

OTTAWA, ONT.

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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*.

BETWEEN:

USED CAR DEALERS ASSOCIATION OF ONTARIO

Applicant

- and -

INSURANCE BUREAU OF CANADA

Respondent

PROPOSED NOTICE OF APPLICATION PURSUANT TO SECTIONS 75 AND 76 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 sections 75 and 76 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “*Act*”) for an Order directing the Respondent to accept the UCDA as a customer and to resume supplying the Respondent’s Web Claims Search application on usual trade terms, as well as UCDA’s costs of this application.
2. **AND TAKE NOTICE THAT** the person against whom the order is sought is the Respondent, Insurance Bureau of Canada (“IBC”). The Respondent’s address is:

2235 Sheppard Avenue East
Atria II, Suite 1100
Toronto, Ontario, M2J 5B5

3. **AND TAKE NOTICE THAT** UCDA will rely on the Statement of Grounds and Material Facts attached as Schedule "A" hereto, 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.
4. **AND TAKE NOTICE THAT** a concise statement of the economic theory of the case is contained in Schedule "B" hereto.
5. **AND TAKE NOTICE THAT** UCDA requests that this Application be heard in English.
6. **AND TAKE NOTICE THAT** UCDA requests that the documents for this Application be filed in electronic form.

Dated at Toronto this 29th day of June, 2011.

On behalf of the Applicant UCDA



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

A. NEIL CAMPBELL

Tel: 416-865-7025
Fax: 416-865-7048
E-mail: neil.campbell@mcmillan.ca

CASEY W. HALLADAY

Tel: 416-865-7052
Fax: 416-865-7048
E-mail: 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
Tel: 416-445-5912
Fax: 416-644-3135

SCHEDULE A

STATEMENT OF GROUNDS AND MATERIAL FACTS:

I. The Parties

1. 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 4500 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.
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 Vehicle Accident History Searches

3. UCDA provides vehicle accident histories 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 claim data, reported by its member insurers, that is used in the provision of vehicle accident histories by CarProof, Carfax and Auto Check™.
4. Vehicle accident history searches are an important source of information about the history of a used vehicle. Such searches 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.

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.
6. Vehicle accident history searches also assist purchasers to learn more about the vehicle they are proposing to purchase (although UCDA only makes its Auto Check™ searches available to its members).
7. 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.
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 information supplied from its Web Claims Search application.
9. 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™. In 2008, Carfax, an American-based provider of vehicle accident histories began offering similar services in Ontario. CarProof and Carfax source claims data for

their vehicle accident history searches directly or indirectly from IBC. UCDA is not aware of any other providers of vehicle accident history searches in Ontario.

10. CarProof is the market leader in the supply of vehicle accident history searches in Ontario. A standard CarProof 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 vehicle history service.
11. 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 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.
12. 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. Given 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.
13. In early 2010, representatives of CarProof again approached UCDA and repeated the partnering proposal. UCDA again rejected CarProof's overtures.
14. UCDA understands that CarProof obtains its vehicle claims history data from IBC indirectly through i2iQ Inc. ("i2iQ") and CGI Group Inc. ("CGI"). CarProof's 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.

15. 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 vehicle claims histories provided by CarProof.

III. IBC’s Refusal to Deal with Auto Check™

16. 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 vehicle has ever suffered damage in which the total repair costs exceeded \$3,000.
17. 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.
18. 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 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”.

19. 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 vehicle accident history service is priced substantially below that of CarProof.
20. 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.
21. 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 the ASP the dollar value claims information.
22. 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, thereby ending the 12-year relationship between the parties and Auto Check™'s ability to source claims data from the Web Claims Search application.
23. 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, something that has never been required to use the Web Claims Search application.

24. 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.
25. 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 briefness of the notice period.
26. On June 17, 2011 at 5:00 p.m. IBC terminated supply of the Web Claims Search application to UCDA.
27. Effective June 17, 2011 UCDA suspended its Auto Check™ service until further notice due to inability to obtain supply of sufficient data to provide vehicle accident history searches.

IV. Refusal to Deal (Section 75(1))

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

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

29. 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™ will deprive it of the essential input required to continue offering its vehicle accident history service.
30. The provision of vehicle accident history searches based on IBC claims data generates 100% of Auto Check™'s revenues and profits. Auto Check™ accounts for more than half of UCDA's net income. The inability to obtain supply from the IBC Web Claims Search application has begun and will continue to directly and substantially affect UCDA and its Auto Check™ business.
31. 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. The loss of Auto Check™ for an extended period of time will 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.
32. The substantial negative impact on Auto Check™ and UCDA results from the inability to obtain adequate supply of vehicle insurance claims data anywhere in a market on usual trade terms. IBC is the only source of integrated industry-wide data.
33. Auto Check™'s inability to obtain supply is a result of insufficient competition among suppliers of vehicle insurance claims data. IBC is the only current supplier of integrated industry-wide claims data.

34. Auto Check™ is willing and able to meet the usual trade terms to obtain vehicle insurance claims data. UCDA has fully paid its IBC associate membership dues and is paying the \$1.00 per hit fee levied by IBC for the Web Claims Search output.
35. The claims data supplied through the Web Claims Search application is in ample supply. Given the reproducible nature of data, supplying output from the Web Claims Search application to any particular provider of vehicle accident history searches, such as UCDA, does not render it unavailable for supply to others.
36. IBC's refusal to supply Auto Check™ is likely to have an adverse effect on competition in the vehicle accident history searches market. As of June 17, 2011, IBC's refusal has resulted in the elimination of Auto Check™, the low-price supplier in the market. This will allow CarProof, with whom IBC, through CGI and i2iQ, has a preferred business relationship, to preserve and enhance its market power in the downstream market for vehicle accident history searches and require used car dealers to pay higher prices for searches.
37. UCDA therefore submits that IBC's refusal to deal satisfies all the elements of section 75 of the *Act*, and respectfully requests that the Tribunal make an order under section 75 of the *Act* requiring that IBC accept UCDA as a customer and resume supplying it with the Web Claims Search application on usual trade terms forthwith.

V. Refusal to Supply Because of Low Pricing Policy (Section 76(1)(a)(ii))

38. Section 76(1) of the *Act* provides that:

76. (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

(a) a person referred to in subsection (3) directly or indirectly . . .

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

(b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

39. Section 76(3) of the *Act* states that:

76. (3) An order may be made under subsection (2) against a person who

(a) is engaged in the business of producing or supply a product, . . .

40. As noted above, IBC initially threatened to terminate supply of the Web Claims Search application to UCDA's Auto Check™ business in June 2010 and has done so effective June 17, 2011.

41. CarProof is the largest supplier of vehicle accident history searches both in Ontario and in Canada. UCDA is a competitor of CarProof, and the low-price supplier in the market. UCDA charges \$7 per search for its Auto Check™ service; CarProof charges \$34.95 for a similar service.

42. Given the relationships between CarProof, i2iQ, CGI Inc., and IBC, and the discussions between them relating to UCDA's request for dollar value claims data, it appears that IBC's refusal to continue to supply the Web Claims Search application may have been motivated by UCDA's low pricing policies. The effect of these refusals is to deny Auto Check™, the low-price supplier in the market, access to critical inputs needed to continue offering its vehicle accident history searches. This will ultimately also impact the consumers who buy used vehicles.

43. As set out above, UCDA and its Auto Check™ business are directly (and substantially) affected by IBC's refusal to supply the Web Claims Search application.

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

45. UCDA therefore respectfully requests that the Tribunal make an order under section 76(2) of the *Act* requiring IBC to accept UCDA as a customer on usual trade terms forthwith.
46. In support of this application, and the Grounds and Material Facts set out above, UCDA relies on the affidavit of Robert G. Beattie, sworn June 29th, 2011 and such further or other material as counsel may advise and the Tribunal may permit.

SCHEDULE B

CONCISE STATEMENT OF THE ECONOMIC THEORY OF THE CASE:

47. UCDA's Auto Check™ business competes against CarProof and CarFax in the market for vehicle accident history searches. UCDA's \$7.00 price for a vehicle accident history is substantially lower than CarProof's standard price of \$34.95 (as well as CarFax's standard price of US\$34.99).
48. IBC's Web Claim Search application is a critical input which enables UCDA to offer its Auto Check™ vehicle accident history service.
49. IBC's termination of supply of the Web Claim Search application has eliminated Auto Check™ as a competitor in the vehicle accident history searches market.
50. CarProof, directly and/or indirectly through i2iQ and/or CGI, has a significant business relationship with IBC.
51. CarProof was the market leader in the supply of vehicle accident history searches in Ontario prior to the suspension of the Auto Check™ service.
52. The elimination of Auto Check™ as a potential source of supply for used car dealers will allow CarProof to preserve and enhance its market power and hence result in an adverse effect on competition in the supply of vehicle accident history searches in Ontario.