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Insurance Bureau must supply data pending hearing

by [Michael Osborne](#), Affleck Greene McMurtry LLP

The Insurance Bureau of Canada must continue to supply the Used Car Dealers Association of Ontario with claims data pending the hearing of UCDA's application for a permanent order that IBC continue to supply this data, the Competition Tribunal ruled on March 16.

UCDA is a trade association representing 4,500 Ontario car dealers. Its Auto Check service provides dealers with information about the accident history of used vehicles. UCDA needs claims data from IBC to offer Auto Check. However, in June 2011, IBC cut UCDA off. UCDA applied to the Competition Tribunal for leave to bring a private application under the *Competition Act's* refusal to deal provisions to force IBC to continue to supply this data permanently. The Tribunal granted leave on September 9.

UCDA also sought an interim order that IBC continue to supply claims data pending the outcome of its application. After negotiations, the two parties agreed, and an interim supply order was made on October 20.

Two weeks later, however, one of IBC's members, State Farm, directed IBC to cease providing its claims data to UCDA, citing internal policies that forbid sharing this data with third parties.

IBC then applied under section 106 of the *Competition Act* to rescind the consent interim order. The Tribunal ruled that this was the wrong procedure; IBC should have brought a motion instead. IBC then brought a motion.

According to the *Competition Act*, applications for interim relief are decided following the same test as that used by the courts in deciding whether to grant interim injunctions. Accordingly, when deciding whether to vary or rescind an interim supply order, the principles applied by the courts when considering motions to vary or rescind an injunction ought to be applied, Phelan J., sitting as a judicial member of the Tribunal, ruled.

By **Michael Osborne**
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The test is two-fold: first, are there new facts or changed circumstances that justify re-opening the original interim order? If there are, the second step is to re-evaluate whether interim relief should be granted using the traditional test.

Here, Phelan J. ruled, there was no change of circumstances; rather, State Farm, having failed to object before the interim order was agreed to, changed its mind and chose to enforce its policy selectively. Indeed, Phelan J. noted, State Farm continued to make this same data to a competitor of UCDA, despite its policy against providing claims data to third parties. Phelan J. found this fishy: "The timing of State Farm's new-found objection to UCDA's data access, two weeks after the interim supply order, seems unduly convenient in frustrating the Interim Supply Order." That State Farm allowed UCDA's competitor access to this data "raises more questions than answers".

IBC claimed that its consent to the interim order was conditional on continued consent of its members, yet IBC did not put a term to this effect in its agreement with UCDA nor disclose it to the Tribunal, Phelan J. noted. IBC's consent was unconditional. Phelan J. concluded:

"In these circumstances, a change of mind is not a change of circumstance which should ground a rescission of the Interim Supply Order. This is particularly so where an industry association purports to act on behalf on and bind itself and, as a consequence, its members. It would make dealing with associations difficult if the Tribunal's orders were not as binding on the association's members as on the association itself."

This was enough to dispose of the motion. However, Phelan J. went on to consider whether the interim order would still be justified. He held that it would be. UCDA's application raised a serious issue. UCDA would suffer irreparable harm if the order were not continued. In the balancing exercise that is the final step in the analysis, the irreparable harm that UCDA would suffer outweighed the speculative issue of damage to the relationship between IBC and State Farm.

This decision has clear implications for parties entering into consent interim orders in the Tribunal: if the parties have in contemplation circumstances that would obviate their consent, they must include them in the agreement that gives rise to the order, and ideally in the order itself.

Phelan J.'s comment that IBC was binding its members is potentially troubling, however. It suggests that the Tribunal considers that IBC's members are all bound by the order, such that if they stopped providing

the data to IBC, they would be in contempt. In the circumstances, this may be appropriate, given that IBC had consulted with its members before agreeing to the interim order. Nevertheless, IBC's members are not parties to the Tribunal proceedings. Normally trade associations are not agents for their members. Moreover, in *Canadian Standard Travel Agent Registry v. International Air Transport Association*, the Tribunal implicitly rejected the notion that a trade association could act in a representative capacity on behalf of its members in bringing proceedings. In that case, the Tribunal rejected CSTAR's application to bring a refusal to deal application on behalf of its members to force IATA members to continue to accept paper tickets. The Tribunal found that CSTAR was not itself directly affected in its business; its members, who were not parties to the proceeding, were the ones affected. ([See article.](#))

[UCDA v. IBC \(Competition Bureau website\)](#)

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