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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 under section 75 of the *Competition Act*.

BETWEEN:

USED CAR DEALERS ASSOCIATION OF ONTARIO

Applicant

- and -

INSURANCE BUREAU OF CANADA

Respondent

**RESPONSE OF INSURANCE BUREAU OF CANADA TO
APPLICATION UNDER SECTION 75 OF THE *COMPETITION ACT***

October 28, 2011

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PART I – OVERVIEW

1. Through its Application, the Used Car Dealers Association of Ontario (the “UCDA”) asks this Tribunal to compel Insurance Bureau of Canada (“IBC”) to supply UCDA with access to insurance claims data through IBC’s Web Claims Search application under section 75 of the *Competition Act*. IBC takes the position that no such order should be made, and relies principally upon the following key facts:

- (a) **IBC does not own the data that UCDA seeks to access.** As recognized by insurance regulatory agencies, these data are owned by insurance companies, certain of whom have directed IBC not to provide such data to UCDA in any form.¹ IBC is simply following the clear directions of these insurers, and has no competitive stake in whether or not UCDA has access to the data it seeks.
- (b) **IBC has made an objectively justifiable business decision to discontinue the supply of Web Claims Search to *all* third party users other than the insurance, government and law enforcement communities.** If 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 Web Claims Search outside of such communities.
- (c) **Web Claims Search was not designed to be used as a source of comprehensive vehicle accident claims history data.** In fact, Web Claims Search is entirely unreliable for the purposes for which UCDA uses it, namely, as

¹ While consents of certain insurers have been restored for purposes of the Order for Interim Supply made by the Tribunal on October 20, 2011, this state of affairs is in place only for the purposes of interim supply and will not be assumed to continue for the purposes of this Response.

the sole input for UCDA's Auto Check product. Due to various technological limitations that IBC will detail in the course of this Response, Web Claims Search can be expected to deliver a "false negative" result in respect of vehicle accident histories in a potentially significant number of cases. In addition, data relating to the dollar value of insurance claims (as required under 2010 amendments to relevant Ontario legislation) is not available through Web Claims Search. Accordingly, UCDA's use of Web Claims Search for its Auto Check product creates serious and legitimate concerns on the part of IBC relating to UCDA's possible misrepresentation of vehicle accident claims history information to potential purchasers of used vehicles.

2. IBC submits that UCDA cannot satisfy the conjunctive requirements of section 75 of the *Competition Act* (the "Act"). In particular:

- (a) **Certain owners of the data accessible through Web Claims Search have directed IBC not to provide it to UCDA.** Accordingly, the product UCDA seeks is not in ample supply as required under paragraph 75(1)(d) of the Act. In addition, UCDA is unable to meet the "usual trade terms" for access to Web Claims as required under paragraph 75(1)(c). One of the usual trade terms for the provision of such access must be that no insurer has directed IBC to withhold that insurer's data from the user seeking to access it.
- (b) **Any inability of UCDA to obtain access to Web Claims Search does not arise because of "insufficient competition"** (as required under paragraph 75(1)(b)). Rather, UCDA's inability to obtain access to Web Claims Search arises *because*

of IBC's objectively justifiable business decision to terminate supply, which was based on IBC's serious and significant policy, legal and reputational concerns over the use of the data accessible through Web Claims Search. Similarly, UCDA's inability to access the data it seeks does not arise because of insufficient competition, since IBC has offered to supply UCDA with substitute and superior data if UCDA obtains the consents of insurers permitting IBC to provide such data to UCDA.

- (c) **IBC's termination of UCDA's access to Web Claims Search has no "adverse effect on competition in a market"** (as required under paragraph 75(1)(e)). UCDA's Auto Check product serves a separate downstream product market than the two other suppliers of vehicle accident history reports, 3823202 Canada Inc., carrying on business as CarProof ("CarProof"), and CARFAX, Inc. ("Carfax").

3. IBC's decision to terminate UCDA's access to Web Claims Search was not motivated by any competitive concerns. IBC does not compete with UCDA in any market. IBC has no competitive stake whatsoever in the success or failure of UCDA or its Auto Check product. IBC does not have any economic interest in any suppliers of vehicle accident history reports. No third party commercial user (other than UCDA) had access to Web Claims Search.

4. UCDA asks this Tribunal to compel IBC – against its best business judgment – to provide mandatory and perpetual access to Web Claims Search, an antiquated and outdated application which UCDA alone relies upon to create a product (*i.e.*, Auto Check) that possibly misrepresents vehicle accident claims history information to potential purchasers of used vehicles. Such a result cannot be in the public interest. It would distort the objectives underlying

section 75 of the Act, and could have adverse implications for the relationships between suppliers and customers generally.

5. The effect of the order UCDA seeks will be to compel IBC to provide UCDA with access to data, even though certain owners of those data have explicitly directed IBC not to do so. In effect, this Tribunal is being asked to make an order that will directly affect the property rights of strangers to this proceeding. Such an order would be contrary to regulatory policies regarding access to insurance data and established principles of privacy and property law. Complying with such an order will place IBC in the position of having to violate these principles and having to contravene the directions of the owners of the data.

6. As the Tribunal indicated in its reasons granting leave dated September 9, 2011, only the Applicant is permitted to lead evidence at the leave stage of a section 75 proceeding. Accordingly, IBC had no opportunity to file its own evidence or to cross-examine Robert Beattie on his affidavit sworn June 29, 2011 (the “Beattie Affidavit”). In what follows, IBC will clarify the record by pointing out numerous inaccuracies in the Beattie Affidavit and UCDA’s Amended Notice of Application. This Response will set out the material facts that IBC will rely in responding to UCDA’s Application, and present the various legal grounds on which IBC opposes UCDA’s Application.

PART II – MATERIAL FACTS ON WHICH IBC RELIES

A. IBC Denies Allegations in Amended Notice of Application

7. IBC denies the allegations in each and every paragraph of UCDA’s Amended Notice of Application, except as otherwise expressly admitted in this Response.

B. The Parties

8. 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 (the “ICPB”).

9. 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 endeavours on behalf of its members.

10. 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 as a benefit to its membership. It is in this capacity that IBC operates the Web Claims Search application, which provides users a certain limited access to the vast collection of data contributed by IBC’s members.

11. 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, through which UCDA

provides vehicle accident history information to its members at a greatly reduced price compared to providers of other vehicle accident history information.

12. As described in greater detail below, IBC's business relationship with UCDA began in 1998, when IBC started providing UCDA with access to IBC's Web Claims Search application as an Associate Member of IBC.

C. Web Claims Search and Automobile Statistical Plan Data

13. UCDA's Amended Notice of Application and the Beattie Affidavit mischaracterize the nature and purpose of Web Claims Search and Automobile Statistical Plan ("ASP") data, and the relationship between the two. The essential facts relating to Web Claims Search and ASP data are as follows:

- (a) Web Claims Search is an application initially developed by ICPB and currently operated by IBC through its Investigative Services Division ("ISD"). Its principal purpose has always been to assist insurance companies in their underwriting activities and to function as a fraud detection tool for IBC's members (including certain law enforcement and government agency members). Though IBC has offered commercial third parties, such as UCDA, limited access to certain data elements through Web Claims Search, this application was not designed to be a comprehensive source of vehicle accident history data, and has significant limitations in this regard.
- (b) Web Claims Search is simply a query tool, akin to a search engine. It allows users to quickly search the extensive data that populate the underlying database, all of

which are provided by insurance companies. Web Claims Search is not *itself* a database.

- (c) Web Claims Search runs on antiquated technology and outmoded software. As discussed further below, these technological weaknesses (together with the limited purposes that the application was designed to accommodate) significantly limit both the quality and the completeness of the data available through Web Claims Search for the purposes of vehicle accident history information. Most notably, in a potentially significant number of cases, Web Claims Search can be expected to deliver a “false negative” result. In other words, it can be expected to provide a collision-free accident history for a vehicle that has, in fact, been involved in a collision. As outlined elsewhere in this Response, this limitation gave rise to serious concerns on the part of IBC.
- (d) The vast majority of the data that users search through Web Claims Search is comprised of ASP data. As described below, ASP data is a comprehensive record of vehicle insurance claims information that insurers are required by provincial insurance regulators to compile and provide.
- (e) However, Web Claims Search was designed to provide only a limited range of claims information bundled in the ASP data. Significantly, while accident damage “dollar value” information is included in ASP data, this particular field of information is *not* accessible through Web Claims Search.

- (f) Recognizing the significant limitations of Web Claims Search for third party users such as UCDA, IBC has made efforts to provide limited ASP data to certain users in a bulk or “flatfile” format. This format allows users access to selected fields of ASP data, some of which (including “dollar value” information) are not available when the ASP data are accessed through Web Claims Search. Significantly, as discussed further below, the ASP data provided in the flatfile format do not suffer from the potential for false negatives that exists when users access ASP data through Web Claims Search.

- (g) Provincial financial services regulators have recently recognized the significance of data ownership and protection. To this end, regulators appointed the General Insurance Statistical Agency (“GISA”) to oversee mandated insurance statistical information, including ASP data. In turn, GISA designated IBC as its third party service provider. IBC’s agreement with GISA provides, among other things, that ASP data may be provided to third parties *only with the consent of insurers*.

14. Each of the above facts is discussed in greater detail over the course of the following paragraphs.

(i) **Web Claims Search**

(a) *Purpose and use of Web Claims Search*

15. Web Claims Search is simply a tool that allows users to search a database of information relating to insurance claims. It has operated in various iterations since 1998. The last substantive upgrade to Web Claims Search occurred in 2005. 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. *IBC does not own these data. IBC cannot compel insurers to provide these data to third parties.*

16. 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 ISD. To this end, Web Claims Search allows users to search by Vehicle Identification Number ("VIN"), License Plate, Driver's License, Names, Business Names and other search terms to access over 200 fields of information relating to a wide range of insurance claims information. As indicated above, the vast majority of the data accessible through Web Claims Search are ASP data.

17. Though most of the more than 160 users of Web Claims Search are insurers themselves, a number of other "Associate Members" of IBC also use the application. 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 public law enforcement.

18. At the time IBC terminated UCDA's access in June, 2011, UCDA was the only third party commercial user to have access to Web Claims Search. Because of UCDA's status as an "auto industry user" of Web Claims Search, UCDA had access to only approximately 60 fields of information and could search only by VIN and License Plate.

(b) Significant limitations of Web Claims Search

19. Web Claims Search suffers from a number of significant design and technological limitations that make it ill-suited as a source of vehicle accident claims history information of the kind UCDA uses to generate its Auto Check product.

20. Contrary to paragraph 2 of the Amended Notice of Application, the Web Claims Search application was not designed to provide comprehensive vehicle accident claims histories, and is no longer used for that purpose. Nevertheless, in 1997 ICPB made a business decision to provide access to Web Claims Search's predecessor application to third party commercial users in the vehicle accident history report business. Both UCDA and Carfax were Associate Members of IBC with access to Web Claims Search until 2011, though UCDA was the only such entity to actually use the Web Claims Search application. However, at all times, IBC regarded the vehicle accident history report business as a peripheral and subsidiary function of Web Claims Search.

21. Web Claims Search also suffers from a number of significant technological limitations that directly affect its functionality. As indicated above, 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. In fact, the last major update to the Web Claims Search system occurred in 2005. The application operates using essentially the same technology today.

22. The design and technological limitations of Web Claims Search give rise to the potential for significantly incomplete and inaccurate vehicle accident claims history reports, for two principal reasons. First, and most importantly, there is a potentially significant possibility

that a search in Web Claims Search will return a “false negative” result. In other words, there is a strong possibility that a search for a given vehicle will not return a collision “hit”, despite the fact that the vehicle has in fact been involved in a collision. Second, as UCDA acknowledges in its Amended Notice of Application, data relating to the dollar value of insurance claims (as required under 2010 amendments to relevant Ontario legislation) is not available through Web Claims Search. Each of these issues is discussed below.

23. **The potential for false negatives:** The potential for false negatives arises because earlier records or “transactions” accessible through Web Claims Search relating to a given claim involving a vehicle (whether that claim is for vehicle theft, collision or other form of damage) are *overwritten* by more recent records. Each time an insurance claim is made in respect of theft or damage to a particular vehicle, there are a number of discrete records or “transactions” that are provided relating to that claim. A record of a collision is one of the many possible transactions for the purposes of Web Claims Search. Other such transactions include the payment of accident benefits, the payment of third party liability coverage and the costs of rental vehicles. Each time a transaction is recorded, it overwrites the earlier transaction.

24. The limitation is best illustrated with an example. If a search for a particular vehicle’s VIN in Web Claims Search is conducted shortly after a collision for that vehicle is reported, that search will typically return a result showing that the vehicle has in fact been in a collision. However, any subsequent “transaction” relating to that particular incident will overwrite any record of the collision, and the search will return a negative result. The record of the collision effectively “disappears” from the Web Claims Search results for that vehicle’s VIN. Accordingly, if an insurance accident benefits payment is made in respect of the claim following

the incident (as is often the case), then only that “transaction” (*i.e.*, the payment of accident benefits) would appear in the Web Claims Search results. There would no longer be any record that the vehicle had been involved in the particular collision.

25. However, this does not mean that a user might not see multiple collision results relating to the same VIN reported in Web Claims Search. In fact, there are at least two possible reasons why multiple collisions for the same VIN may be reported. First, as described above, each incident stands on its own, and only the “transactions” relating to each particular incident overwrite one another. For example, if a vehicle had been involved in three separate collisions, all three incidents could appear as results in Web Claims Search.

26. Second, the database accessible through Web Claims Search is comprised of data from various sources. While ASP comprises the vast majority of these data, other sources of vehicle accident history information available through Web Claims Search may overlap with ASP data in some instances, resulting in multiple records for the same vehicle. For example, a small number of insurers provide both ASP and Automated Claims Exchange (“ACE”) data to IBC for inclusion in the database accessible through Web Claims Search. In these instances, a collision reported through ACE data will appear in Web Claims Search, even though the equivalent ASP record has been overwritten by a subsequent transaction.

27. The probability that a Web Claims Search query will result in a false negative result constantly varies. The likelihood of false negative results at a given point in time depends entirely on the number of incidents in respect of which transactions are entered after the initial transaction indicating the collision. As outlined above, only in those instances where subsequent transactions are entered for a given incident will the record of the collision be overwritten.

Whether or not such subsequent records are entered depends on the individual circumstances surrounding each claim (*e.g.*, whether accidents benefits payments are made in respect of a given incident). Accordingly, it is not possible to know the likelihood that Web Claims Search will return a false negative result on any particular day or time.

28. **The lack of “dollar value” data:** Search results generated through Web Claims Search cannot provide information relating to the dollar value of the claim made in respect of a given vehicle accident, despite the fact that this information is available in the underlying ASP data. This is a significant limitation of Web Claims Search. As UCDA noted in its Amended Notice of Application, under the *Motor Vehicle Dealers Act, 2002*, S.O. 2002, C. 30, Sched. B, since January 1, 2010 motor vehicle dealers have been required to disclose to potential purchasers whether a vehicle has ever suffered damage in which the total repair cost exceeded \$3,000. Given the unavailability of “dollar claims” data, such a determination cannot be accurately made using Web Claims Search. Indeed, it was this limitation of Web Claims Search – combined with the new requirements under the *Motor Vehicle Dealers Act, 2002* – that prompted UCDA to initially approach IBC about receiving ASP data.

(c) ***Web Claims Search continues to be useful for fraud investigations and underwriting activities***

29. In spite of the significant limitations of Web Claims Search outlined above, the application remains a helpful tool for fraud investigations and underwriting activities. In this regard, Web Claims Search typically functions as one of several inputs in a particular underwriting activity or fraud investigation, and not as a definitive or comprehensive source of insurance claims data. Investigators and underwriters are interested in a host of details surrounding a particular claim. Unlike the case of vehicle accident history reports that UCDA

generates using Web Claims Search, the fact of a collision is not typically the focal point of an inquiry for fraud investigations and underwriting activities.

(ii) ASP Data and Regulatory Requirements Concerning Disclosure with Consent

(a) ASP data

30. Beginning January 1, 2006, most Canadian provincial insurance regulatory authorities (including the Financial Services Commission of Ontario) appointed the General Insurance Statistical Agent (defined above as “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 ASP data. Web Claims Search enables access to certain ASP data, and therefore regulatory restrictions and property rights concerning access to ASP data apply to users of Web Claims Search.

31. 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”).

32. Significantly, under s. 13.4 of the GISA Agreement, IBC is entitled to disclose “to any person the Data received from any Participating Insurer *with the written consent* of the Participating Insurer that supplied the data” (emphasis added). Accordingly, IBC may provide

ASP data to third party users, such as UCDA, but only if each insurer who provides its data to IBC consents to such provision.

33. Contrary to paragraph 15 of the Amended Notice of Application, IBC has no business relationship with CGI Group Inc. (“CGI”) relating to management of ASP data. In fact, CGI, i2iQ Inc. and CarProof have nothing whatsoever to do with the collection, consolidation or management of ASP data, and are entirely unconnected with IBC or GISA in this regard.

34. Given the comprehensive nature of ASP data, it is very useful information in insurance underwriting and fraud detection. Accordingly, IBC has made ASP data accessible to its members through Web Claims Search, subject to the various technical limitations described above.

35. UCDA’s Amended Notice of Application and the Beattie Affidavit mischaracterize the nature of ASP data. In particular, in paragraphs 20-21 of the Amended Notice of Application and paragraphs 26-27 of the Beattie Affidavit, UCDA appears to conflate ASP data with “dollar value claims information”. As will be apparent from the above description of Web Claims Search, this characterization of ASP data is simply wrong. There is vastly more to ASP data than simply “dollar value” information.

(b) Accessing ASP data

36. ASP data can be accessed by a user such as UCDA in multiple ways. One means of accessing ASP data is through Web Claims Search. As noted above, ASP data comprise the vast majority of the data accessible through Web Claims Search. However, given the technological and design limitations of Web Claims Search, only certain “data fields” that are

included in ASP data are accessible through Web Claims Search. While “dollar value” information is available through ASP data, such information *cannot be accessed* by any user through Web Claims Search. “Dollar value” information is not one of the available data fields.

37. A second and much more comprehensive means of accessing ASP data is in its native or “flatfile” format. This involves IBC providing a user with a lump 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. This flatfile format does not suffer from the limitations associated with Web Claims Search outlined above. Accordingly, users receiving the ASP data in a flatfile can be provided with complete access to all “dollar value” information. More importantly, the flatfile is not limited by the overwriting issues associated with Web Claims Search. In other words, a user accessing ASP data via the flatfile has access to every transaction for every claim contained within the ASP data, as opposed to only the most recent transactions. Thus, the dangers of inaccurate or incomplete information inherent in Web Claims Search do not exist for users of ASP flatfile data.

38. As of the date of this Response, IBC provides ASP data to CGI and selected ASP data to UCDA in flatfile format. However, IBC only provides these two entities with ASP data from those insurers who have directed IBC to do so. IBC has no say in whether or not insurers choose to provide ASP data to third parties, and takes no position on whether or not insurers should direct IBC to do so. This decision lies entirely in the hands of insurers.

D. UCDA Approaches IBC Regarding Access to Insurance Claims Data

39. UCDA first approached IBC in 1997 regarding Associate Membership and access to IBC's claims information database. IBC approved UCDA as an Associate Member in April 1998. The parties entered into the Associate Member Vehicle Information Agreement on April 15, 1998 (the "1998 Access Agreement"). The 1998 Access Agreement governed the basis on which UCDA accessed what would ultimately become Web Claims Search between 1998 and 2006.

40. In 2006, IBC entered into an Access Agreement (the "2006 Access Agreement") that supplemented the 1998 Access Agreement. The 2006 Access Agreement included more robust provisions relating to information management and privacy considerations, and reflected the increasing awareness of these issues on the part of IBC and in the information technology community at large.

41. Both the 1998 Access Agreement and the 2006 Access Agreement provided for termination without reasons by either party upon sixty days prior notice in writing to the other party.

E. IBC Creates the Data Strategy Committee in 2008

42. IBC's concerns relating to the use of its members' data continued into 2008. In particular, IBC sought to evaluate issues relating to IBC's use and collection of their data, the quality and reliability of IBC data deliverables, and the provision of data to third parties. Accordingly, on March 25, 2008, the IBC Board of Directors approved a mandate and work plan for the IBC Data Strategy Committee (the "DSC").

43. The DSC met periodically over the course of 2008 and 2009 to develop a policy for data collection and sharing, as well as other strategic objectives relating to IBC's use of its members' data. On September 30, 2009, the DSC delivered its report to the IBC Board.

44. The DSC's report included the "Proposed IBC Data Collection and Sharing Policy" (the "Data Policy") which the IBC Board approved. Some of the key policy statements enumerated in the Data Policy included the following:

- (a) Access to industry data is vital for IBC to achieve its mandate;
- (b) Information on Canada's insurance marketplace must be relevant and credible;
- (c) Insurance data is a valuable asset owned by each insurer and will be treated accordingly;
- (d) Providing data to advance industry priorities must not compromise the need to protect the competitive advantage of insurers; and
- (e) IBC Data Standards are needed to ensure the credibility of IBC deliverables.

45. Some of the policy directives that the Data Policy recognized included:

- (a) IBC is the custodian of industry-wide data and through the IBC Board retains control over its collection and use;
- (b) All data collected and/or shared must support IBC's mandate and be justified in a business case;
- (c) The interests of both IBC members and consumers should be considered; and

- (d) When insurers' data is forwarded to third party service providers, IBC does so in terms of the consent/direction provided by the insurer. The insurer owns the data, and remains responsible for its submissions, use and validity.

46. In light of the policy directives that flowed out of the of DSC's work, IBC resolved to prepare new forms of contractual agreements to govern the provision of insurers' data through IBC to third parties, and in particular to address data ownership and privacy considerations. As a result, IBC developed an information management agreement and a service provider agreement to be implemented between IBC, insurers and third party users. These agreements include robust provisions relating to privacy and data ownership. They specifically recognize that insurers, as the owners of the data, grant a given third party user a non-exclusive, non-transferable license to use the data.

F. The Termination of UCDA's Access to Web Claims Search

(i) UCDA Initially Approaches IBC about "Dollar Value" Information in 2009

47. In June 2009, UCDA contacted IBC to inquire about expanding the information it could access through Web Claims Search, in light of new requirements in the *Motor Vehicle Dealers Act, 2002* that would come into force on January 1, 2010. Subsection 5(16) of Ontario Regulation 332/08 (made under the *Motor Vehicle Dealers Act, 2002*) requires that all dealers of motor vehicles disclose to consumers those instances where the "total costs of repairs to fix the damage caused to a vehicle by an incident exceed \$3,000." Accordingly, UCDA requested that IBC provide data through IBC's Web Claims Search application relating to the dollar value of each insurance claim in that database.

48. In response, IBC informed UCDA that it could not provide such information because it was (and continues to be) only available through the ASP data flatfile format, and not through the Web Claims Search application. Moreover, by email dated June 24, 2009, Marti Pehar (then Manager, Business Partnerships at IBC) informed UCDA that IBC could not comply with UCDA's request for dollar value claims information, which would require both the provision of ASP data by flatfile and the consent of each individual insurer. In particular, Ms. Pehar referred to the ongoing activities of the DSC and advised that UCDA's request "does not meet our strategic objectives (as approved by the Data Strategy Committee) and that an alternate provider could better serve your needs."

49. Contrary to paragraph 20 of the Amended Notice of Application, any contact between IBC and i2iQ, CGI and/or CarProof in June of 2009 had nothing whatsoever to do with concerns about competition from UCDA or its Auto Check product. These allegations are entirely unfounded. On the contrary, IBC's contact with CarProof was intended *for the benefit* of UCDA. After IBC had determined that it could not supply the "dollar value" data to UCDA, IBC contacted CGI (who did have access to dollar value data) to inquire as to whether CGI would be willing to supply UCDA with this information.

50. IBC has supplied CGI and certain of its predecessor companies with ASP data for many years. Since 2006, pursuant to the GISA Agreement, IBC has required the consent of insurers to provide ASP data to CGI.

(ii) IBC Agrees to Provide UCDA with ASP Data and Terminates UCDA's Access to Web Claims Search

51. In May, 2010, representatives of UCDA again approached IBC to request access to “dollar value” information. On May 17, 2010, senior representatives of IBC met with representatives of UCDA to discuss UCDA’s request. Following this meeting, IBC determined that it could provide UCDA with access to the “dollar value” data it sought through ASP data, provided UCDA could obtain the requisite consents from insurers, as required under the GISA Agreement.

52. However, in light of the significant limitations of Web Claims Search, the policy directions recommended by the DSC and approved by the IBC Board, and the new requirements under the *Motor Vehicle Dealers Act, 2002* outlined above, IBC also developed significant concerns that the Web Claims Search application was insufficient and inappropriate as the source input for UCDA’s Auto Check product. IBC determined that UCDA’s use of incomplete data accessible through Web Claims Search in order to generate a vehicle accident history report product such as Auto Check had the real potential to mislead consumers and misrepresent the actual accident history of a given vehicle sold by used car dealers. This potential for misrepresentation spurred concerns of potential liability and/or reputational risk on the part of IBC and its members.

53. Accordingly, on May 26, 2010, Randall Bundus of IBC wrote to UCDA indicating that IBC was terminating UCDA’s Associate Membership with IBC (and, consequently, UCDA’s access to Web Claims Search) in accordance with the terms of the 1998 Access Agreement.

54. However, contrary to UCDA's allegation in paragraph 22 of the Amended Notice of Application, this notice of termination did not end the 12-year relationship between IBC and UCDA. Rather, Mr. Bundus made clear in this letter that, in spite of IBC's termination of UCDA's Associate Membership, IBC was willing to provide UCDA with the ASP data in a flatfile if UCDA were able to obtain the necessary consents from insurers as required under the GISA Agreement, discussed further below.

55. Contrary to statements at paragraphs 29 and 35 of the Beattie Affidavit, IBC provided reasons for the termination of UCDA's access to Web Claims Search in the May 26, 2010 letter and in subsequent correspondence:

- (a) In the May 26, 2011 letter, Mr. Bundus stated that "We are concerned that the information you receive from IBC does not meet the needs of your members as outlined in the revisions to the *Motor Vehicle Dealers Act* effective January 1, 2010."
- (b) By letter dated June 18, 2010 from Mr. Bundus to Neil Campbell of McMillan LLP, counsel to UCDA, Mr. Bundus explained that the estimates of damage costs available through Web Claims Search (which are Web Claims Search's closest substitutes for "dollar value" information) represented only approximately 30% of the total claims volume of IBC's members: "It appears there may have been misunderstandings on the part of UCDA as to the nature and limitations of the information that UCDA has been receiving as an 'ICPB Associate Member'. The information respecting the damage to vehicles comes from IBC's Web Claims Search Database. This database is populated by voluntary submissions of insurers

and it represents something in the neighbourhood of 30% of the automobile insurance claim volume of our members. Approximately 70% of the damaged vehicles are therefore not reported in this database.”

- (c) By letter dated June 28, 2010 from Mr. Bundus to Mr. Campbell, Mr. Bundus stated that “The information provided by IBC to UCDA from the Web Claims Search database is, as mentioned in my June 18, 2010 letter, not a complete list of all collision claims that have occurred. We are surprised that UCDA would continue to find this information useful for the Auto Check product, since a negative finding respecting a VIN does not necessarily mean that the vehicle has not been involved in a collision.” Moreover, Mr. Bundus reiterated the importance of the activities of the DSC in IBC’s decision to terminate UCDA’s access to Web Claims Search: “IBC has, during the past year, undertaken a review of its data strategy to ensure that its incoming and outgoing data sources are in alignment with IBC’s strategies and the needs of our insurer members. The decision to terminate UCDA’s Associate Membership flowed out of the principles coming from that review.” Mr. Bundus also made clear in this letter that “Neither Carfax nor Carproof had any role in the decision to terminate UCDA’s Associate Membership.”

G. IBC Extends UCDA’s Access to Web Claims Search as UCDA Transitions to ASP Data

56. As described in the correspondence listed above, IBC clearly informed UCDA that it would supply UCDA with ASP data if UCDA could secure the consents of the individual

insurance companies, as required under the GISA Agreement. Beginning July 2010, UCDA began the process of acquiring the requisite consents from insurers.

57. As a gesture of good faith, IBC provided significant assistance to UCDA in its transition to ASP data. In particular, in response to UCDA's request, IBC agreed on July 13, 2010 that it would extend UCDA's access to Web Claims Search until November 26, 2010, in order to allow UCDA a reasonable opportunity to obtain the required directions from insurers. This extension of supply of UCDA's access to Web Claims Search was made subject to the following express qualification outlined in an email from Mr. Bundus: "Our concern around possible misrepresentations of the results of searches of the Web Claims Search database remain, so we are making this extension conditional upon your client informing 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."

58. By letter dated October 7, 2010, UCDA informed IBC that it had acquired the directions of 41 insurers, and provided those directions to IBC. The parties engaged in a number of subsequent communications, with a view to resolving various legal and technological issues so that IBC could begin providing ASP data to UCDA prior to November 26, 2010, which was the date until which UCDA's access to Web Claims Search had been extended. On November 22, 2010, the parties entered into an agreement governing the transfer of data from IBC to UCDA. However, when it became apparent that other legal and logistical issues could not be resolved in advance of November 26, 2010, IBC informed UCDA on November 25 – as a further and gratuitous accommodation to UCDA – that it would extend UCDA's access to Web Claims Search until IBC could begin supplying UCDA with ASP data.

59. In addition to extending UCDA's access to Web Claims Search on various occasions, IBC also attempted to expedite UCDA's acquisition of consents from insurers. In particular:

- (a) IBC provided to UCDA on June 28, 2010 a form of insurer direction that was required to be executed by each insurer in order for IBC to forward ASP data to UCDA.
- (b) IBC sent bulletins to its members beginning in July, 2010 to advise that UCDA would likely approach them seeking their consent for IBC to provide ASP data. These bulletins also summarized various legal and logistical issues relating to the provision of ASP data to UCDA. However, IBC made clear in its communications with insurers that "IBC is not in a position to either encourage or discourage insurers from providing the direction to IBC, as IBC cannot be seen as endorsing a particular third party vendors' product."
- (c) Though UCDA had obtained 41 insurer directions in October, 2010, it became apparent to IBC that UCDA was having difficulties in this regard. Accordingly, IBC engaged in good faith efforts to develop a robust agreement to be implemented between UCDA and each insurer. This agreement was modeled on the information management agreement that is being developed for other third parties, and was designed by IBC in an attempt to improve UCDA's ability to secure the consent of a greater number of insurers. After working in consultation with UCDA, this agreement was finalized in February, 2011.

60. On May 16, 2011, IBC commenced supplying ASP data to UCDA in the flatfile format from those insurers who had directed IBC to do so. As a part of that provision, on April 13, 2011, IBC required UCDA to enter into a service provider agreement.

H. Insurers Direct IBC to Cease UCDA's Access to ASP Data and to Web Claims Search

61. However, starting in December, 2010, IBC began to receive directions from certain insurers that IBC was *not* to supply UCDA with those insurers' ASP data.

62. Significantly, many of these same directions also indicated that IBC was to terminate UCDA's access to these insurers' data through the Web Claims Search application. Certain of these directions specified, in particular, that the insurer's data was only to be made available through Web Claims Search to the following users: government institutions, law enforcement agencies, National Insurance Crime Bureau, and insurance companies and their respective agents.

63. In total, eight insurance companies (together with their subsidiaries) directed IBC to cease UCDA's supply of ASP data and its access to Web Claims Search.

64. The impact of these directions was two-fold. First, IBC was unable to provide UCDA with these insurers' ASP data. Given that these insurers collectively comprised a significant share of automobile insurance claims, UCDA has taken the view that the remaining ASP data (from those insurers who had consented to its provision) is insufficient as the source for UCDA's Auto Check product.

65. Second, and critically, in light of these directions, IBC had no choice but to cease UCDA's access to Web Claims Search *altogether*. As discussed above, Web Claims Search is

significantly constrained by antiquated hardware and software. One of the consequent limitations of this antiquated technology is that it does not allow IBC to prevent a particular user (in this case, UCDA) 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. It would be technically and economically prohibitive to modify the Web Claims Search application in order to allow IBC to filter the data through Web Claims Search in this way.

66. Accordingly, if even one insurer directs IBC not to supply access to their data through Web Claims Search to a particular user, the only way IBC can respect the direction of the insurer is to terminate that user's access to Web Claims Search altogether.

I. Provision of ASP Data and Web Claims Search Since UCDA Commenced this Application

67. As indicated above, IBC continues to supply UCDA with ASP data in the flatfile format on a weekly basis, from those insurers who have provided their consent to IBC. However, UCDA has taken the position that, because it has been unable to obtain a sufficient number of consents, the ASP data IBC provides is inadequate as the source for UCDA's Auto Check product.

68. Since UCDA commenced this Application, IBC has been in further contact with the eight insurers who directed IBC not to supply UCDA with their ASP data or with access to their data through Web Claims Search. For the purposes of interim supply arrangements pending resolution of this Application, these insurers have directed IBC to provide UCDA with access to their data through Web Claims Search on an interim basis. The Tribunal issued a consent Order to this effect on October 20, 2011.

69. However, as indicated in a letter of October 7, 2011 from counsel for IBC to counsel for UCDA, “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.” Accordingly, given the technological limitations of Web Claims Search, if any insurer directed IBC to cease supply of their data through Web Claims Search to UCDA, IBC would not be in a position to continue to supply UCDA with access to Web Claims Search.

PART III – GROUNDS ON WHICH THE APPLICATION IS OPPOSED

70. Under s. 75(1) of the *Competition Act*, the Tribunal may order a supplier to accept a person as a customer on usual trade terms if the person satisfies the Tribunal that it has met *all* of the following requirements:

(a) the 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.

71. IBC opposes UCDA’s Application on the following grounds, each of which will be discussed in greater detail below:

- (a) IBC is simply the custodian of insurers' data and is bound by the directions of the insurers who own the data accessible through Web Claims Search. Accordingly, when insurers direct that IBC cannot supply their data to UCDA, such data can no longer be considered to be in ample supply. Similarly, UCDA is unable to meet the usual trade terms for access to Web Claims Search, since those terms necessarily require that the insurers – as owners of the data – do not object to the provision of access to the Web Claims Search application. (paragraphs 75(1)(c) and (d) of the Act).
- (b) As a result of IBC's internal concerns and the mandate of its Board of Directors following the report of the DSC, the limitations of Web Claims Search, and the new requirements under the *Motor Vehicle Dealers Act, 2002*, IBC developed serious concerns about the use of the data accessible through Web Claims Search as the source for UCDA's Auto Check product. IBC had legitimate and considered business reasons for terminating UCDA's access on this basis. UCDA's inability to access Web Claims Search does not arise because of insufficient competition in the market, but rather as a result of IBC's objectively justifiable business decision (paragraph 75(1)(b)).
- (c) ASP data in a flatfile format would serve as a complete substitute to the data accessible through Web Claims Search, and is in fact a superior product. ASP data is available to UCDA, if UCDA can obtain the requisite consents from insurers. Accordingly, UCDA's inability to obtain adequate supplies of vehicle accident claims history data is due to its inability to obtain consents from insurers

and *not* from insufficient competition in the market. In any case, UCDA could always acquire the data it seeks from CarProof or Carfax, two suppliers of vehicle accident history data (paragraphs 75(1)(a) and (b)).

- (d) IBC's termination of UCDA's access to Web Claims Search has no adverse effect on competition in a market. UCDA's Auto Check product serves a separate downstream product market than the two other suppliers of vehicle accident history reports, CarProof and Carfax. Auto Check reports cost five times less than the reports of these two other suppliers (paragraph 75(1)(e)).
- (e) IBC denies that UCDA has been substantially affected in its business by its inability to obtain access to Web Claims Search, and puts UCDA to the strict proof thereof (paragraph 75(1)(a)).

A. IBC is the Custodian – and Not the Owner – of the Data UCDA Seeks to Access

72. As set out above, IBC does not own the data that UCDA seeks to access through Web Claims Search. Instead, these data are owned by insurers who provide them to IBC for consolidation and management purposes. Accordingly, IBC is not at liberty to provide third parties with access to these data if insurers specifically direct IBC not to do so. While IBC does not dispute that it owns and operates the Web Claims Search application itself, this fact is irrelevant to the question of ownership of the underlying data.

73. That IBC is not the owner of these data is evidenced in the many documents specifically referenced above, including DSC documents and the GISA Agreement, which were

created prior to the events giving rise to this Application. One such document specifically states that “insurance data is a valuable asset owned by each insurer and will be treated accordingly.”

74. Moreover, by its conduct in seeking insurers’ consents and acknowledging to IBC the need for them, UCDA accepted that the consent of each insurer was required for the provision of ASP data in the flatfile format. Given that ASP data also comprise the vast majority the data available through Web Claims Search (as described above), there is no reason to believe that insurers cannot also determine who should have access to their ASP data in that format.

75. Finally, UCDA’s suggestion at paragraph 23 of the Amended Notice of Application that insurer consents “have never been required to use the Web Claims Search application” over UCDA’s 12-year business relationship with IBC is irrelevant to this Application. The issue of insurer directions regarding access by particular users of Web Claims Search had simply never arisen prior to 2010. However, this does not mean that insurer consent is not a usual trade term for the purpose of access agreements between UCDA and IBC. Insurer consents are clearly necessary and this fact has been acknowledged by UCDA, IBC, insurers and insurance regulatory bodies.

76. As a result, an order of the Tribunal compelling IBC to supply UCDA with access to Web Claims Search will directly affect the property and privacy rights of the insurers, who are the owners of the data and who have not been named as parties to this Application. In addition, complying with such an order will place IBC in the position of having to violate established principles of privacy and property law and having to contravene the directions of the owners of the data.

77. Moreover, the fact that insurers own the data UCDA seeks – and have directed IBC not to supply it to UCDA – has significant impacts on at least two elements under subsection 75(1), as discussed below: (i) the data UCDA seeks to access is not in “ample supply” as required under paragraph 75(1)(a); and (ii) UCDA cannot meet IBC’s “usual trade terms” as required under paragraph 75(1)(b).

(i) The Data UCDA Seeks to Access is Not in Ample Supply

78. Because the owners of the data have expressly directed IBC *not* to supply their data to UCDA, there cannot be an ample supply of the product as required under subparagraph 75(1)(d) of the Act. The data in question can only be considered to be in ample supply if the owners of such data do not object to their provision to third parties. As the Tribunal held in *Canada (Competition Act, Director of Investigation and Research) v. Warner Music Canada Ltd.*, Trib. Dec. No. CT9703/22, a product cannot be in ample supply when its owners have a legal right to withhold it. Moreover, as this Tribunal recognized in *Quinlan’s of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28, 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 for the purposes of paragraph 75(1)(d).

79. Put another way, and based on the reasons of the Federal Court of Appeal in the case of *Nadeau Poultry Farm Limited v. Groupe Westco Inc. (et al)*, 2011 FCA 188, for a product to be in ample supply, the supplier must have the capacity to increase production in a timely way to meet increases in demand for the product. Here, because of the legal rights of the owners of the data to withhold it from dissemination by IBC, IBC does not have such capacity to increase production of Web Claims Search.

(ii) UCDA Cannot Meet IBC's "Usual Trade Terms" for Access to Web Claims Search

80. Similarly, UCDA cannot claim to be able to meet the usual trade terms of IBC with respect to access to Web Claims Search. Such trade terms necessarily require that insurers have not directed that their data be withheld from a particular user. In this case, because insurers have directed that IBC not provide access to their data through Web Claims Search, UCDA is simply unable to meet IBC's usual trade terms regarding provision of access to the application.

B. IBC had Objectively Justifiable Business Reasons for Terminating UCDA's Access to Web Claims Search

81. IBC made its decision to terminate UCDA's access to Web Claims Search before it received any directions from insurers in this regard.

82. This termination was not *because of* insufficient competition among suppliers of a product. Rather, IBC's termination of UCDA's access to Web Claims Search arose *because of* IBC's objectively justifiable business and reputational, policy and legal concerns.

83. As described above, Web Claims Search was not designed to be a source of comprehensive vehicle accident history information. Rather, it is an investigative tool for underwriting activities and for fraud detection and prevention. UCDA was the only third party commercial user of Web Claims Search, and the only user who generated vehicle accident history reports on the basis of the data accessible through Web Claims Search.

84. In 2010, shortly before informing UCDA that its access to Web Claims Search would be terminated, IBC determined that the use of Web Claims Search for purposes of generating UCDA's Auto Check product raised a number of significant business concerns and liability issues on the part of IBC and its members. In particular, given the real possibility of

false negatives as a result of Web Claims Search's significant design and technological limitations, and the new requirements under the *Motor Vehicle Dealers Act, 2002*, IBC determined that it was not in the interests of IBC, its members or consumers to continue supplying UCDA with access to Web Claims Search. IBC communicated these business reasons to UCDA in various pieces of correspondence contemporaneously with IBC's decision, as described above.

85. Moreover, IBC terminated UCDA's access to Web Claims Search in accordance with the terms of the 1998 Agreement. The two sophisticated commercial parties to that contract agreed under section 4 that the contract could be terminated without reasons by either party with 60 days written notice. IBC terminated the contract with the requisite notice. Though not required under the terms of the agreement, when IBC exercised its contractual right to terminate, it did so for legitimate business reasons which were communicated to UCDA.

86. The fact that IBC had supplied UCDA with access to Web Claims Search for 12 years before finally terminating UCDA's access is irrelevant to this Application. Business practices and relationships must be allowed to evolve and end over time. The alternative – which UCDA would have this Tribunal order – is to preserve forever a business relationship simply because it has existed for a period of time. As described above, IBC had become increasingly aware of and sensitive to issues relating to the use of insurer data by third parties. The report of the DSC, endorsed by the IBC Board of Directors, specifically addressed these concerns. IBC determined that the purposes for which UCDA accessed insurer data through Web Claims Search were no longer consistent with IBC's data strategy going forward. This is an objectively justifiable decision that IBC must be entitled to make in its own independent business judgment.

87. Compelling a supplier to perpetually supply a sole remaining commercial user with a product that the user will incorporate to create a product that contains potentially misleading and inaccurate information that may be passed on to potential purchasers of used vehicles – in the face of compelling commercial, reputational, policy, and legal concerns of the supplier – cannot be in the public interest or contribute to competition in a market. Such an order would effectively stand section 75 on its head, and have adverse implications for suppliers in general and for future commercial relationships between suppliers and customers.

88. Finally, even if this Tribunal finds that IBC is the owner of the data (which is demonstrably not the case and which IBC denies), IBC's decision to follow the directions of its members is *itself* an objectively justifiable business decision sufficient to avoid an Order under subsection 75(1) of the Act. As a national trade association, IBC has a critical business interest in respecting and complying with the wishes and instructions of its members. Similarly, if IBC were to disregard these explicit directions, the damage to its relationships with its members would be serious and significant. In these circumstances, IBC's decision to respect the directions of its members is entirely legitimate.

C. ASP Data is a Substitute for Web Claims Search

89. As indicated above, ASP data provide all of the benefits and suffer from none of the considerable weaknesses of Web Claims Search. UCDA agreed to undertake the upgrade from Web Claims Search to ASP data, and did in fact pursue insurer consents and make the technical arrangements to effect this transition. IBC provided considerable assistance to UCDA in this regard.

90. When UCDA failed in its attempt to secure consents from insurers, it brought this Application to the Tribunal.

91. As discussed above, IBC had absolutely no role in the insurers' decisions to grant or refuse consent to provide ASP data to UCDA. It is because of UCDA's failure to obtain the requisite consents for ASP data that it has been unable to obtain an adequate supply of vehicle accident history data, and not from any anti-competitive conduct of IBC or a lack of competition in a market.

92. Moreover, UCDA could obtain vehicle accident history data from CarProof or Carfax. As UCDA indicates in paragraph 18 of its Amended Notice of Application, CarProof approached UCDA in June of 2009 and offered to supply vehicle accident history reports to UCDA's membership. Such reports are based on ASP data and are substitutes and superior products to those generated by UCDA using Web Claims Search. Accordingly, UCDA cannot demonstrate an inability to obtain adequate supplies of vehicle accident claims history data anywhere in a market on usual trade terms, as required under paragraph 75(1)(a).

D. IBC's Termination of UCDA's Supply to Web Claims Search Will have No Adverse Effect on Competition in the Market

93. If IBC's termination of UCDA's access to Web Claims Search eliminates Auto Check from the market, then this elimination will have no adverse effect on competition, since Auto Check services a separate market from similar suppliers of vehicle accident history reports. There are two separate *downstream* markets at issue in this case, serviced by two separate types of products: (a) the market for UCDA's inexpensive Auto Check product based on access by UCDA to IBC's Web Claims Search data ("Market A"), and (b) the market for CarProof and

Carfax's superior products based on ASP flatfile data ("Market B"). UCDA, with its Auto Check product, operates alone as the sole participant in Market A. There are a number of critical differences between these two products:

- (a) Auto Check uses data derived from Web Claims Search. As described above, this data is incomplete and gives rise to the significant risk of false negative results and the attendant risk of misleading information passing through to consumers;
- (b) As the Tribunal noted in *Director of Investigation and Research v. Chrysler Canada Ltd.*, the starting point for the definition of product is the buyer's customers. The only potential customers of Auto Check are the approximately 4,500 members of UCDA. By contrast, CarProof and Carfax are available to every individual in Canada;
- (c) CarProof and Carfax provide the dollar value of claims, while Auto Check does not. This difference is especially important given the January 1, 2010 changes under the *Motor Vehicle Dealers Act, 2002*, which require motor vehicle dealers to disclose to potential purchasers whether a vehicle has ever suffered damage in which the total repair costs exceed \$3,000; and
- (d) An Auto Check reports costs \$7.00, while CarProof and Carfax reports cost five times more, at \$34.95 and USD\$34.99 each, respectively.

94. In effect, UCDA has created Market A in relation to the 4,500 used car dealers comprising its membership. There is no reason to believe that CarProof and Carfax will raise the prices of their products if UCDA ceases to provide its Auto Check product, since Auto Check

clearly has no price constraining effect on these products. CarProof and Carfax will continue to compete against one another in Market B. The elimination of UCDA's Auto Check product will have no impact on their businesses or on competition in Market B.

E. The Tribunal Should Exercise its Discretion Not to Order IBC to Supply Access to Web Claims Search

95. As IBC has described in this response, the Web Claims Search application was not designed to be used as a source of comprehensive vehicle accident history information, and has significant limitations when used for this purpose. The effect of these limitations is that there is a risk that potential purchasers of used vehicles may be provided with potentially misleading and inaccurate information by the used car dealers who purchase and provide Auto Check reports. IBC has indicated its proper commercial, reputational, policy, and legal bases for the termination of UCDA's access to Web Claims Search. These objectively justifiable business reasons should not be lightly disregarded.

96. Further, such an order would have adverse implications for suppliers and for commercial relationships generally in a distribution chain. As noted above, compelling a supplier to provide a sole remaining commercial user with perpetual access to a product that the user will incorporate to create a product that contains potentially misleading and inaccurate information that may be passed on to potential purchasers of used vehicles - against the legitimate concerns and best business judgment of the supplier - would neither serve the interests of competition in a market nor the public interest generally.

97. Moreover, such a result would distort the objectives underlying section 75 of the *Act*, could chill legitimate commercial relationships between suppliers and customers, and could

invite inclusion of overly restrictive and limiting terms into commercial agreements. The spectre of suppliers facing the potential unwinding of objectively justifiable business decisions in the face of potential litigation by customers who demand perpetual access to obsolete product lines will hardly foster the development of competitive markets.

98. No part of IBC's decision to terminate UCDA's access to Web Claims Search was motivated by competitive concerns. IBC is simply an intermediary between the insurers and UCDA, and has no competitive stake in the success or failure of UCDA or its Auto Check product.

99. For these reasons, should the Tribunal nonetheless find that UCDA has fulfilled the criteria of section 75 of the Act, IBC submits that the Tribunal should properly exercise its discretion to refuse the order sought in this case.

PART IV – ECONOMIC THEORY OF THE CASE

100. IBC's economic theory of the case is attached as Schedule "A".

PART V – PROCEDURAL MATTERS

101. IBC requests that this proceeding be heard in English and that documents be filed electronically.

PART VI – RELIEF SOUGHT

102. IBC requests that UCDA's Application be dismissed with costs.

October 28, 2011

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SCHEDULE “A” – ECONOMIC THEORY OF THE CASE

103. IBC does not compete with UCDA in any market.
104. IBC does not have any competitive stake in the success or failure of UCDA’s Auto Check product, or any economic interest in any other suppliers of vehicle accident history reports.
105. IBC discontinued the supply of Web Claims Search because of an objectively justifiable business decision and as a result of directions received from the owners of the data which is accessible through Web Claims Search.
106. UCDA’s Auto Check product does not compete against the products of CarProof and Carfax. 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).
107. UCDA’s Auto Check product serves used car dealers in Ontario, a separate downstream product market (“Market A”) than the downstream product market served by CarProof and CarFax (“Market B”).
108. UCDA is the only supplier in Market A.
109. IBC’s termination of UCDA’s access to Web Claims Search does not create, preserve or enhance the market power of CarProof or Carfax in Market B.
110. Accordingly, IBC’s termination of UCDA’s access to Web Claims Search does not have an adverse effect on competition in a market.

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

**RESPONSE OF INSURANCE BUREAU OF CANADA
TO APPLICATION UNDER SECTION 75 OF THE
*COMPETITION ACT***

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