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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

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.

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

\$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.

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.

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 10th 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,

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

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

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.

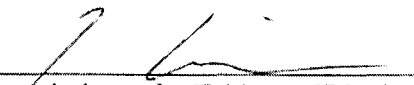
Impact of the Termination


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.

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.

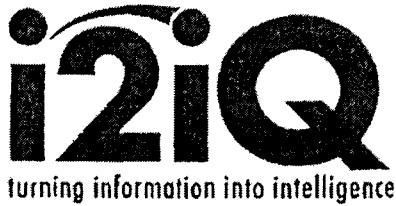

A Commissioner for Taking Affidavits


Robert G. Beattie

JAMES F. 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.

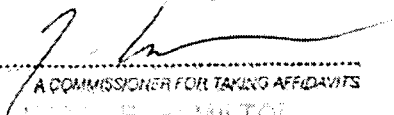
Hopefully this letter is satisfactory for your purpose. Feel free to contact me should you have any questions whatsoever.

Regards,

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

cc: Paul Antony - CarProof

"A"
This is Exhibit A referred to in the
affidavit of ROBERT G. BEATIE
sworn before me, this 29TH
day of JUNE 2011


A COMMISSIONER FOR TAKING AFFIDAVITS
NOEL F. HAMILTON
BARRISTER & SOLICITOR

June 11, 2009

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

The document that is being electronically submitted to the Tribunal is an electronic version of a paper document that has been signed by the affiant. The signed document in paper copy is available and will be produced if requested by the Tribunal.