



Reference: *Construx Engineering Corporation v. General Motors of Canada*, 2005
Comp. Trib. 21
File no.: CT-2005-004
Registry Document no.: 0007a

IN THE MATTER OF the *Competition Act* R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by Construx Engineering Corporation for an order pursuant to section 103.1 granting leave to make application under sections 75 and 77 of the *Competition Act*;

AND IN THE MATTER OF an application by Construx Engineering Corporation for an interim order pursuant to section 104 of the *Competition Act*.

BETWEEN:

Construx Engineering Corporation
(applicant)

And

General Motors of Canada Ltd
(respondent)



Decided on the basis of the written record.
Member: Simpson J. (Chairman)
Date of reasons and order: Monday June 13, 2005
Signed by: Simpson J.

**REASONS AND ORDER IN LEAVE APPLICATION UNDER SECTIONS 75
AND 77**

[1] This application, pursuant to section 103.1 of the Competition Act, R.S.C. 195, c. C-34, as amended, (the "Act") is for leave to apply to the Competition Tribunal (the "Tribunal") for orders under section 75 of the Act - refusal to deal - and section 77 - market restriction. Construx Engineering Corporation ("Construx") alleges that General Motors of Canada Ltd. ("GM") is refusing to supply it with new GM motor vehicles (the "Vehicles"). Construx also alleges that this practice amounts to market restriction.

[2] GM acknowledges that its policy is to prohibit authorized GM dealers in Canada from selling Vehicles to persons or businesses who will resell or export. This policy is clearly stated in the agreements between GM and its authorized dealers. Those agreements also provide for various enforcement mechanisms which are designed to ensure that dealers will respect the prohibition. These include loss of rebates and allowances, loss of warranty coverage for the vehicle sold, etc. GM also acknowledges its policy of prohibiting the import of Vehicles manufactured outside Canada by persons other than its authorized dealers. For ease of reference, these policies will collectively be described as the "Policies".

[3] Construx filed its application for leave on April 25, 2005. The Commissioner certified on May 3, 2005, pursuant to subsection 103.1(3), that the matter was not the subject of an inquiry and had not been the subject of an inquiry which was discontinued because of a settlement. On May 5, 2005, the Tribunal issued a notice stating that it could hear the application for leave. GM filed its response on May 20, 2005. Counsel for Construx inquired about the possibility of filing a reply, and was given 7 days to do so. No reply was filed.

I. BACKGROUND

[4] On leave applications, an applicant must provide the Tribunal with sufficient information about its business to allow the Tribunal to grant leave. The affidavit of Construx' president, affirmed on April 1 I, 2005, discloses that:

- (i) Construx describes itself as a "wholesale dealer and broker of transportation products, including automobiles". Historically, once Construx purchased a transportation product, it either exported it to a buyer outside Canada or resold it to buyers in Canada. Construx' president states that, to the best of his knowledge, those buyers "generally" exported the product.
- (ii) In the course of its business, Construx has purchased Vehicles primarily from authorized GM dealers in Ontario. However, Construx has also acquired Vehicles from other suppliers which had previously purchased them from authorized Ontario GM dealers.
- (iii) Construx states that it cannot purchase Vehicles from authorized GM dealers because of GM's Policies which prohibit the export of Vehicles from Canada and the resale of Vehicles in Canada. As well, Construx would like to begin importing Vehicles but this option is also precluded by GM's Policies.

- (iv) Construx alleges that the Policies have had a "devastating" effect. Between 1997 and 2003, Construx' Vehicle sales figure was \$6.8M, representing 38% of its total sales. Construx says that in 2003, it sold 53 Vehicles, which represented 67% of all its new motor vehicle sales in 2003. However, in 2004, by contrast, Construx was unable to acquire any Vehicles.
- (v) Construx states that GM's efforts to prevent the export of Vehicles from Canada has meant that Construx has been unable to fill a number of purchase orders described as orders for 120 sport utility vehicles and other similar vehicles and 200 Chevrolet Avalanche and heavy duty pickup trucks, for a total loss of \$490,000.
- (vi) Construx also claims that if allowed to do so, authorized GM dealers would place orders with Construx to purchase Vehicles manufactured outside Canada. Since Construx cannot import Vehicles from outside Canada, it says that it is also losing those prospective sales. Also because of the import prohibition, Construx was unable in 2003 to satisfy orders of 15 Chevrolet SSRs for a total loss of \$75,000.

[5] The Tribunal notes the following serious deficiencies in the evidence presented by Construx:

- (i) There is no evidence, except in relation to the Vehicles, concerning either the nature of or the volume of the transportation products Construx sells.
- (ii) There is no evidence setting out Construx' annual sales figures for the Vehicles in the period from 1997 to 2003.
- (iii) There is no evidence of Construx' total annual sales of transportation products in those years.
- (iv) There is no evidence about the geographic market, except that Construx primarily purchased from authorized GM dealers in Ontario, and resold mainly for export.
- (v) There is no evidence about how many Vehicles sold by Construx remained in Canada and how many were exported.
- (vi) There is no evidence about what constitutes the product market. In particular, no attempt is made to show that the Vehicles constitute a separate product.
- (vii) Finally, there is no evidence that the Policies have led to a substantial lessening of competition.

II. DISCUSSION

[6] The starting point in the consideration of a leave application is subsection 103.1(7) which states:

103.1

(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

103.1

(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement affecté dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

[7] The threshold in a leave application is low, but there must be some evidence presented that would, if the facts were proven, justify an order requiring supply or prohibiting market restriction (*Symbol Technologies Canada ULC v. Barcode Systems Inc.* 2004 FCA 339). In that case, the Federal Court of Appeal confirmed the test for leave under section 103.1 first enunciated by Madam Justice Dawson in *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41 at paragraph 14:

Accordingly, on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.

[8] In the present case, the Tribunal need not consider whether Construx is "directly" affected, because even if it is assumed that it is directly affected by GM's Policies, there is no evidence that it is "substantially" affected. As noted in the list of deficiencies above, Construx' evidence does not provide sufficient information about its business and the impact of the Policies on its business. Construx claims that the sale of Vehicles represented 38% of its total sales from 1997 to 2003, but given the absence of a yearly breakdown, the Tribunal cannot assess the significance of those sales. Construx claims that the sales of Vehicles in 2003 represented 67% of the sales of new motor vehicles, but since the business of Construx is "transportation products" and no total sales figure has been provided, the Tribunal cannot know what this means for the whole enterprise. There is therefore no reasonable basis for the Tribunal to believe that Construx has been substantially affected as required by subsection 103.1(7).

[9] The Tribunal therefore concludes that the application for leave is not supported by "sufficient credible evidence" to give it reason to believe that the applicant is substantially affected in its business. That being so, it is not necessary to consider sections 75 and 77 of the Act, nor the submissions made by GM.

III. ORDER

[10] For these Reasons, this application is hereby dismissed without costs.

DATED at Toronto, this 13th da y of June, 2005,

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson

REPRESENTATIVES:

For the applicant:

Construx Engineering Corporation

Donald S. Affleck, Q.C.
Angela Yadav

For the respondent:

General Motors of Canada Ltd.

Peter Franklyn
Mahmud Jamal
Steve Sansom