surprise to UCDA because this has never been an issue with the Web Claims Search application. Nevertheless, on May 20, 2010, I wrote to Mr. Palumbo and formally requested that IBC seek the requisite authorization from its member insurers to provide the ASP dollar value claims information to Auto Check™.

### **Termination of Supply**

28. In a letter dated May 26, 2010, Mr. Bundus wrote to me to state that IBC would not seek the authorization UCDA had requested to supply dollar claims data from its insurer members. Instead, Mr. Bundus indicated that UCDA should contact each insurer member of IBC in order to obtain individual consents for provision of dollar claims information. Moreover, without any prior warning, Mr. Bundus informed me that IBC was terminating UCDA's Associate Membership, thereby ending the 12-year relationship between the parties and Auto Check™'s ability to continue to obtain the claims data from the Web Claims Search application.
29. On June 2, 2010, my colleague Warren Barnard wrote to Mr. Bundus expressing the UCDA's shock over the unexplained and unforeseen termination of its Associate Membership, and requesting that the IBC reconsider its decision. In the alternative, Mr. Barnard requested an extension of the termination notice period to six months (*i.e.*, to November 26, 2010) in order to (i) allow the UCDA a reasonable opportunity to contact the

## PUBLIC VERSION

- 8 -

individual insurers whose authorization would be required for UCDA to obtain ASP information from IBC, and (ii) continue using the Web Claims Search application.

30. In the absence of a reply to Mr. Barnard's letter, on June 9, 2010, McMillan LLP, external counsel to UCDA, wrote to Mr. Bundus expressing UCDA's concerns that IBC's conduct raised issues under the *Competition Act* and reiterating UCDA's request that IBC reconsider the termination of UCDA's membership and its ability to source vehicle claims data (or, alternatively, extend the notice period to six months).
31. On June 23, 2010, McMillan LLP again wrote to Mr. Bundus, requesting that IBC grant the six-month extension and, in the meantime, provide UCDA with further particulars as to the form and content of the insurer authorizations required by IBC in order to supply the ASP information to Auto Check™. Mr. Bundus replied on June 28, 2010 providing information about the form of authorization required, but refusing to reconsider IBC's termination of UCDA's membership and provision of the Web Claims Search application, or UCDA's request for an extension of the notice period.
32. After further discussions and emails, IBC reinstated UCDA's Associate Membership and ability to use the Web Claims Search application until November 26, 2010. UCDA also began a process of contacting numerous insurers to obtain consent for IBC to provide ASP information to UCDA, something that has never been required to use the Web Claims Search application.
33. Between July 2010 and May 2011, UCDA obtained consents from insurers in respect of ASP information, and was also dealing with IBC on a range of contractual, technical and logistical issues related to ASP information. UCDA's Associate Membership has continued on a month to month basis as did its ability to use the Web Claims Search application.
34. On April 18, 2011, UCDA signed a Service Provider Agreement with IBC for the provision of ASP information from consenting insurers. UCDA was then in a position to seek consent from three insurers who had apparently withdrawn their earlier consents. However, UCDA was not made aware until May 30, in an email from James Fordham, Director of Customer



## PUBLIC VERSION

- 9 -

Service at IBC, to Neil Elgar, UCDA's Manager of Administrative Services, that several other insurers had withdrawn their consents in the period from January to March, 2011. Mr. Fordham did not explain how the withdrawals occurred or why UCDA was not informed about them many months earlier when the withdrawals took place.

35. On June 7, 2011, Mr. Fordham informed Mr. Elgar by email that IBC would be terminating use of the Web Claims Search application. IBC gave notice that termination would take place on June 10, 2011, although after subsequent correspondence between Messrs. Elgar and Fordham, the date was extended to June 17, 2011. Mr. Fordham did not give a reason for the termination or for the briefness of the notice period.
36. On June 9, 2011, Mr. Barnard communicated with Mr. Bundus and requested continuing provision of the Web Claims Search application, for which insurer consents had never been required, while UCDA pursued consents from insurers for supply of the ASP information. On June 16, 2011, McMillan LLP reiterated Mr. Barnard's request in voicemail and email messages to Mr. Bundus.
37. On June 16, 2011, UCDA advised its members that the Auto Check™ searches would be suspended effective June 17, 2011 until further notice due to the inability to obtain supply of sufficient data to provide vehicle accident history searches. On June 17, 2011 at 5:00 pm IBC terminated supply of the Web Claims Search application to UCDA.
38. On June 21, 2011, Mr. Bundus sent a letter to McMillan confirming that IBC would not change its decision to terminate UCDA's use of the Web Claims Search application effective June 17, 2011.

### **Impact of the Termination**

39. IBC has supplied vehicle insurance claims data to Auto Check™ for more than 13 years, making possible the growth and success of this business. IBC's termination of its longstanding supply relationship with Auto Check™ has deprived it of the essential input required to continue offering this vehicle accident history service.


## PUBLIC VERSION

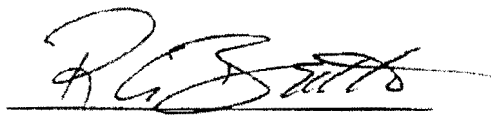
- 10 -

40. The Web Claims Search application will remain critical to the Auto Check™ business unless and until UCDA is able to obtain consents from individual insurers to access sufficient ASP information to offer a viable vehicle accident history search service.
41. Given Auto Check™'s very low price, this vehicle accident history service remains useful to UCDA members even without dollar claims information. Approximately two-thirds of vehicle accident history searches disclose no prior claims. In those cases where a search discloses one or more claims based on IBC's Web Claims Search application a UCDA member dealer may comply with the new Ontario disclosure regulations by applying its business judgment as to whether the nature of the claim would be expected to be well above or well below \$3,000 (the disclosure requirement does not include the actual amount of the claim). Alternatively, in the small number of situations where more precise information is required, the dealer could then purchase a high-priced vehicle accident history search from CarProof or Carfax.
42. If Auto Check™ is unable to continue sourcing from the Web Claims Search application, UCDA's members will no longer have the option of accessing a vehicle accident history service that is priced substantially lower than the competing offerings from CarProof and Carfax. This will remove low-priced competition and an important choice of service providers in the highly concentrated market for vehicle accident history searches. As a result, used car dealers will be required to pay the substantially higher prices charged by CarProof or Carfax. This will ultimately also impact the consumers who buy used vehicles.
43. The provision of vehicle accident history searches based on IBC Web Claims Search data accounts for 100% of Auto Check™'s revenues and profits. The inability to obtain supply of the IBC web claims data is directly and substantially affecting the Auto Check™ business.
44. In 2010, Auto Check™ accounted for over 50% of UCDA's net income. IBC's refusal to continue supplying the Web Claims Search application to UCDA therefore is having an immediate and ongoing direct and substantial effect on UCDA's business. UCDA's net income and Auto Check™'s net income are set out in the confidential Appendix A to this affidavit.

45. Auto Check™ is one of the most important benefits that UCDA offers to its members; indeed, it is viewed by members as a critical service offering. I believe that the loss of Auto Check™ for an extended period of time will also significantly damage UCDA's credibility and cause reputational harm among existing and prospective dealer members. This will also directly and substantially affect UCDA, including through likely reductions in membership fees, which are a major source of UCDA's revenues.
46. If the Tribunal grants UCDA leave to proceed with its proposed applications under section 75 and / or section 76 of the *Act*, UCDA's intention will be to bring an application seeking an immediate interim supply order to allow the Auto Check™ business to continue to operate pending the outcome of the applications.
47. I make this Affidavit in support of the relief requested in this application.

SWORN BEFORE ME at the City of  
Toronto, on June 29, 2011.

  
A Commissioner for Taking Affidavits

  
Robert G. Beattie

JAMES E. HAMILTON  
BARRISTER & SOLICITOR

**Appendix A**  
**CONFIDENTIAL UCDA Financial Information**  
**for the Year Ended December 31, 2010**

**[Redacted – CONFIDENTIAL]**



Ms. Marti Pehar  
Manager, Business Partnerships  
Insurance Bureau of Canada  
2235 Sheppard Avenue East  
Atria II, Suite 1100  
Toronto, Ontario  
M2J 5B5

Dear Marti,

Further to our telephone conversation from yesterday, I would like to confirm that UCDA can purchase and distribute vehicle history reports from CarProof to its Members. Following our discussion, I once again confirmed this with Paul Antony, President of CarProof.

CarProof would be pleased to work out a suitable arrangement with UCDA. Should UCDA wish to pursue this, they can contact Paul Antony @ (519) 670-0893 or Marty Meadows @ (519) 675-1415 ext 251. They can also contact me at the number below.

Hopefully this letter is satisfactory for your purpose. Feel free to contact me should you have any questions whatsoever.

Regards,

Armie Francescut  
Chief Executive Officer  
(905) 479-3109 ext 224  
[armie@i2iq.ca](mailto:armie@i2iq.ca)

cc: Paul Antony - CarProof

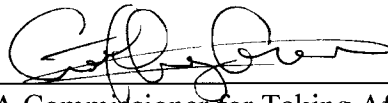
This is Exhibit "A" referred to in the affidavit of ROBERT G. BEAME sworn before me, this 29<sup>TH</sup> day of JUNE 20 11

*[Signature]*  
A COMMISSIONER FOR TAKING AFFIDAVITS  
BARRISTER & SOLICITOR

June 11, 2009

# TAB B

THIS IS EXHIBIT "B" REFERRED TO IN  
THE AFFIDAVIT OF RANDALL BUNDUS,  
SWORN BEFORE ME ON THIS 7<sup>th</sup>  
DAY OF DECEMBER, 2011.



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A Commissioner for Taking Affidavits.

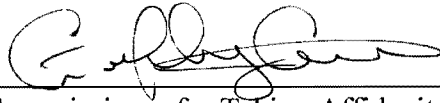
**REDACTED FOR CONFIDENTIALITY  
PROTECTED DOCUMENT**

Exhibit "B" to the Affidavit of Randall Bundus has been redacted for confidentiality pursuant to the Confidentiality Order of the Competition Tribunal dated August 2, 2011 as a Protected Document containing commercially sensitive information.



# TAB C

THIS IS EXHIBIT "C" REFERRED TO IN  
THE AFFIDAVIT OF RANDALL BUNDUS,  
SWORN BEFORE ME ON THIS 7<sup>th</sup>  
DAY OF DECEMBER, 2011.



---

A Commissioner for Taking Affidavits.

File No.: CT-2011-008  
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 the Used Car Dealers Association of Ontario under section 75 of the *Competition Act*.

**BETWEEN:**

**USED CAR DEALERS ASSOCIATION OF ONTARIO**

Applicant

- and -

**INSURANCE BUREAU OF CANADA**

Respondent

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
November 14, 2011 CT-2011-008	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 14

**REPLY SUBMISSIONS OF THE APPLICANT**  
**PURSUANT TO SECTION 39 OF THE *COMPETITION TRIBUNAL RULES***

**McMILLAN LLP**  
Barristers & Solicitors  
181 Bay Street, Suite 4400  
Toronto, Ontario, M5J 2T3

**A. NEIL CAMPBELL, LSUC# 31774T**  
Tel: 416-865-7025  
Fax: 416-865-7048  
E-mail: neil.campbell@mcmillan.ca

**CASEY W. HALLADAY, LSUC# 45965G**  
Tel: 416-865-7052  
Fax: 416-865-7048  
E-mail: casey.halladay@mcmillan.ca

*Solicitors for the Applicant*

-2-

**TO:**           **The Registrar**  
**Competition Tribunal**  
The Thomas D'Arcy McGee Building  
#600-90 Sparks Street  
Ottawa, Ontario K1P 5B4  
Tel: 613-957-7851  
Fax: 613-952-1123

**AND TO:**   **Melanie Aitken**  
**Commissioner of Competition**  
Competition Bureau  
50 Victoria Street  
Gatineau, Québec K1A 0C9  
Tel: 819-997-3301  
Fax: 819-997-0324

**AND TO:**   **Insurance Bureau of Canada**  
2235 Sheppard Avenue East  
Atria II, Suite 1100  
Toronto, Ontario M2J 5B5

**REPLY SUBMISSIONS OF THE APPLICANT**  
**PURSUANT TO SECTION 39 OF THE *COMPETITION TRIBUNAL RULES***

**I. Overview**

1. UCDA submits this Reply to the Tribunal to respond to certain of the assertions made by IBC in its Response submissions and, in so doing, to focus and clarify the arguments before the Tribunal on this application.
2. The key theme of IBC's Response is that the Tribunal should not exercise its discretion to make an order under section 75 of the *Competition Act* because certain insurers have not consented to UCDA receiving access to the data which underlies IBC's Web Claims Search application, the product for which supply is sought in this case. As this Reply will demonstrate, that argument is fatally flawed as it:
  - (a) ignores the fact that the legal agreements between the parties explicitly state that IBC owns the data in question, thereby negating the need for insurers' consents;
  - (b) confuses use of the Web Claims Search application, the product at issue in this proceeding, with access to Automobile Statistical Plan ("ASP") data, a separate product not at issue in this proceeding;
  - (c) ignores the fact that the data underlying the Web Claims Search application is provided by insurers pursuant to a statutory reporting obligation, and as such is not subject to their ongoing consent or control; and
  - (d) overlooks the inherent power of the Tribunal to make orders affecting third parties in addition to the respondent in a proceeding.
3. IBC further suggests that an order to resume supply to UCDA should not issue as IBC's decision to terminate its longstanding relationship with UCDA was made with IBC's "best business judgment". However, a supplier's "business judgment" is **not** an element of section 75 of the *Act*, nor should it be — otherwise any anti-competitive refusal to deal could be justified on this highly subjective and self-serving basis.

4. IBC also argues that it has legal and reputational concerns that should preclude the granting of an order under section 75. These arguments are not relevant to the requisite analysis under section 75. In any event, they have been over-stated, and are fully addressed by UCDA in this Reply.
5. IBC suggests that flaws in the functionality of the Web Claims Search application should prevent the Tribunal from issuing a remedial order. These claims have also been overstated, particularly given that IBC continues to supply this product to numerous other parties. In more than 13 years and over two million Auto Check™ searches, UCDA has never received a dealer complaint regarding the quality or accuracy of the Auto Check™ service. Furthermore, prior to terminating UCDA's membership, IBC had never raised such concerns.
6. Finally, IBC also briefly contests UCDA's ability to satisfy the requisite elements of section 75 of the *Act*. As this Reply will also demonstrate, each element of section 75 is clearly made out in this case.

## **II. Responses To The Material Facts Cited By IBC In Its Response**

7. UCDA denies the allegations set out in paragraphs 10, 13(b), 13(c), 13(d), 13(g), 15-16, 18, 21, 30, 35, 49, 54-55, 57-59, and 65-67 of IBC's Response.
8. UCDA has no knowledge of the allegations set out in paragraphs 13(a), 13(f), 17, 19-20, 22-29, 31-34, 36-38, 42-46, 50, 52, 61-64, and 68-69 of IBC's Response.
9. Importantly, IBC has dealt at length with matters that do not relate to the application before the Tribunal. In particular, UCDA notes that the allegations set out in paragraphs 13(d)-13(g), 30-38, 56-61, and 67-68 of IBC's Response relate exclusively to ASP data, a product not in issue in these proceedings.
10. UCDA admits the facts set out in paragraphs 8, 9, 11, 12, 39, 40, 41, 47, 51, and 53 of IBC's Response.

## **III. Responses To The Grounds On Which IBC Opposes The Application**

11. In addition to its arguments on the test to be met under section 75 of the *Act*, IBC raises several additional issues intended to sway the Tribunal from ordering a continuation of the 13-year supply relationship between the parties. For greater clarity, UCDA has organized and will respond to these arguments as follows:

- Insurer consents are not relevant to the relief sought in this application.
- Even if such consents were relevant, the underlying data is collected by IBC only as agent for the province of Ontario and the insurers do not own or control the data.
- Even if insurer consents were relevant, the Tribunal has the power to make orders affecting the rights of third parties, and has frequently done so.
- Any references to IBC’s “business judgment” are self-serving and superfluous to the required analysis under section 75.
- There are no legal and reputational concerns risks to IBC as it is merely a compiler of data, and the ultimate product at issue is marketed and provided by UCDA — not IBC — to its motor vehicle dealer members.
- The functionality issues raised by IBC in respect of the Web Claims Search application have been overstated, particularly in respect of a product that IBC continues to market, and in any event are irrelevant to this application.

**(a) Insurer Consents Are Not Relevant To The Relief Sought In This Application**

12. In the first paragraph of its Response, IBC suggests that the Tribunal cannot issue a remedial order in this case as “IBC does not own the data that UCDA seeks to access.” Yet both of the two principal documents defining the relationship between UCDA and IBC — the 1997 *Associate Member Vehicle Information Agreement* (at paragraph 2(f)) and the 2006 *Access Agreement* (at paragraph 2.2) — explicitly state that IBC has title to the vehicle accident history information sought by UCDA. IBC’s present assertions that it cannot be the subject of a Tribunal order as it is not the owner of the underlying data strike UCDA as entirely self-serving given the contrary provisions of these documents, both of which were drafted by IBC.

13. In any event, UCDA submits that insurer consents are entirely irrelevant as this application concerns the Web Claims Search application. IBC acknowledges in numerous places in its Response that insurer consents have not been required in respect of the Web Claims Search

application and **only relate to ASP data** (see, *e.g.*, paragraphs 2(b), 13(g), 32, 48, 50, 51, 54, 56, 59, and 71(c)). This is consistent with the trade terms throughout the 13-year course of dealings between the parties: at no time during the supply relationship did IBC ever require any insurer consents for UCDA to use the Web Claims Search application.

14. By raising the consent issue on this application, which seeks only reinstatement of supply of the Web Claims Search application, IBC continues to invoke the “straw man” fallacy and substitute arguments that may relate to another product (*i.e.*, ASP data) not in issue in this proceeding. UCDA submits that the issue of insurer consents is entirely irrelevant to the issues before the Tribunal on this application.

**(b) Even If Insurer Consents Were Relevant To This Application, Insurers Have No Rights Over The Underlying Data At Issue In This Case**

15. Even if the subject of insurer consents were relevant to this application (which is denied for the reasons set out in Part (a) above), no such consents would be required. Such data has been disclosed pursuant to a statutory reporting obligation under the Ontario *Insurance Act*, and is not owned or controlled by the insurers.
16. As admitted by IBC, in paragraph 13(g) of its Response, IBC only holds the vehicle accident history data that is obtained through its Web Claims Search application in its role as a contractual service provider to the General Insurance Statistical Agency (“GISA”). GISA, in turn, received the data as an “agency [...] designated to compile the data” on behalf of the Financial Services Commission of Ontario (“FSCO”) under section 101(2) of the *Insurance Act*. The data was originally provided to FSCO by insurers carrying on business in Ontario pursuant to a statutory obligation to do so, under section 101.1 of the *Insurance Act*.
17. Section 101.1 of the *Insurance Act* stipulates that “[e]very **insurer shall provide the Superintendent or an agency designated by the Superintendent** with information prescribed by the regulations about applications for insurance and **claims made to the insurer** at such times and subject to such conditions as are prescribed by the regulations.” (emphasis added) Once such data is provided, it is controlled by FSCO.



18. GISA's own policies acknowledge this. In its *Policy on Access to Information and Protection of Privacy*, GISA states (at page 1):

The data collected by GISA or its service provider for its participating jurisdictions, and including without limitation any and all Exhibits, Standard Reports, Ad Hoc Reports, information and documents derived from such data (collectively, the "Member Owned Information"), **are the respective property of GISA's participating jurisdictions**. The Member Owned Information of each participating jurisdiction is **subject to the provincial laws of such jurisdiction** including any freedom of information and privacy legislation of such province. (emphasis added)

19. Ontario is a "participating jurisdiction", and has appointed GISA as its statistical agent. IBC is the "service provider" to GISA. GISA's policy on access to information clearly states that any data collected by GISA, or by IBC on behalf of GISA, for a province is "the respective property" of that province and subject to provincial laws. Thus, in the present case the underlying data held by IBC is not controlled by insurers. IBC cannot therefore claim that it is prevented from continuing to disclose this data to UCDA, as it has consistently done since 1998, due to the objections of insurers.

**(c) Even If Insurer Consents Were Relevant, The Tribunal May Make Orders Affecting The Rights Of Third Parties, And Has Done So**

20. Finally, even if insurer consents were relevant to this application (which is denied for the reasons set out above), the Tribunal's remedial powers include the ability to order a resumption of supply without such consents. For example, in *Canada (Director of Investigation & Research) v. Southam Inc.*, the Tribunal stated that "[c]onsiderations of **harm or inconvenience to the respondents or third parties** or other factors **are not relevant in assessing the effectiveness of a proposed remedy.**"<sup>1</sup> The Tribunal expressed similar views in the *Gemini* litigation.<sup>2</sup> Therefore, any theoretical harm or inconvenience to third party insurers — which as demonstrated above would not occur in any case — should not be accorded any weight in this case.

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<sup>1</sup> (1992), 47 C.P.R. (3d) 240 at 246 (emphasis added).

<sup>2</sup> See *Canada (Director of Investigation & Research) v. Air Canada (Reasons for Order Varying Consent Order)* (1993), 51 C.P.R. (3d) 143 at 149, 153-159; and *Canada (Director of Investigation & Research) v. Air Canada (Reasons for Order Varying Consent Order) v. Air Canada (Reasons and Order)*, (1993), 49 C.P.R. (3d) 7 at 65.

**(d) References To IBC’s “Business Judgment” Are Self-Serving And Superfluous To The Section 75 Analysis**

21. At various points, beginning at paragraph 4 of its Response, IBC argues that the Tribunal should not grant UCDA’s application for relief because doing so would contravene IBC’s “best business judgment”. Accepting this argument would set a highly subjective standard, found nowhere in the language of section 75, by which all future refusals to deal could be justified by the simple assertion that the supplier had exercised “good judgment”.
22. In any event, UCDA submits that IBC’s conduct does not exemplify “good judgment”. As set out in the Beattie Affidavit, IBC terminated UCDA’s longstanding Associate Membership in the IBC in a high-handed manner, without providing reasons, and did so immediately following UCDA’s reasonable request to acquire additional data regarding the dollar-value of claims.
23. IBC further attempts to justify its behaviour by repeatedly claiming that UCDA is the only third party commercial user of Web Claims. This contention is flawed for several reasons. First, the number of users of a product or service is irrelevant to the analysis under section 75 of the *Act*. Second, even if it were relevant, IBC admits at paragraph 17 of its Response that other commercial users of the Web Claims Search application do exist, such as private investigative agencies and independent insurance adjusters. Effectively, IBC’s real argument appears to be that UCDA should be denied supply because it uses the Web Claims Search application for a different end-use application than others (*i.e.*, as a basis for used vehicle accident history searches). However, this is no basis for justifying an anti-competitive refusal to deal: UCDA’s use of the Web Claims Search application differs from that of others because UCDA is an industry association for used motor vehicle dealers in Ontario. Its 4,600 member dealers account for more than 70% of the used vehicles sold in Ontario, and create a significant demand for the Auto Check™ service.
24. Thus, IBC’s warning at paragraph 1(b) that “[i]f this Tribunal orders that IBC supply access to Web Claims Search to UCDA, then IBC will be compelled to provide such access to the

*only* remaining third party commercial user” of the Web Claims Search application rings hollow. In any event, the “compulsion” that IBC warns of is no more than the resumption of a pre-existing supply relationship that lasted more than a decade.

25. Finally, in a similar vein IBC argues that its conduct is beyond review because the termination of UCDA was “not motivated by any competitive concerns”. In fact, section 75(1)(e) focuses on anti-competitive **effects**, not anti-competitive **intent**. IBC’s submission also ignores the basic design of section 75 of the *Act*, which governs the vertical relationship between supplier and customer. Given this vertical relationship, refusals to deal will often not be motivated by “competitive concerns”. Nevertheless, UCDA has, using the limited information available to it prior to discovery, detailed various links between IBC and UCDA’s competitor, CarProof, in the Beattie Affidavit. The Tribunal has taken note, at paragraphs 59-61 of its decision granting leave in this matter, of these links and concluded that “it is possible that the Termination occurred as a result of IBC’s wish to support CarProof’s business objectives [...]”

**(e) There Are No Legal Or Reputational Risks To IBC In Continuing Its Longstanding Supply Of The Web Claims Search Application To UCDA**

26. IBC repeatedly suggests that a supply order under section 75 could subject it to legal or reputational risks since, by sourcing data from the Web Claims Search application, UCDA’s Auto Check™ business “possibly misrepresents vehicle accident claims history information to potential purchasers of used vehicles”. Among the numerous flaws with this argument, UCDA would highlight that:

- (i) The Auto Check™ service has provided used vehicle accident histories for 13 years. During that time, UCDA members have conducted over two million Auto Check™ searches, and UCDA has not received a single complaint from a dealer regarding the quality or accuracy of the Auto Check™ service. Any concerns about the quality of the Web Claims Search application are belied by the fact that IBC never raised such concerns prior to terminating supply to UCDA, and that IBC continues to supply the Web Claims Search application to users through the IBC web portal.

-10-

(ii) Furthermore, IBC faces no risk, reputational or otherwise, in respect of purchasers of used vehicle accident histories or purchasers of used vehicles. It is merely a compiler of data. It has no relationship with purchasers of used vehicle accident histories or of used vehicles.

(iii) The Auto Check™ service is available only to motor vehicle dealers that are members of the UCDA. UCDA's members are sophisticated entities, well aware of their legal obligations as participants in a regulated industry, and are aware that an Auto Check™ search may not necessarily provide a complete accident claims history of a used vehicle.

(iv) Moreover, in the extremely unlikely event of a claim against IBC, the 2006 *Access Agreement* governing IBC's relationship with UCDA provides IBC with "bulletproof" protection. Drafted by IBC, the agreement contains an express limitation clause (at paragraph 7.3(a)), stipulating that:

IBC makes no Warranties with respect to the Information, including any Warranties that the Information will be **accurate, complete or up-to-date, or free of errors or omissions, in whole or in part, or that the Information will be fit for any purpose.** (emphasis added)

(v) The *Access Agreement* also disclaims any liability of IBC in respect of the data provided, and requires UCDA to indemnify IBC for any claim made against IBC in connection with the provision of the data.

(vi) The predecessor agreement between IBC and UCDA, dating from 1997, contained similarly thorough protections for IBC's benefit.

27. IBC has also suggested, at paragraphs 5, 16, and 76, that privacy law considerations militate against granting UCDA's application. IBC contends that complying with a remedial supply order would force it to "violate established principles" of privacy law. It is telling that IBC has not cited or specified any legislation in support of this assertion for, as IBC is well aware, UCDA has never had access to any information protected by privacy laws through the Web Claims Search application. At paragraph 18 of its Response, IBC admits that UCDA can only search the Web Claims Search application by VIN or license plate number. (In fact,

UCDA can only search the Web Claims Search application by VIN.) Any suggestion that the Tribunal's remedial powers are constrained by the application of privacy laws in this case is simply inaccurate. Furthermore, IBC itself admits (for example, at paragraph 40 of its Response) that the 2006 *Access Agreement* which IBC drafted contains "robust provisions relating to privacy", which would address any theoretical privacy concern.

**(f) The Functionality Issues Raised By IBC Regarding The Web Claims Search Application Have Been Overstated, And Are Irrelevant To This Application**

28. IBC attempts to make much of the fact that the Web Claims Search application is, in its own words, an "antiquated and outdated" application and may produce "false negative" results. However, despite these allegedly fatal flaws, the Web Claims Search application continues to be marketed and supplied to users through the IBC website, at <<https://apps.ibc.ca/ibc.site/menu>>.
29. In fact, quite to the contrary, UCDA and its member dealers have consistently found that the data from the Web Claims Search application, when integrated into UCDA's Auto Check™ business, serves a valuable purpose. As IBC admits at paragraph 29 of its Response, the Web Claims Search application is "a helpful tool" for investigators and underwriters. It serves a similar purpose for automobile dealers, as one of numerous tools available to them for learning about the history of a used vehicle. There is an obvious demand for the Auto Check™ service — over the past 13 years, UCDA's member dealers have conducted over two million Auto Check™ searches. Furthermore, despite this vast number of searches, UCDA has never received a complaint from a dealer regarding the quality or accuracy of the Auto Check™ service.
30. Finally, as pointed out at paragraph 57 of its Response, prior to July 2010, IBC never expressed any concerns about the reliability of the Web Claims Search application, and after that time continued to supply UCDA on condition that UCDA "inform its members that the fact a particular VIN does not register a 'hit' on the database must not be taken as proof that the vehicle associated with that VIN had not been involved in a collision resulting in costly repairs." UCDA has complied with this request. In summary, no basis exists for IBC to

attempt to justify its refusal to deal on the grounds of the functionality of the Web Claims Search application.

**IV. All Of The Legal Elements Of Refusal To Deal Have Been Established In This Case**

31. Section 75(1) of the *Competition Act* sets out a five-part test that an applicant must meet in order to obtain a remedial order from the Tribunal. Unlike arguments relating to insurer consents, business judgment and reputational harm — to which IBC has devoted the bulk of its Response, and which UCDA has refuted above — the five elements of section 75 are the relevant issues for the Tribunal’s consideration. Each of these elements exists in the present case.

**(a) Section 75(1)(a): UCDA Has Been Substantially Affected By IBC’s Refusal To Deal**

32. IBC’s termination of its longstanding supply of the Web Claims Search application has deprived the Auto Check™ business of an essential input, forcing UCDA to suspend this service. The provision of vehicle accident history searches based on Web Claims data generated 100% of Auto Check™’s revenues and profits. Auto Check™, in turn, accounted for more than half of UCDA’s net income. As one of the most important benefits that UCDA offers to its members, the elimination of the Auto Check™ business also has caused significant damage UCDA’s credibility and reputational harm among existing and prospective dealer members.

33. IBC’s Response does not address the Section 75(1)(a) criterion in any meaningful way, apart from the bare assertion that “IBC denies that UCDA has been substantially affected in its business”.

**(b) Section 75(1)(b): UCDA Is Unable To Obtain Adequate Supply Of The Web Claims Search Application Because Of Inadequate Competition Among Suppliers In The Market**

34. IBC is the only source of integrated industry-wide vehicle claims data, and is refusing to deal with UCDA. The present case is the very definition of “inadequate competition among suppliers” — there is no other supplier to whom UCDA can turn. IBC attempts to respond to this argument in two ways, neither of which is persuasive. First, it claims that its own

subjective business rationale is a sufficient for refusing to deal; UCDA has dealt with this point in Parts III(d) and III(e) above. Second, it makes the incredible suggestion that UCDA should instead attempt to purchase vehicle insurance claims data from its competitors in the downstream market, CarProof and Carfax. In no prior case has the Tribunal ever interpreted section 75 as requiring a terminated customer to seek supply from its competitors. Indeed, as Justice Simpson noted in her decision granting leave in this case, section 75 does not require UCDA “to purchase the data it needs from Auto Check’s competitors.”<sup>3</sup>

**(c) Section 75(1)(c): UCDA Is — And Always Has Been — Willing And Able To Meet IBC’s Usual Trade Terms For The Web Claims Search Application**

36. IBC suggests that the lack of consents from certain insurers means that UCDA has not met IBC’s usual trade terms for the Web Claims Search application. This argument is flawed for several reasons.
37. First, it is entirely irrelevant to the legal test to be applied under section 75(1)(c): as the Tribunal has previously determined, the phrase “usual trade terms” means “the trade terms which have thus far applied” to the dealings between the customer and the supplier.<sup>4</sup> Insurer consents have never formed part of the trade terms between IBC and UCDA for the Web Claims Search application, and IBC never suggested that they were relevant to the supply of that product prior to the commencement of this litigation. IBC claims, for instance, that its agreement with GISA precludes it from sharing data with third parties such as UCDA, but that agreement was signed in 2006 (as noted at paragraph 50 of IBC’s Response), and no consents were ever required for UCDA to access the Web Claims Search application in the following five-year period.
38. Second, even if insurer consents had formed part of the usual trade terms for supply of the Web Claims Search application — which they clearly did not — UCDA has dealt at length in Parts III(a)-III(c) above with the inaccurate suggestion that insurers own and control the

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<sup>3</sup> *Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, CT-2011-006, decision of September 9, 2011 at para 35.

<sup>4</sup> *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 38 at paras. 56-57 [hereinafter *B-Filer*].

underlying data that is reported to FSCO pursuant to a statutory mandate and held by IBC as agent for FSCO.

39. Finally, IBC's submissions **do not cite a single instance** where UCDA failed to make timely payments for the Web Claims Search application, failed to observe its obligations under the agreements between the parties, or otherwise failed to comply with any of the usual trade terms for supply of the Web Claims Search application.

**(d) Section 75(1)(d): The Web Claims Search Application Is In Ample Supply**

40. IBC reiterates its insurer consent argument in an attempt to suggest that the Web Claims Search application is not a product or service that is "in ample supply". In so doing, it claims that the Tribunal's decision in *Deeley* stands for the proposition that "actions taken by an upstream supplier that affect the availability of the product may determine whether it can be said to be in ample supply". In fact, the *Deeley* case stated that section 75 is intended "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.**"<sup>5</sup> In *Deeley*, the Tribunal confronted the issue of trying to fashion a remedial supply order when only limited quantities of a specific brand of motorcycles was available, and those products available had already been assigned to dealers other than the applicant. In this case, in contrast, there is no question of the relevant product — the Web Claims Search application — being unavailable because it has been "sold or promised to another purchaser". It is a data-based service made available to an unlimited number of users through IBC's website. Supplying output from the Web Claims Search application to any particular user, such as UCDA, does not render it unavailable for supply to others.

**(e) Section 75(1)(e): The Refusal Is Likely To Have An Adverse Effect On Competition In A Market**

41. IBC attempts to rebut the clear adverse effect on competition caused by its elimination of Auto Check™, the low-price supplier in the market, with a speculative discussion of hypothetical separate product markets: Market A (the market for Auto Check™ search

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<sup>5</sup> *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28 at para. 19 [hereinafter *Deeley*] (emphasis added).



reports) and Market B (the market for CarProof and Carfax search reports). However, there is clear evidence that UCDA, Carproof and Carfax do compete, including the following:

- (i) the services supplied by all three competitors are used vehicle accident search histories;
- (ii) the primary purchasers of all of these services are used car dealers;
- (iii) most used car dealers in Ontario are members of UCDA;
- (iv) the price differential between Auto Check™, Carfax and CarProof did not change after the January 2010 amendments to the *Motor Vehicle Dealers Act, 2002*; and
- (v) CarProof's aggressive and misleading advertising activities targeted at UCDA, and its multiple attempts to propose an arrangement in which it would replace Auto Check™ as the source of vehicle accident history searches for UCDA members, clearly indicate that CarProof views UCDA's Auto Check™ business as a direct competitor.

42. IBC makes much of the price difference between the Auto Check™ search reports and those of CarProof and Carfax, but this conveniently ignores the fact that Auto Check™'s prices are lower because the UCDA is a not-for-profit corporation, and operates the Auto Check™ business on a lower-margin basis than its for-profit competitors as a benefit to its members.

43. IBC's refusal to continue supplying its Web Claims Search application has resulted in the exit of the Auto Check™ business from the market for used vehicle accident histories. As a result, used car dealers in Ontario have lost an important product choice and the lowest-priced option for conducting a vehicle accident history search. This will clearly have an adverse effect on competition and facilitate the preservation and enhancement of CarProof's market leadership and market power.

44. Alternatively, even if the Auto Check™ vehicle accident history search reports were to constitute a separate market from the CarProof and Carfax vehicle accident history search

reports, IBC's refusal to deal with UCDA has resulted in the elimination of the sole supplier in that hypothetical market. This would clearly constitute an adverse effect on competition and on the customers in that market.

**V. The Tribunal Should Issue An Order Restoring Competition In The Market For Used Vehicle Accident Histories**

45. IBC's termination of supply of the Web Claims Search Application would force Auto Check™, the low-price supplier, from the market for used vehicle accident histories. As a result, UCDA's 4,600 dealer members, who account for over 70% of the used vehicles sold in Ontario, would have no option but to purchase used vehicle accident histories from CarProof or Carfax at vastly higher prices.
46. IBC's Response gives short shrift to the legal analysis required under section 75 of the *Competition Act*, choosing instead to focus on issues not addressed in the *Act*. UCDA has addressed each of these arguments at Part III above.
47. In asking the Tribunal to exercise its discretion to not issue a remedial order in this case, IBC also attempts to cast itself in the role of the "honest broker" in respect of data access issues. This is simply not the case. For example, at paragraph 90 of its submission, IBC claims that "[w]hen UCDA failed in its attempt to secure consents from insurers, it brought this Application to the Tribunal." This statement is false — UCDA initiated this application **twelve days after IBC terminated its supply of the Web Claims Application** to UCDA. This application only seeks access to the Web Claims Search application, a product whose usual trade terms have never included insurer consent.
48. In fact, IBC's conduct falls far short of the image it attempts to project. At paragraph 57 of its Response, IBC claims that out of "good faith" it agreed to continue supply of the Web Claims search application following its initial attempt at terminating UCDA in 2010. However, IBC ignored UCDA's initial requests for a reasonable notice period, and only agreed to continue supply after UCDA retained external counsel and sent several letters to IBC drawing its attention to section 75 of the *Competition Act*. Similarly, UCDA provided IBC with 41 insurer consents on October 7, 2010 in order to obtain ASP data, yet, as admitted at paragraph 60 of its Response, IBC only "commenced supplying ASP data to

-17-

UCDA” on May 16, 2011. Thus, despite UCDA complying, at considerable time and expense to UCDA, with IBC’s request for individual insurer consents in order for UCDA to obtain ASP data, IBC still delayed providing this data for **more than seven months** due to “various legal and technological issues”, all of which were issues were raised by IBC.

49. In summary, UCDA submits that each of the elements of section 75 have been clearly established in this case. UCDA therefore submits that this is an appropriate case for relief under section 75 of the *Competition Act*, and requests that the Tribunal issue a remedial supply order to prevent the elimination of Auto Check™, the low-price supplier, from the used vehicle accident histories market.

All of which is respectfully submitted.

DATED at Toronto, this 14<sup>th</sup> day of November, 2011.

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**McMILLAN LLP**  
Barristers & Solicitors  
181 Bay Street, Suite 4400  
Toronto, Ontario, M5J 2T3

**A. NEIL CAMPBELL, LSUC# 31774T**  
Tel: 416-865-7025  
Fax: 416-865-7048  
E-mail: neil.campbell@mcmillan.ca

**CASEY W. HALLADAY, LSUC# 45965G**  
Tel: 416-865-7052  
Fax: 416-865-7048  
E-mail: casey.halladay@mcmillan.ca

*Solicitors for the Applicant*

# TAB D

THIS IS EXHIBIT "D" REFERRED TO IN  
THE AFFIDAVIT OF RANDALL BUNDUS,

SWORN BEFORE ME ON THIS 7<sup>th</sup>

DAY OF DECEMBER, 2011.



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A Commissioner for Taking Affidavits.

File No.: CT-2011-006  
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 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*.

**AND IN THE MATTER** of an Application by the Used Car Dealers Association of Ontario for interim relief pursuant to section 104 of the *Competition Act*.

**BETWEEN:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  FILED / PRODUIT August 10, 2011 CT-2011-006  Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 22

**USED CAR DEALERS ASSOCIATION OF ONTARIO**

Applicant

- and -

**INSURANCE BUREAU OF CANADA**

Respondent

**NOTICE OF APPLICATION FOR INTERIM RELIEF  
PURSUANT TO SECTION 104 OF THE *COMPETITION ACT***

1. **TAKE NOTICE THAT** the Applicant, the Used Car Dealers Association of Ontario (“UCDA”), will make an application to the Competition Tribunal (the “**Tribunal**”) pursuant to section 104 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “*Act*”) for an interim order directing the Respondent Insurance Bureau of Canada (“**IBC**”) to resume supply of its Web Claims Search application to UCDA, as previously provided, pending resolution of UCDA’s application to the Tribunal under section 75 of the *Act*.

-2-

2. **AND TAKE NOTICE THAT** UCDA will rely on the Statement of Grounds and Material Facts attached hereto and on the Affidavit of Robert G. Beattie, sworn June 29, 2011, and such further or other material as counsel may advise and the Tribunal may permit.
3. **AND TAKE NOTICE THAT** UCDA seeks directions from the Tribunal for an expedited hearing of this Application.
4. **AND TAKE NOTICE THAT** UCDA requests that this Application be heard in the English language.
5. **AND TAKE NOTICE THAT** UCDA requests that the documents for this Application be filed in electronic form.
6. **AND TAKE NOTICE THAT** UCDA requests that any hearing of this Application be held at Toronto, Ontario.
7. **AND TAKE NOTICE THAT** the person against whom the interim order is sought is the Respondent. The address of the Respondent is: Insurance Bureau of Canada, 2235 Sheppard Avenue East, Atria II, Suite 1100, Toronto, Ontario, M2J 5B5.
8. **THE GROUNDS AND MATERIAL FACTS** for this Application are set out in the Statement of Grounds and Material Facts attached as Schedule A to this Notice of Application.

Dated at Toronto this 10<sup>th</sup> day of August, 2011.

On behalf of the Applicant UCDA



**McMILLAN LLP**

Barristers & Solicitors

181 Bay Street, Suite 4400

Toronto, Ontario, M5J 2T3

**A. NEIL CAMPBELL, LSUC# 31774T**

Tel: 416-865-7025

Fax: 416-865-7048

E-mail: [neil.campbell@mcmillan.ca](mailto:neil.campbell@mcmillan.ca)

**CASEY W. HALLADAY, LSUC# 45965G**

Tel: 416-865-7052

Fax: 416-865-7048

E-mail: [casey.halladay@mcmillan.ca](mailto:casey.halladay@mcmillan.ca)

*Solicitors for the Applicant*



**TO:**           **The Registrar**  
**Competition Tribunal**  
The Thomas D'Arcy McGee Building  
#600-90 Sparks Street  
Ottawa, Ontario K1P 5B4  
Tel: 613-957-7851  
Fax: 613-952-1123

**AND TO:**   **Melanie Aitken**  
**Commissioner of Competition**  
Competition Bureau  
50 Victoria Street  
Gatineau, Québec K1A 0C9  
Tel: 819-997-3301  
Fax: 819-997-0324

**AND TO:**   **Insurance Bureau of Canada**  
2235 Sheppard Avenue East  
Atria II, Suite 1100  
Toronto, Ontario M2J 5B5

**SCHEDULE A****STATEMENT OF GROUNDS AND MATERIAL FACTS:****I. The Parties**

1. As set out in the Affidavit of Robert G. Beattie, sworn June 29, 2011 and attached to the application for leave under section 103.1 in this matter (the "**Beattie Affidavit**"), the Applicant Used Car Dealers Association of Ontario ("**UCDA**") is a not-for-profit association founded in 1984 and incorporated under the *Canada Corporations Act*. As an active trade association in the used vehicle industry, UCDA represents more than 4,500 motor vehicle dealer members located throughout Ontario, who deal with thousands of individual consumers on a daily basis. UCDA operates the Auto Check™ business, which provides used vehicle accident history searches to UCDA member dealers on a fee-for-service basis.

Beattie Affidavit, para. 3

2. The Respondent, Insurance Bureau of Canada ("**IBC**"), is a not-for-profit association incorporated under the *Canada Corporations Act* which represents home, vehicle and business insurers in Canada. Among other things, IBC compiles and maintains detailed vehicle accident history and claims data provided by its member insurers, including its "**Web Claims Search application**", which is the subject of this proceeding, as well as additional information related to the dollar value of vehicle claims. Various forms of such information are made available to commercial parties.

**II. The Provision of Used Vehicle Accident History Searches**

3. UCDA provides used vehicle accident history searches to its members through its Auto Check™ business. Competing services are provided by 3823202 Canada Inc., carrying on business as CarProof ("**CarProof**"), and CARFAX, Inc. ("**Carfax**"). The Respondent, IBC, supplies various underlying vehicle insurance claims data, reported by

-6-

its member insurers, that is used in the provision of used vehicle accident histories by CarProof, Carfax and Auto Check™.

Beattie Affidavit, paras. 10-11

4. Used vehicle accident history searches are an important source of information about the history of a used vehicle. Such searches assist used car dealers in learning more about the vehicle they are proposing to purchase. They are also used by dealers to assist in determining whether a vehicle may have suffered previous damage requiring disclosure, pursuant to the Ontario *Motor Vehicle Dealers Act, 2002*, or similar legislation in other provinces, when dealers sell the vehicle.

Beattie Affidavit, para. 9

5. A dealer need only provide an automobile's Vehicle Identification Number ("VIN") in order to search its accident history. The types of information reported by these searches may vary but typically will include one or more of the following: the existence of a prior collision or accident insurance claim made against a vehicle, the number of such claims, the date on which the collision(s) or accident(s) occurred, the point of impact on the vehicle where the damage occurred, and potentially the amount of the insurance claim paid.

Beattie Affidavit, para. 5

6. In 1998, UCDA became an Associate Member of the IBC in order to acquire vehicle claims data which is a critical input into the Auto Check™ business. IBC was, and remains, the only source for integrated industry-wide claims data from all insurers supplying auto insurance coverage in Ontario.

Beattie Affidavit, para. 6

7. A long and mutually-beneficial relationship evolved between UCDA and IBC, with UCDA renewing its Associate Membership annually and gradually expanding its Auto Check™ business based on claims data supplied by IBC. In addition to its annual payment of membership fees, in June 2007 UCDA provided funding in the amount of

\$16,000 to IBC in order to help finance upgrades to IBC's database infrastructure. In 2010, IBC added a fee of \$1.00 per "hit" for the information supplied from its Web Claims Search application.

Beattie Affidavit, para. 8

8. Over time, two other providers entered the used vehicle accident history searches market. In or around 2005, a business called CarProof, which had been supplying lien searches in competition with UCDA since 2000, began providing a service that competes with Auto Check™. In 2008, Carfax, an American-based provider of used vehicle accident histories, began offering similar services in Ontario. CarProof and Carfax source claims data for their used vehicle accident history searches directly or indirectly from IBC. UCDA is not aware of any other providers of used vehicle accident history searches in Ontario.

Beattie Affidavit, para. 10

9. CarProof is the market leader in the supply of used vehicle accident history searches in Ontario. A standard CarProof used vehicle accident history costs \$34.95 (exclusive of GST/HST). Carfax charges US\$34.99 (exclusive of GST/HST) per individual search for its service. By comparison, Auto Check™ charges UCDA member dealers \$7.00 for its competing used vehicle history service.

Beattie Affidavit, para. 12

10. 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. However, it again began distributing false and misleading promotional material in 2007 with respect to UCDA's services including Auto Check™. 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.

Beattie Affidavit, para. 13

11. In early 2009, representatives of CarProof approached UCDA and proposed that UCDA “partner” with CarProof to provide CarProof used 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. Given CarProof’s aggressive business tactics and the significantly higher prices at which it provides used vehicle accident history searches, UCDA concluded that a relationship with its major competitor was not in the best interests of its members and declined the CarProof proposal.

Beattie Affidavit, para. 14

12. In early 2010, representatives of CarProof again approached UCDA and repeated the “partnering” proposal. UCDA again rejected CarProof’s overtures.

Beattie Affidavit, para. 15

13. UCDA understands that CarProof obtains its used vehicle claims history data from IBC indirectly through i2iQ Inc. (“i2iQ”) and CGI Group Inc. (“CGI”). CarProof’s used vehicle claims histories are among the product offerings listed on the website of i2iQ. i2iQ also states on its website that a “partnership” or “strategic alliance” exists between itself and CarProof. i2iQ further claims to have a “partnership” or “strategic alliance” with CGI Insurance Information Services, a division of CGI.

Beattie Affidavit, paras. 16-17

14. CGI has a business relationship with IBC that includes management of the Automotive Statistical Plan (“ASP”) information of IBC’s member insurance companies as well as the provision of various data services to IBC’s members. Such services include “Enhanced AutoPlus,” which, among other things, contains used vehicle claims histories provided by CarProof.

Beattie Affidavit, para. 18

### **III. IBC's Refusal to Deal with Auto Check™**

15. On January 1, 2010 certain changes to the regulations under the Ontario *Motor Vehicle Dealers Act, 2002* came into force. These changes were widely discussed and anticipated by Ontario motor vehicle dealers and required, among other things, that motor vehicle dealers disclose to potential purchasers whether a used vehicle has ever suffered damage in which the total repair costs exceeded \$3,000.

Beattie Affidavit, para. 20

16. In early June 2009, in anticipation of these changes, UCDA contacted IBC and requested that IBC expand the scope of the information it provided to Auto Check™ to include dollar value claims information.

Beattie Affidavit, para. 21

17. Shortly after that communication, on June 11, 2009, Armie Francescut, CEO of i2iQ, wrote to Marti Pehar, IBC's Manager of Business Partnerships. Mr. Francescut referred to a June 10<sup>th</sup> telephone conversation with Ms. Pehar, and stated that "further to" that conversation, he "would like to confirm that UCDA can purchase and distribute vehicle history reports from CarProof to its members". Mr. Francescut also stated that "[f]ollowing our discussion, I once again confirmed this with Paul Antony, President of CarProof." Mr. Francescut further indicated that if UCDA was interested in pursuing an arrangement with CarProof, its representatives should contact Mr. Antony of CarProof or "contact me at the number below".

Beattie Affidavit, para. 22, Exhibit A

18. UCDA has no further knowledge of the contacts that took place between IBC, i2iQ and CarProof on this issue. However, there does not appear to be any legitimate reason why representatives of IBC, i2iQ and CarProof should have been discussing a confidential business request made by UCDA to IBC. Instead, these contacts suggest that CarProof,

i2iQ and IBC were concerned about competition to CarProof provided by Auto Check™, whose used vehicle accident history service is priced substantially below that of CarProof.

19. On June 16, 2009, a UCDA representative met with Ms. Pehar to discuss Auto Check™'s request for dollar value claims information. Although UCDA had indicated its willingness to compensate IBC for the provision of this additional information, on June 24, 2009 Ms. Pehar advised that IBC had refused UCDA's request. UCDA understands that IBC provided at that time, and presently continues to provide, similar information directly or indirectly to CarProof.

Beattie Affidavit, para. 25

20. On May 17, 2010, UCDA's Executive Director and its Legal Services Director met with IBC's Vice-President, Ontario as well as its Vice-President Operations and General Counsel, and renewed UCDA's request for dollar value claims information. IBC indicated that it would need to obtain authorization from its member insurers in order to provide this information to UCDA. On May 20, 2010, UCDA formally requested that IBC seek the requisite authorization from its member insurers to provide dollar value claims information to UCDA.

Beattie Affidavit, paras. 26-27

21. In a letter dated May 26, 2010, IBC informed UCDA that it would not seek the requested authorization from its insurer members. Instead, it indicated that UCDA should contact each insurer member of IBC in order to obtain individual consents (in contrast to UCDA's dealings with IBC on the Web Claims Search application, where no consent has ever been required). Moreover, without any prior warning, IBC stated that it was terminating UCDA's Associate Membership, which would end the 12-year relationship between the parties and Auto Check™'s ability to source claims data from the Web Claims Search application.

Beattie Affidavit, para. 28

22. After further discussions and emails, IBC reinstated UCDA's Associate Membership and its ability to use the Web Claims Search application until November 26, 2010. UCDA also began a process of contacting numerous insurers to obtain consent for IBC to provide ASP information to UCDA. Between July 2010 and May 2011 UCDA obtained consents from insurers and dealt with IBC on a variety of contractual, technical and logistical issues related to the ASP information. During this period UCDA's Associate Membership continued on a month-to-month basis as did its ability to use the Web Claims Search application.

Beattie Affidavit, paras. 29-34

23. On June 7, 2011, IBC's Director of Customer Service notified UCDA's Manager of Administrative Services that IBC would be terminating UCDA's use of the Web Claims Search application on June 10, 2011 (subsequently extended to June 17, 2011). He did not provide a reason for the termination or for the lack of a reasonable notice period.

Beattie Affidavit, para. 35

24. On June 17, 2011 at 5:00 p.m. IBC terminated supply of the Web Claims Search application to UCDA.

Beattie Affidavit, para. 37

25. Effective June 17, 2011 UCDA suspended its Auto Check™ service until further notice due to inability to obtain supply of sufficient data to provide used vehicle accident history searches.

Beattie Affidavit, para. 14

#### **IV. The Tribunal Should Grant UCDA's Application for Interim Relief**

##### ***(a) The Tribunal's Power to Issue Interim Orders***

26. Section 104 of the *Act* empowers the Tribunal to issue an interim order under the following circumstances:



## 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.

27. Section 104(1) requires that the applicant for interim relief have filed an application with the Tribunal seeking relief under section 75 or 77 of the *Act*. UCDA has filed a section 75 application with the Tribunal.
28. Section 104(1) provides that the Tribunal may issue an interim order as it considers appropriate, “having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.” Prior decisions of the Tribunal have established that the test for issuing such an order is set out in the Supreme Court of Canada’s decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*.

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

*Quinlan’s of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28, at para. 5 [hereinafter *Deeley*]

29. The *RJR-MacDonald* test comprises three elements: (i) that there be a serious issue to be tried; (ii) that not granting interim relief would cause irreparable harm to the applicant; and (iii) that the balance of convenience favours the applicant. As set out below, each of these requirements is clearly satisfied in the present case.

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

***(b) There is a Serious Issue to Be Tried***

30. As held by the Supreme Court in *RJR-MacDonald*, and cited with approval by the Tribunal in *Nadeau*, “there are no specific requirements which must be met to satisfy this test”. Notably, “[t]he threshold is a low one.” So long as the application is not “frivolous or vexatious”, the Tribunal “should proceed to consider the second and third tests, even if of the opinion that the [applicant] is unlikely to succeed at trial.” In *Deeley*, Simpson J. similarly explained that “the demonstration of a serious issue (in the sense that it is **not frivolous or vexatious**) is most consistent with the statutory scheme which sets a relatively low threshold for leave.”

*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at 337-338 (emphasis added)

*Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 16, at para. 15

*Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28, at para. 24 (emphasis added)

31. The present case easily surpasses this “low” threshold. Far from being a “frivolous and vexatious” claim, UCDA is merely seeking reinstated supply of IBC’s Web Claims Search application — data that it has been receiving, without interruption, since 1998. As noted in UCDA’s Application for Leave under section 103.1, the accompanying proposed Notice of Application under sections 75 and 76, and the supporting Affidavit of Robert G. Beattie, all filed with the Tribunal on June 29, 2011:
- a. UCDA and its Auto Check™ business have been directly and substantially affected (indeed Auto Check™ has been shut down) as a result of the inability to obtain adequate supply of integrated industry-wide vehicle claims data (*i.e.*, IBC’s Web Claims Search application) anywhere in the market on usual trade terms;
  - b. the inability to obtain supply occurred because there is insufficient competition to IBC in this market;
  - c. UCDA is willing and able to meet IBC’s usual trade terms for supply of the Web Claims Search application, as it has since 1998;

-14-

- d. the data sourced through the Web Claims Search application is in ample supply; and
- e. the refusal to deal is adversely affecting competition in the downstream market for used vehicle accident history searches because Auto Check™, the low-priced competitor, has been eliminated and used vehicle dealers now only have the option of purchasing at much higher prices from CarProof or Carfax.

Beattie Affidavit, paras. 39, 42

32. UCDA therefore submits that this case presents a serious issue to be tried.

*(c) In the Absence of an Interim Order, UCDA Will Suffer Irreparable Harm*

33. The provision of used vehicle accident history searches based on data sourced from IBC's Web Claims Search application generates 100% of Auto Check™'s revenues and profits. IBC's refusal to continue supplying this data has resulted in the suspension of the Auto Check™ business, resulting in the elimination of 100% of its revenues and its contribution to UCDA's net income since June 17, 2011.

Beattie Affidavit, para.43

34. Auto Check™ accounted for more than 50% of UCDA's net income in 2010. Furthermore, as noted in Mr. Beattie's affidavit, the termination of the Auto Check™ business is likely to directly and substantially affect UCDA through damage to UCDA's credibility and reputational harm among both existing and prospective dealer members, and thus a likely reduction in future membership fees.

Beattie Affidavit, paras. 44-45, Appendix A

35. As described by the Supreme Court in *RJR-MacDonald*, irreparable harm is the sort of damage:

which either **cannot be quantified in monetary terms** or which **cannot be cured**, usually because one party **cannot collect damages from the other**. Examples of the former include instances where one party will be **put out of business** by the court's

decision [...]; [or] where one party will **suffer permanent market loss or irrevocable damage to its business reputation.**

*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at 341 (emphasis added)

36. This creates a threshold whereby either one of (i) harm that cannot be quantified, or (ii) harm that cannot be cured, will constitute “irreparable harm”. While either type of harm is sufficient to meet the *RJR-MacDonald* test, notably **both of these types harm** exist in the present case.

UCDA Has Suffered Harm That Cannot Be Quantified

37. IBC’s refusal to continue supplying its Web Claims Search application has put Auto Check™ out of business. As noted in the passage from *RJR-MacDonald* cited above, and as the Tribunal held in *Nadeau*, irreparable harm will occur “where one party will be put out of business” if it does not obtain relief under section 104. That is precisely what has occurred in this case.

*Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 16, at para. 25

38. Furthermore, if supply of the Web Claims Search application is not promptly restored through an interim order, the suspension of the Auto Check™ business will cause “permanent market loss and irrevocable damage” to UCDA by depriving it of over 50% of its net income, and by damaging its “business reputation” among its members, and forcing them to source essential used vehicle accident history searches from Auto Check™’s two competitors at vastly higher prices. As the Tribunal held in the *Deeley* case, the loss of substantial sales and customer goodwill “constitutes irreparable harm”.

*Quinlan’s of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28, at para. 26

Beattie Affidavit, paras. 44-45, Appendix A

UCDA Has Suffered Harm That Cannot Be Cured

39. Moreover, the impact of the suspension of the Auto Check™ business cannot be cured by damages because the volume of used vehicle accident history searches that would be ordered in the absence of the termination is impossible to predict, and the effects on new memberships and renewals by used car dealers cannot be quantified with precision.
40. Even if the harm to UCDA was quantifiable, there is no damages remedy available to UCDA under section 75 or other provisions of the *Act*, or at common law. As a result, the harm from IBC's refusal to supply is irreparable. Instead, Parliament has provided the Tribunal with the power to remedy such circumstances by making mandatory supply orders under section 75, as well as interim supply orders under section 104.

***(d) The Balance of Convenience Favours the UCDA***

41. As set out in *RJR-MacDonald*, and confirmed by the Tribunal in *Nadeau*, “[i]n the balance of convenience test, the Tribunal must determine which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.”

*Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 16, at para. 44

*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at 342

42. Applying this standard, it is clear that UCDA will suffer the greater harm should the Tribunal decline to issue an interim order. In the absence of such an order, UCDA's Auto Check™ business will remain shut down. For the reasons set out in paragraphs 33-40 above, the resulting harm to UCDA would be substantial and irreparable. In addition, UCDA's 4,500 member dealers will lose access to the lowest-priced (\$7.00) used vehicle accident history searches on the market, and will be forced to purchase such services from CarProof or Carfax at vastly higher prices.
43. As compared to the serious and irreparable harm that UCDA will suffer, the issuance of an interim order reinstating supply of IBC's Web Claims Search application would cause no harm to IBC whatsoever. Indeed, IBC would continue to receive UCDA's annual

membership fees and the \$1.00 per hit charge payable for output from the Web Claims Search application.

44. The Web Claims Search application is a service which UCDA has continually purchased since 1998. UCDA is willing to meet the usual trade terms for this service, as it has always done in the parties' long history of dealings. Moreover, given the reproducible nature of data, supplying Auto Check™ would not affect IBC's ability to use the data for other purposes, including supply to other parties. In *Deeley*, the Tribunal held that when a product is in ample supply, the balance of convenience favours the issuance of an interim order. That is the case here.

*Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28, at para. 27

Beattie Affidavit, para. 39

***(e) An Interim Order is Appropriate in This Case***

45. The issuance of an interim order would be a just and appropriate use of the Tribunal's powers. As Simpson J. stated in the *Deeley* case, "in the context of an application under section 75, **a mandatory order is not an extraordinary remedy. Rather, it is what the section is all about** and it seems to me that, in this context, **orders which preserve or resume supply should not be viewed as exceptional.**"

*Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28, at para. 24 (emphasis added)

46. This statement is particularly apt in the present case. UCDA is only seeking the reinstatement of a pre-existing supply relationship, at no incremental cost to IBC. Such a remedy is clearly far from "extraordinary" but rather, by allowing the Auto Check™ business to continue to operate pending the adjudication of the merits of the section 75 application, is "what the section is all about". Absent such an interim order, the low-price supplier of used vehicle accident history searches will be unable to compete in the market.

47. UCDA therefore respectfully requests that the Tribunal exercise its powers under section 104 of the *Act* to issue an order requiring IBC to resume supply of its Web Claims Search application to UCDA, as previously provided, pending resolution of UCDA's application to the Tribunal under section 75 of the *Act*.
48. In support of this application, UCDA relies on the Affidavit of Robert G. Beattie, sworn June 29, 2011, and such further or other material as counsel may advise and the Tribunal may permit.

#### **V. Request For Expedited Hearing**

49. This application for interim relief relies on the same evidence — the Beattie affidavit — as UCDA's application for leave under section 103.1 of the *Act* filed on June 29, 2011. Furthermore, UCDA's intention to seek interim relief under section 104 of the *Act* was clearly stated in paragraph two of its notice of application. In light of the fact that IBC has already had more than six weeks to consider the issues raised in the leave application and the facts set out in Mr. Beattie's affidavit, UCDA respectfully requests that the Tribunal establish a schedule for the hearing of this application for interim relief as expeditiously as possible.

All of which is respectfully submitted.

DATED at Toronto, this 10<sup>th</sup> day of August, 2011.

---

**McMILLAN LLP**

Barristers & Solicitors

181 Bay Street, Suite 4400

Toronto, Ontario, M5J 2T3

**A. NEIL CAMPBELL, LSUC# 31774T**

Tel: 416-865-7025

Fax: 416-865-7048

E-mail: [neil.campbell@mcmillan.ca](mailto:neil.campbell@mcmillan.ca)

**CASEY W. HALLADAY, LSUC# 45965G**

Tel: 416-865-7052

Fax: 416-865-7048

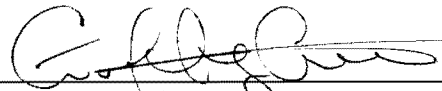
E-mail: [casey.halladay@mcmillan.ca](mailto:casey.halladay@mcmillan.ca)

*Solicitors for the Applicant*



# T A B L E

THIS IS EXHIBIT "E" REFERRED TO IN  
THE AFFIDAVIT OF RANDALL BUNDUS,  
SWORN BEFORE ME ON THIS 7<sup>th</sup>  
DAY OF DECEMBER, 2011.



---

A Commissioner for Taking Affidavits.

Osler, Hoskin & Harcourt LLP  
 Box 50, 1 First Canadian Place  
 Toronto, Ontario, Canada M5X 1B8  
 416.362.2111 MAIN  
 416.862.6666 FACSIMILE

# OSLER

Toronto

September 30, 2011

Montréal

Graham Reynolds  
 Direct Dial: 416.862.  
[greynolds@osler.com](mailto:greynolds@osler.com)  
 Our Matter No. 1130921

Ottawa

**SENT BY EMAIL**

Calgary

A. Neil Campbell  
 McMillan LLP  
 Brookfield Place  
 181 Bay Street, Suite 4400  
 Toronto, ON M5J 2T3

New York

Dear Mr. Campbell:

**Used Car Dealers Association of Ontario v. Insurance Bureau of Canada  
 (CT-2011-006)**

I am writing in response to your letter of September 27, 2011, in which you set out your client's position in respect of our telephone discussion of September 22, 2011. In what follows, I address issues raised in your letter. I also provide an update on IBC's position regarding potential interim supply arrangements for Web Claims Search to UCDA.

During our discussion on September 22, I informed you that, in late 2010 and early 2011, eight insurers directed IBC not to provide UCDA with access to their data through the Web Claims Search application. I further advised that IBC is not the owner of the data accessible through Web Claims Search. Rather, such ownership resides with insurers, who voluntarily provide the data to IBC for consolidation and management purposes. IBC merely runs the Web Claims Search application and serves as custodian of these data. Accordingly, IBC is legally bound to respect and follow the wishes of the insurers.

Your letter fundamentally mischaracterizes the nature of the relationship between IBC, the insurers, and UCDA. An individual insurer – as the owner of the data – is always entitled to direct IBC as to the manner in which IBC is permitted to disclose the data.

As well, there are other mischaracterizations in your letter which I must correct. First, contrary to your letter, at no point in IBC's submissions to the Tribunal did IBC indicate that consents are required "only" in respect of ASP data and "not" in respect of the Web Claims Search application. The three paragraphs of IBC's submissions you cite in support of this position simply contain no statement in this regard. Second, your reference to an expectation that IBC would have been required to stipulate any consent issues relating to Web Claims Search in its responding material to your client's application is met by the Tribunal's observations at paragraph 32 of its reasons that IBC had no opportunity to file its own evidence at the leave stage. Finally, we do not

## OSLER

Page 2

necessarily agree with any remaining characterizations of the circumstances of this matter as set out in your letter.

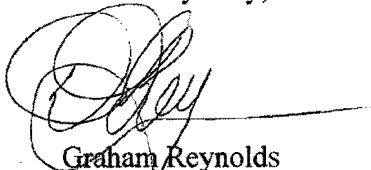
In any event, setting aside the above clarifications, you have acknowledged my advice to you during our conversation that IBC was at that point (and has been) engaged in active discussions with the eight insurers who had directed IBC not to provide access to their data through Web Claims Search. In particular, IBC has discussed with these insurers the possibility of providing directions permitting IBC to supply UCDA with access to Web Claims Search, in light of UCDA's interim relief application and the direction of Justice Simpson. As I indicated, these discussions have taken time to initiate and to develop.

However, I am pleased to inform you that, as of today, all eight insurers have now provided IBC with new directions permitting IBC to provide UCDA with interim access to Web Claims Search. Our client is therefore prepared to provide immediate access for UCDA to Web Claims Search on an interim relief basis, pending the disposition of the matter by the Tribunal or the withdrawal, cessation, settlement, or termination of the application by other means. As you know the existing contract between your client and ours was terminated, and a new contract will first need to be put in place. Please note that, consistent with the proper characterization of the legal relationship between IBC and insurers, IBC's ability to continue to provide access to Web Claims Search is dependent upon matters beyond its control.

Nothing in this letter nor in any position adopted by IBC to date in relation to the above matter including our discussions on this matter shall constitute any admission against interest, admission of liability, or admission of any matter that may fall under the jurisdiction of the Tribunal.

We trust this will be satisfactory,

Yours very truly,



Graham Reynolds  
GR:

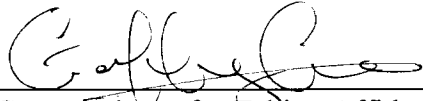
c: Casey W. Halladay

# TAB F

THIS IS EXHIBIT "F" REFERRED TO IN  
THE AFFIDAVIT OF RANDALL BUNDUS,

SWORN BEFORE ME ON THIS 7<sup>th</sup>

DAY OF DECEMBER, 2011.



---

A Commissioner for Taking Affidavits.

Osler, Hoskin & Harcourt LLP  
 Box 50, 1 First Canadian Place  
 Toronto, Ontario, Canada M5X 1B8  
 416.362.2111 MAIN  
 416.862.6666 FACSIMILE

# OSLER

Toronto

October 7, 2011

Montréal

Graham Reynolds, Q.C.  
 Direct Dial: 416.862.4868  
 GREynolds@osler.com  
 Our Matter Number: 1130921

Ottawa

## Sent By Electronic Mail

Calgary

A. Neil Campbell  
 McMillan LLP  
 Brookfield Place  
 181 Bay Street, Suite 4400  
 Toronto ON M5J 2T3

New York

Dear Mr. Campbell:

### **Used Car Dealers Association of Ontario v. Insurance Bureau of Canada (CT-2011-006)**

Further to our discussions earlier this week, we are attaching hereto an annotated draft of the proposed Order for interim relief sought by your client in relation to the above matter.

We believe that the addition of the phrase "access to" is consistent with the terms of the March 17, 2006 agreement and more properly reflects the legal relationship between IBC and UCDA.

As to providing access to Web Claims Search, as mentioned in our September 30 letter, our Client has advised that, given its receipt of consents from the eight insurers, it is prepared to recommence access to Web Claims Search for UCDA immediately.

However, we must reiterate the point raised in our letter of September 30, namely that IBC is legally bound to respect and follow the wishes of the insurers who own the data in question, and that any insurer contributing to Web Claims Search is always entitled to direct IBC as to the manner in which IBC is permitted to grant access to the insurer's data. As also indicated to you in our telephone discussion of September 22<sup>nd</sup>, our Client has advised us that Web Claims Search is a legacy 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.

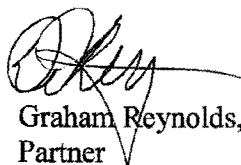
Our Client has advised us that if such a circumstance were to arise, it would immediately apply to the Tribunal for directions and that it would be prepared to provisionally maintain UCDA's access to Web Claims Search pending the Tribunal's directions.

# OSLER

Page 2

We trust this will set forth IBC's position in this matter. Please advise if the indicated change to the proposed Order is acceptable to UCDA.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Graham Reynolds', with a long horizontal flourish extending to the right.

Graham Reynolds, Q.C.  
Partner  
GR:

c. P. Glossop  
c. C. Halladay  
Enclosure

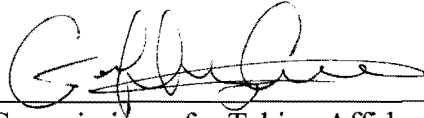


# TAB G

THIS IS EXHIBIT "G" REFERRED TO IN  
THE AFFIDAVIT OF RANDALL BUNDUS,

SWORN BEFORE ME ON THIS 7<sup>th</sup>

DAY OF DECEMBER, 2011.



---

A Commissioner for Taking Affidavits.



<b>Reply to the Attention of</b>	Neil Campbell
<b>Direct Line</b>	416.865.7025
<b>Email Address</b>	neil.campbell@mcmillan.ca
<b>Our File No.</b>	93636
<b>Date</b>	October 11, 2011

**VIA E-MAIL**

Graham Reynolds  
 Osler, Hoskin & Harcourt LLP  
 100 King Street West  
 1 First Canadian Place  
 Suite 6100, P.O. Box 50  
 Toronto, Ontario, M5X 1B8

Dear Mr. Reynolds:

**Re: *Used Car Dealers Association of Ontario v. Insurance Bureau of Canada, CT-2011-006 — Interim Supply Arrangements***

I write in connection with our recent correspondence in the above-captioned matter and, in particular, in response to your letter of October 7, 2011.

The Used Car Dealers Association of Ontario (“UCDA”) is willing to accept your client’s proposed revision, set out in your October 7<sup>th</sup> letter, to the draft interim supply order prepared by UCDA. A clean copy of the revised order is attached for your reference. We will write to the Competition Tribunal Registrar indicating that the parties have reached consensus on interim supply arrangements and providing the Registrar with a copy of the agreed draft order for the Tribunal’s consideration. We will copy you and your colleagues, Messrs. Glossop and Grove, on that communication.

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. I would note for the record that, as previously expressed in our telephone discussion of October 3<sup>rd</sup>, UCDA does not agree with the views expressed by your client in your letter of September 30<sup>th</sup> (at paragraphs 2 and 3) and reiterated in your letter of October 7<sup>th</sup> (at paragraph 4). Our client reserves its position on these issues, should they arise for further consideration by the Tribunal in this matter.

We look forward to the expeditious reinstatement of supply of the Web Claims Search application.

mcmillan

October 11, 2011  
Page 2

Yours truly,



Neil Campbell

/CWH  
Attach.

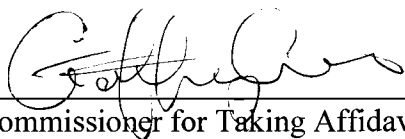
Copy to: P. Glossop and G. Grove, Osler, Hoskin & Harcourt LLP  
C. Halladay, McMillan LLP

# TAB H

THIS IS EXHIBIT "H" REFERRED TO IN  
THE AFFIDAVIT OF RANDALL BUNDUS,

SWORN BEFORE ME ON THIS 7<sup>th</sup>

DAY OF DECEMBER, 2011.

A handwritten signature in black ink, appearing to read "G. J. ...", is written over a horizontal line. The signature is cursive and somewhat stylized.

A Commissioner for Taking Affidavits.

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*,  
2011 Comp. Trib. 20  
File No.: CT-2011-008  
Registry Document No.: 8

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 75 of the *Competition Act*;

AND IN THE MATTER of an Application by the Used Car Dealers Association of Ontario for  
interim relief pursuant to section 104 of the *Competition Act*.

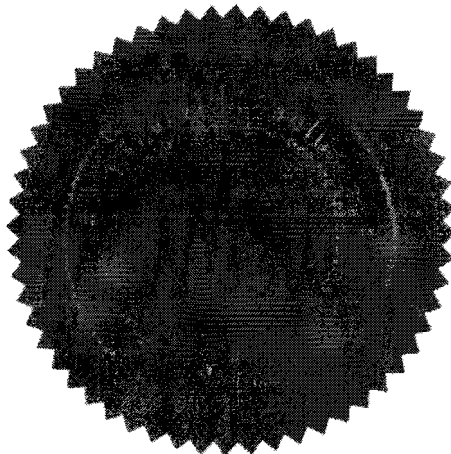
B E T W E E N:

**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 Order: October 20, 2011  
Order signed by: Madam Justice Sandra J. Simpson



**INTERIM SUPPLY ORDER ON CONSENT**

[1] **UPON** an Application by the Used Car Dealers Association of Ontario (the "UCDA") for an Order pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, (the "Act"), granting leave to make an application under sections 75 and 76 of the Act;

[2] **AND UPON** an Application by the UCDA for interim relief pursuant to section 104 of the Act;

[3] **AND UPON** the Tribunal's decision granting the UCDA leave to make application under section 75 of the Act and the direction of the Tribunal in that decision asking the parties to consult to see whether they could agree about whether an interim supply order could be made and, if so, on what terms (see *The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, 2011 Comp. Trib. 10);

[4] **AND UPON** being advised by e-mail dated October 11, 2011, that the UCDA and the Respondent, the Insurance Bureau of Canada (the "IBC"), consent to the issuance of an interim supply order on the terms set out below;

**NOW THEREFORE THIS TRIBUNAL ORDERS THAT:**

[5] 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, the IBC is to supply the UCDA forthwith with access to the 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 the IBC and the UCDA.

DATED at Ottawa, this 20th day of October, 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

# TAB I

THIS IS EXHIBIT "I" REFERRED TO IN  
THE AFFIDAVIT OF RANDALL BUNDUS,

SWORN BEFORE ME ON THIS 7<sup>th</sup>

DAY OF DECEMBER, 2011.



---

A Commissioner for Taking Affidavits.

**From:** Ray G Kearns [<mailto:ray.g.kearns.alt9@statefarm.com>]  
**Sent:** Wednesday, November 02, 2011 3:30 PM  
**To:** Lingard, Steven  
**Cc:** Bellissimo, Barbara; Fiorino, Mario; Michael Padfield; Bundus, Randy  
**Subject:** IBC's Web Claims Search database - UCDA

Dear Steven,

After further review and as previously communicated by State Farm Mutual Automobile Insurance Company to the Insurance Bureau of Canada, State Farm does not consent to any data provided by or on behalf of State Farm to the IBC's Web Claims Search database being supplied to the Used Car Dealers Association of Ontario. This data is valuable and unique property belonging to State Farm, and we are mindful of confidentiality and the interests of our customers. We direct you to stop the provision of this data to the UCDA through Web Claims Search (or otherwise) promptly.

Should you have any questions, please contact me or Michael Padfield (Counsel, Canada; 905 750 4981).

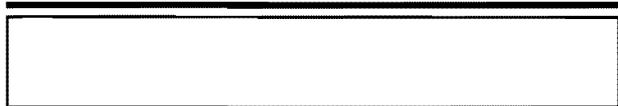
Thank you.

Ray

---

Ray G Kearns, FCIP  
Canadian Compliance Director  
**State Farm®**  
Providing Insurance and Financial Services  
Phone: (905) 750-4204

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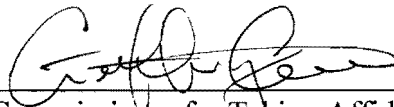
\*\*\*\*\*

# TAB J

THIS IS EXHIBIT "J" REFERRED TO IN  
THE AFFIDAVIT OF RANDALL BUNDUS,

SWORN BEFORE ME ON THIS 7<sup>th</sup>

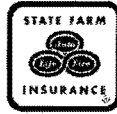
DAY OF DECEMBER, 2011.



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A Commissioner for Taking Affidavits.

State Farm®  
Providing Insurance and Financial Services  
Canadian Head Office, Aurora, Ontario L4G 8A4



November 9, 2011

**Raymond G. Kearns, FCIP**  
Canadian Compliance Director  
Bus: (905) 750 4204  
Fax: (905) 750 4035

333 First Commerce Drive  
Aurora ON L4G 8A4

Randy Bundus  
General Counsel  
Insurance Bureau of Canada  
777 Bay Street, Suite 2400  
P.O. Box 121  
Toronto, ON M5G 2C8

Dear Randy:

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.

State Farm is concerned about the provision of its data to UCDA for the following reasons:

- 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 the provision of this information to UCDA or any other operator of a similar commercial database.
- We are mindful of the interests of our policyholders in terms of the privacy of their automobile insurance claims history with State Farm. The State Farm organisation makes a commitment to its policyholders and customers across North America not to sell customer information. The sale of State Farm policyholder information by IBC to third parties such as the UCDA raises substantial concerns about an indirect failure to comply with the spirit of that commitment in Canada. Our success is in large part built on a foundation of trust and integrity, and knowingly permitting the spirit of our privacy commitments to customers to be compromised could erode that foundation.

We have reviewed the IBC's Response to the Application under Section 75 of the *Competition Act*. We note in particular that State Farm is not among the insurers who have consented to the provision of their data to UCDA for the purposes of the consent Order for Interim Supply made by the Tribunal on October 20, 2011. We further note, and we agree with, IBC's acknowledgement that the State Farm data forming part of the Web Claims Search database continues to be the property of State Farm.

We understand from you that the direction will be promptly brought to the attention of the Competition Tribunal in the proceedings ongoing between IBC and UCDA. Please ensure that this letter is specifically provided to the Tribunal at the earliest opportunity. Should the Tribunal desire any further information from State Farm regarding this matter, we would of course be pleased to provide it.

We look forward to your prompt attention to this matter, and in particular to the immediate compliance by IBC with the direction set out in this letter.

Yours truly,

A handwritten signature in cursive script, appearing to read "Ray Kearns".

Ray G. Kearns  
Canadian Compliance Director  
State Farm Insurance

RGK/ja

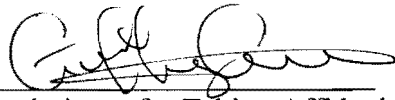


# TAB K

THIS IS EXHIBIT "K" REFERRED TO IN  
THE AFFIDAVIT OF RANDALL BUNDUS,

SWORN BEFORE ME THIS 7<sup>th</sup>

DAY OF DECEMBER, 2011

A handwritten signature in black ink, appearing to read "G. J. [unclear]", written over a horizontal line.

A Commissioner for Taking Affidavits

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**From:** Reynolds, Graham  
**Sent:** Monday, November 14, 2011 2:03 PM  
**To:** Jos.Larose@ct-tc.gc.ca; Filing Depot  
**Cc:** Casey Halladay; Neil Campbell; Grove, Geoff; Glossop, Peter  
**Subject:** Used Car Dealers Association of Ontario v. Insurance Bureau of Canada - file number CT-2011-008

Dear Sir,

We are counsel to the Respondent, Insurance Bureau of Canada in file number CT-2011-008, Used Car Dealers Association of Ontario (the "Applicant") and the Insurance Bureau of Canada (the "Respondent") pursuant to section 75 of the Competition Act.

We are requesting a judicial case management conference pursuant to Rule 135 of the Competition Tribunal Rules in relation to an application for directions by the Respondent in relation to the Interim Supply Order issued by the Tribunal of October 20, 2011 (the "Order").

That Order requires that the Respondent supply the Applicant with access to the Respondent'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 the Respondent and the Applicant until the disposition of the Applicant's application under section 75 of the Competition Act or the withdrawal, cessation, settlement, or termination of that application by other means.

The Respondent seeks directions from the Tribunal because it has received a direction from one insurer that the Respondent shall not provide that insurer's data that forms part of the Web Claims Search Application to the Applicant, which data was included in the Respondent's Web Claims Search Application supplied to the Applicant prior to June 17, 2011.

The Respondent has consulted with Counsel to the Applicant and the parties are agreed that the case management conference be conducted by teleconference.

A copy of this communication is being sent to Counsel for the Applicant.

Thank you,  
[file:///C:/program%20files/osler/osler%20Outlook%20Email%20Signatures/email\_logo.gif]

Graham Reynolds  
Partner

416.862.4868

DIRECT

416.862.6666

FACSIMILE

[greynolds@osler.com](mailto:greynolds@osler.com)

Osler, Hoskin & Harcourt LLP  
Box 50, 1 First Canadian Place  
Toronto, Ontario, Canada M5X 1B8

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