

COMPETITION TRIBUNAL

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

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

GENERAL MOTORS OF CANADA LIMITED

Respondent

**REPRESENTATIONS OF
GENERAL MOTORS OF CANADA LIMITED
IN RESPONSE TO APPLICATION FOR LEAVE
PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT***

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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**REPRESENTATIONS OF GENERAL MOTORS OF CANADA LIMITED
IN RESPONSE TO APPLICATION FOR LEAVE PURSUANT TO
SECTION 103.1 OF THE *COMPETITION ACT***

I. OVERVIEW

1. General Motors of Canada Limited (“GM Canada”) opposes the application of Construx Engineering Corporation (“Construx”) for leave to apply for orders under ss. 75 and 77 of the *Competition Act*. Construx and its President, Geoffrey Leigh Zaldin, have failed to file sufficient credible evidence establishing that they are directly and substantially affected in their business by any conduct of GM Canada, or that GM Canada has engaged in a refusal to deal or a market restriction that could be subject to an order of the Tribunal.

2. Construx and Zaldin have merely made bald allegations of lost opportunity to fill a number of “purchase orders” for GM vehicles, yet have failed to put into evidence even a single documented purchase order from even a single documented customer. This is the sort of “speculative and undocumented” assertion which this Tribunal has recently found is insufficient to support a leave application under s. 103.1 of the *Competition Act*. This is a sufficient basis to dismiss this application.

3. Further, Construx and Zaldin have failed to file sufficient credible evidence to support the claim that GM Canada has engaged in a refusal to deal (s. 75) or a market restriction (s. 77) that could be subject to an order of the Tribunal.

4. With respect to s. 75, the evidence filed by Construx and Zaldin shows that, by their own admission, Construx and Zaldin are unwilling to meet GM Canada’s usual trade terms. Construx and Zaldin have failed to file sufficient credible evidence that their inability to obtain vehicles is due to insufficient competition among suppliers; on the contrary, it is due to their acknowledged unwillingness to meet GM Canada’s usual trade terms. Further, Construx and Zaldin have failed to file sufficient credible evidence that GM Canada’s distribution practices are having or are likely to have an adverse effect on competition; on the contrary, GM Canada’s authorized dealer network is an efficient, pro-competitive distribution system and the restrictions imposed by GM Canada on unauthorized export and resale of new GM vehicles are reasonable and justified. The inability of Construx and Zaldin to obtain vehicles for the admitted purpose of exporting them from Canada cannot, by definition, have an adverse effect on competition in Canada.

5. With respect to s. 77, the restrictions imposed by GM Canada on unauthorized and illicit export, and resale for export, of new GM vehicles are not a market restriction for the purpose of s. 77. These export restrictions have no impact in any “defined market” in Canada, and furthermore are not likely to substantially lessen competition in relation to any product in Canada.

6. The Tribunal should exercise its discretion to refuse to grant leave because the complaint of Construx and Zaldin has nothing to do with maintaining or encouraging competition in Canada, but rather is a private dispute about whether Construx and Zaldin should be allowed to engage in the unauthorized and illicit export of GM vehicles.

7. For these reasons and the additional reasons set out below, this application should be dismissed.

II. BACKGROUND FACTS

A. GENERAL MOTORS AND ITS NETWORK OF AUTHORIZED DISTRIBUTORS AND RETAIL DEALERS

8. GM Canada is a corporation incorporated under the laws of Canada with its head office in Oshawa, Ontario. GM Canada is a wholly-owned subsidiary of General Motors Corporation, a manufacturer of vehicles incorporated under the laws of the state of Delaware with its head office in Detroit, Michigan. (Affidavit of Paul Risebrough, sworn May 19, 2005 (“Risebrough Affidavit”), para. 2)

9. Substantially all the automotive-related products manufactured by GM Canada and its affiliates (collectively, “GM”) are marketed through a network of authorized distributors and retail dealers in Canada and elsewhere. As of December 31, 2004, there were approximately 780 authorized GM vehicle dealers in Canada. The GM Canada authorized dealer network employs approximately 34,000 people and provides coast-to-coast service to GM customers, including roadside assistance, warranty repairs, recall and safety adjustments and other maintenance. Among other things, GM Canada’s authorized dealers are required to provide quality service to owners of GM vehicles regardless of where in Canada the vehicles were purchased. GM uses sales of GM vehicles through the authorized dealer network to help fund the cost of maintaining adequate service and parts organizations in remote locations, in order to give GM Canada

customers the ability to obtain emergency service throughout Canada when required. (Risebrough Affidavit, para. 3)

10. The viability of GM Canada's authorized dealer network is jeopardized by unauthorized distributors. Unauthorized distributors sell GM vehicles by "free riding" on the investments by GM Canada and its authorized dealers in the GM brand and the GM Canada authorized dealer network, without providing the pre- and post-sale service or meeting the standards of excellence and technical expertise that GM Canada requires its authorized GM dealers to provide to GM's customers. In 2004, the GM Canada dealer network invested over \$26 million in sales and service training. In addition, the GM Canada dealer network invests in special tools, information technology systems, and facilities. (Risebrough Affidavit, para. 4)

11. In order to maintain the viability of its authorized dealer networks in Canada and in other countries, GM has had in place since 1958 a policy of not allocating vehicles to domestic GM authorized dealers for export shipment. GM Canada requires its authorized GM dealers to abide by GM Canada's Dealer Sales and Service Agreement (the "Dealer Agreement"), which includes provisions protecting the viability and integrity of the dealer distribution system and the GM brand by restricting the unauthorized export and resale of new GM vehicles. Pursuant to the Dealer Agreement, GM Canada authorized dealers are not authorized to directly or indirectly sell new GM vehicles for resale or primary use outside Canada. In order not to discourage legitimate resale activity and cross-border movement of vehicles by legitimate customers who in good faith purchased new GM vehicles for use in Canada but who chose to resell them at a later date, GM Canada imposes no restrictions on the export or resale of vehicles over 6 months old which have been driven more than 12,000 kilometres. (Risebrough Affidavit, paras. 5-6 and Exhibit "A")

12. GM Canada's authorized dealers require volume customers to execute an Enrollment Form for Fleet Customers (referred to as a Fleet Account Number or "FAN" agreement). Fleet customers receive special discounts to encourage volume purchases. By executing the FAN agreement, the customer certifies that no motor vehicles ordered pursuant to the FAN agreement are being or will be purchased or leased, directly or indirectly, for export, sale or use outside of Canada, or for resale within Canada. In return, the fleet customer benefits from a special volume discount. (Risebrough Affidavit, para. 7 and Exhibit "B")

B. CONSTRUX, ZALDIN AND THEIR ILLICIT EXPORT ACTIVITY

13. Construx is a corporation controlled by Geoffrey Leigh Zaldin, the President and directing mind of Construx. Construx and several other corporations controlled by Mr. Zaldin have at various times since 1998 engaged in or attempted to engage in the unauthorized and illicit export of GM Canada vehicles designed for sale and use in Canada, and in the unauthorized and illicit sale of GM vehicles to buyers in Canada for the purpose of exporting such vehicles. Moreover, Zaldin has, directly or through his companies, improperly obtained a benefit from GM Canada in the form of fleet discounts. (Risebrough Affidavit, para. 8)

14. Construx and an authorized GM Canada dealership, Leggat Chevrolet Oldsmobile Ltd., executed a FAN agreement (including the no-export commitment) on October 5, 1998. Mr. Zaldin signed the agreement on behalf of Construx. Construx subsequently placed an order for seven Chevrolet Astro vans with specifications making the vans suitable for export to Asia. GM Canada investigated and found no evidence that Construx was a tenant of the building at the address provided by Construx on the FAN agreement. Following this investigation, GM Canada exercised its right to revoke Construx's fleet customer privileges (including the fleet discounts) on October 27, 1998, on the basis of this information GM Canada had discovered (rather than on the basis that Construx was engaged in unauthorized export activity, which GM Canada did not discover until later). (Risebrough Affidavit, paras. 9-10 and Exhibit "C")

15. GM Canada has subsequently received at least four other FAN agreements which appear to have been executed by Mr. Geoffrey Leigh Zaldin on behalf of several different companies which are apparently (or are believed by GM Canada to be) controlled by him (as set out below), and which GM Canada believes were used in an attempt to deceive and mislead GM Canada and its authorized dealers and conceal the fact that these entities were being used for the purpose of engaging in unauthorized and illicit export of GM vehicles from Canada:

- (i) On June 7, 1999, a FAN Agreement was executed on behalf of Canadian Computer Recyclers Inc. ("Computer Recyclers"). Following an investigation by its dealer audit department, GM Canada sent a letter to Computer Recyclers at the address given on the FAN Agreement advising that GM Canada suspected the company of engaging in unauthorized export activity and that it would be placed on GM Canada's list of

suspected exporters if a response was not received within 30 days. The letter was returned by Canada Post with an indication that no record of the company was found.

- (ii) On September 27, 1999, a FAN Agreement was executed on behalf of G&C Marketing Services Inc. ("G&C"). GM Canada terminated the account when it discovered that the phone number given was inactive, and reinstated it when a new phone number was provided. GM Canada terminated the account again in February 2001 when a letter sent by GM Canada to the address on the FAN Agreement was returned to GM Canada as undeliverable, and reinstated it in February 2002 when a new address was provided.
- (iii) On October 18, 1999, a FAN Agreement was executed on behalf of Niagara Tours Inc. ("Niagara Tours"). GM Canada terminated the account in January 2001 when it determined that the phone number on the FAN Agreement was no longer in service and directory assistance had no listing for the company.
- (iv) On May 30, 2002, a FAN Agreement was executed on behalf of The Classic Car Store Inc. ("Classic Car"). In September 2002, GM Canada's dealer audit department determined that there was reason to believe Classic Car was engaged in unauthorized export activity. GM Canada terminated the FAN Agreement in February, 2003. (Risebrough Affidavit, para. 11 and Exhibit "D")

16. In November 2002, Classic Car (whose President is Geoffrey Leigh Zaldin) commenced an action against GM Canada in the Ontario Superior Court of Justice. As a result of this action, GM Canada commenced an investigation and determined that there was a connection between Construx, Computer Recyclers, G&C, Niagara Tours and Classic Car. The handwriting on the FAN Agreements was similar and some addresses, telephone and fax numbers were identical. The contact names (Geoffrey Zaldin for Construx, Geoffrey Leigh for Computer Recyclers, Geoffrey Cohen for G&C, Leigh Zaldin for Niagara Tours and Geoffrey Zaldin for Classic Car) were also similar or identical. The Corporation Profile Report maintained by the Ontario

Ministry of Consumer and Business Services lists 149 Dolomite Drive in Toronto as the registered office address of each of the five companies. Geoffrey Zaldin or Geoffrey Leigh Zaldin is listed as the administrator, an officer and/or a director of Construx, Computer Recyclers, G&C and Niagara Tours. The Corporation Profile Report for Classic Car indicates that it has changed its name to Art In Motion Conversions Ltd. effective January 18, 2005. The report for Classic Car/Art In Motion lists the “person authorizing filing” as Barb Zaldin, who is also listed as having authorized certain filings in respect of Construx, Computer Recyclers and G&C. (Risebrough Affidavit, paras. 12-13 and Exhibits “E” and “F”)

17. In January 2003, GM Canada’s dealer audit department determined that four GM vehicles purchased by Niagara Tours were exported to Japan between March 2000 and May 2000; two GM vehicles purchased by G&C were exported to Japan in April 2000 and August 2001; and a GM vehicle purchased by Classic Car was exported to Japan in July 2002. GM Canada has subsequently determined that another GM vehicle purchased by Classic Car was exported to Sweden in March 2003. (Risebrough Affidavit, para. 14 and Exhibit “G”)

18. In its application to the Tribunal, Construx states that it “is a wholesale dealer and broker of transportation products, including automobiles”.¹ If Construx is currently engaged in wholesale dealing and brokering of automobiles as it claims, Construx may be engaged in unlawful activity contrary to the Ontario *Motor Vehicle Dealers Act*.² The Ontario *Motor Vehicle Dealers Act* requires that any “motor vehicle dealer” be registered under the Act. Section 3(1) of the Act provides that “No person shall [...] carry on business as a motor vehicle dealer unless the person is registered under this Act”. A “motor vehicle dealer” is defined as meaning “a person who carries on the business of buying or selling motor vehicles”. As a condition of registration, s. 5 of the Act provides that an applicant is not entitled to registration where “the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with honesty and integrity”. The current registration status of motor vehicle dealers in Ontario is published on the public website of the Ontario Motor Vehicle Industry Council (“OMVIC”). The registration status for Construx is shown as “TERMINATED”. GM Canada has been informed by OMVIC that Construx’s registration was

¹ Statement of Grounds and Material Facts, para. 1.

² R.S.O. 1990, c. M.42.

terminated in March 2005. Accordingly, Construx is not currently permitted to carry on business as a motor vehicle dealer in Ontario. (Risebrough Affidavit, para. 15 and Exhibit “H”)

III. SUMMARY OF PRINCIPAL LEGAL ARGUMENTS

A. The Test For Leave To Commence A Private Application Has Not Been Met

19. The test for leave to commence a private application under s. 103.1 was recently established by the Federal Court of Appeal in *Symbol v. Barcode*.³ The Tribunal must be satisfied that 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”.

20. Importantly, the Tribunal must be also satisfied that there is sufficient credible evidence with respect to *each of the conjunctive statutory conditions* under ss. 75 or 77 of the *Competition Act*. As the Federal Court of Appeal cautioned in *Barcode*:

[...] it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under s. 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in s. 75(1). These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under s. 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in s. 75(1) on the leave application, it could not conclude, as required by s. 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under s. 75(1).⁴

21. Construx and Zaldin have failed to meet the test for leave to commence a private application in this case. Construx has failed to present sufficient credible evidence that it is directly and substantially affected in its business by any conduct of GM. This is a sufficient basis to dismiss this application. Construx has also failed to file sufficient credible evidence of all the elements of either a refusal to deal under s. 75 or a market restriction under s. 77 of the *Competition Act*.

³ *Symbol Technologies Canada ULC v. Barcode Systems Inc.* (2004), 34 C.P.R. (4th) 481 at para. 16 (Fed. C.A.) per Rothstein J.A. (“*Barcode*”).

⁴ *Barcode*, para. 18.

B. There Is Not Sufficient Credible Evidence That Construx Is Directly and Substantially Affected In Its Business By Any Conduct of GM Canada

22. In recent cases, the Tribunal has failed to accept merely “speculative and undocumented” evidence in support of a leave application. Construx alleges that it has been unable to fill over 365 “purchase orders” for GM vehicles, yet has failed to file in evidence even a single documented purchase order from even a single documented customer. Further, the allegations made by Construx are very similar to allegations raised by Construx’s affiliate, Classic Car (another Zaldin-controlled company), which commenced litigation against GM Canada in 2002 in connection with the export restriction, claimed a breach of the *Competition Act*, sought an interim injunction and alleged “irreparable harm and substantial damages”, yet took absolutely no steps to pursue the litigation on the merits or the injunction. The case remains dormant, belying any allegation of substantial business effect or harm. Finally, Construx has presented no evidence, merely speculative and undocumented assertions, that any alleged loss of business Construx has encountered has been caused by any conduct of GM Canada. Any such unsubstantiated losses (if they exist) could be the result of a variety of other factors such as the appreciation of the Canadian dollar relative to the U.S. dollar, which has largely eliminated the profitability of cross-border arbitrage in GM vehicles.

23. Further, Construx lacks standing to commence a private application against GM Canada because it is not “directly” affected by any of GM Canada’s business practices. An applicant claiming conduct contrary to ss. 75 or 77 of the *Competition Act* may seek leave to commence proceedings under s. 103.1 only where the applicant is “directly and substantially affected” in its business by the impugned conduct. Here, GM Canada’s enforcement of its Dealer Agreements with its authorized dealers has at most an *indirect* effect on Construx. Accordingly, Construx does not have standing to apply to the Tribunal for an order against GM Canada in respect of actions by GM Canada dealers.

C. There Is Not Sufficient Credible Evidence Of A Refusal to Deal

24. Construx and Zaldin have failed to file sufficient credible evidence establishing that they are unable to obtain adequate supplies of a product “on usual trade terms” (s. 75(1)(a)), that their inability to obtain such supply is due to insufficient competition among suppliers (s. 75(1)(b)), or that they are willing to meet the “usual trade terms of the suppliers of the product” (s. 75(1)(c)). In fact, the evidence that they have filed establishes exactly the opposite, *i.e.* that *Construx and*

Zaldin are not willing to meet GM Canada's usual trade terms by agreeing to the no-export rule in GM Canada's Dealer Agreement. Construx and Zaldin admit that they want supply in order to engage in the unauthorized and illicit export of vehicles designed for sale and use in Canada ("grey market vehicles"), and in the unauthorized and illicit sale of vehicles to buyers in Canada for the purpose of exporting such vehicles. Their stated purpose in seeking supply is entirely consistent with Zaldin's earlier unauthorized and illicit export activity, and his admitted unwillingness to comply with GM Canada's usual trade terms.

25. Further, neither Construx nor Zaldin have filed any evidence of their willingness to comply with other GM Canada usual trade terms set out in GM Canada's Dealer Agreement, including: conducting dealership operations from an approved location (s. 4.4.1 of the Dealer Agreement) and in properly equipped and maintained premises (s. 4.4.5); maintaining a knowledgeable and properly trained sales force (s. 5.1.1); providing courteous, convenient, prompt, efficient and quality service to owners of GM vehicles (s. 5.2.1); and maintaining an adequate service and parts organization (s. 5.2.2). (Risebrough Affidavit, para. 5 and Exhibit "A")

26. Further, Construx and Zaldin have failed to file sufficient credible evidence that the alleged refusal to deal (which is denied) is having or is likely to have an "adverse effect on competition in a market", as required under s. 75(1)(e). GM Canada's prohibitions on unauthorized export and resale are pro-competitive as they protect the viability and integrity of GM's distribution and dealer organizations, protect GM's reputation with its customers, and protect against the damage caused to its customers and dealers by the unauthorized and illicit sale of exported vehicles. If GM Canada were unable to enforce the provisions of its Dealer Agreements regarding unauthorized export and resale, it would be necessary for GM to take other steps to maintain the viability of its authorized dealer network. Such steps would likely have the effect of reducing the availability in Canada of vehicles that are attractive to grey marketers and/or increasing the prices of such vehicles in Canada, both of which would be detrimental to consumers in Canada. (Risebrough Affidavit, para. 23)

D. There Is Not Sufficient Credible Evidence Of A Market Restriction

27. Construx and Zaldin have also failed to file sufficient credible evidence of a "market restriction" within the meaning of s. 77 of the *Competition Act*. The provisions in GM Canada's

Dealer Agreement prohibiting the unauthorized and illicit export of new GM vehicles outside Canada are not a “market restriction” for the purpose of s. 77 of the *Competition Act*. Section 77 applies only in respect of requirements that a customer supply product in a “defined market”, which means a defined market *within Canada*. A restriction on sales in respect of export *outside Canada* is beyond the Tribunal’s territorial jurisdiction under the *Competition Act* and the *Competition Tribunal Act*.

28. Further, GM Canada’s prohibition on unauthorized resale within Canada is a necessary and ancillary component of its prohibition on unauthorized and illicit export and, for the reasons referred to above and discussed in greater detail below, does not lessen competition, substantially or otherwise, in Canada. Construx admits that it engages in the resale of vehicles to buyers in Canada for the purpose of exporting such vehicles. Because GM Canada has no way of determining or monitoring whether a particular vehicle will be resold for use in Canada or for export, GM Canada’s Dealer Agreements necessarily prohibit sales by GM Canada dealers to persons or parties engaged in (or believed to be engaged in) the business of reselling, brokering (including professional auto buying services) or wholesaling. Even if such vehicles were resold solely for use in Canada, the existence of a parallel unauthorized dealer network would threaten the viability of GM Canada’s authorized dealer network. GM Canada’s dealer network is best suited to distribute GM vehicles in Canada and is in the best position to arrange for the proper performance of warranty repairs, safety campaign inspections and adjustments, pre-delivery inspections, educating customers on the proper use of vehicles, on-going maintenance and compliance with government safety, emissions and other requirements.

29. GM Canada’s prohibitions on the unauthorized export and resale of new GM vehicles do not lessen competition in Canada, substantially or otherwise. On the contrary, because they support GM Canada’s efficient dealer network and provide dealers with the incentive to make the necessary investment to become dealers, they help to ensure that Canadian consumers have access to knowledgeable dealers who are able to provide proper sales information and expert servicing at competitive prices, and that Canadian consumers have access to a network of coast-to-coast dealers who can provide emergency service in small towns and remote locations when required. Therefore, the prohibitions are pro-competitive.

30. For these reasons, and the additional reasons set out below, this application should be dismissed.

IV. GM CANADA HAS A VALID BUSINESS JUSTIFICATION FOR PROHIBITING UNAUTHORIZED EXPORT AND RESALE

A. GM Canada's Distribution Network is Efficient and Pro-Competitive

31. Through many years of cooperative effort, GM Canada and its authorized dealers have developed a strong, high quality authorized dealer network in Canada. In order to preserve the integrity of that network and the goodwill attached to it, GM Canada authorized dealers must meet standards of excellence to ensure that GM Canada vehicle owners will receive the high level of technical expertise and pre- and post-sales service that GM Canada requires that they provide to purchasers of GM vehicles. Maintaining these standards is an integral part of the ongoing obligations to be met by GM Canada authorized dealers as a condition of retaining their status as members of the GM Canada authorized dealer network. Meeting these standards on an ongoing basis involves significant effort and a large financial investment by such authorized dealers. (Risebrough Affidavit, para. 16)

32. Similarly, GM's affiliates maintain high quality authorized dealer networks in other countries. Local GM dealers are best suited to distribute GM vehicles in their respective jurisdictions, to meet local approval and operations requirements, to arrange for proper performance of warranty repairs, safety campaign inspections and adjustments, education in the operation of the vehicle, and to meet local government emissions, safety and similar requirements. In order to protect the viability and integrity of GM's worldwide distribution and authorized dealer organizations, to protect GM's reputation with its customers, and to protect against the damage caused to its customers and dealers from the unauthorized sale of exported vehicles, GM Canada's Dealer Agreement authorizes GM Canada dealers to purchase new motor vehicles only for sale to customers located and resident in Canada for personal use or for a primary business use other than resale (s. 5.1.2 of the Dealer Agreement). (Risebrough Affidavit, para. 17 and Exhibit "A")

33. GM and other major automobile manufacturers distribute their vehicles through authorized dealer distribution networks. Such a system provides that the manufacturer only makes its vehicles available to authorized dealers. Modern automotive vehicles are highly

complex and dealers require a highly-trained staff to properly inform consumers about the vehicles and perform required recalls, repairs and maintenance. GM Canada makes available or recommends to authorized dealers general and specialized product, sales, service and parts, accounting, business management, finance, insurance and systems training courses for authorized dealer personnel. GM Canada authorized dealers are required to comply with GM Canada's reasonable training requirements and pay any specified training charges (s. 8 of the Dealer Agreement). The cost of training staff and maintaining standards of excellence is funded by sales of GM vehicles through the authorized dealer network. (Risebrough Affidavit, para. 18 and Exhibit "A")

34. This distribution method is a proven system that is designed to serve the mutual needs of the manufacturer, its authorized Canadian dealers and Canadian consumers. The manufacturer has an important economic interest in having its product marketed at the lowest possible cost, and in a manner which is consistent with its pre-sales information efforts and its post-sales service obligations. If the authorized dealer knows that the manufacturer will support the selective distribution system, it then has the incentive to make the necessary investment and provide the facilities and personnel necessary to effectively market the vehicle and to perform post-sales service, free of the threat of unauthorized dealers. As a result, Canadian consumers benefit by having access to knowledgeable authorized dealers who are able to provide proper sales information and expert servicing at competitive prices. (Risebrough Affidavit, para. 19)

35. As a result of the necessarily interdependent relationship between the manufacturer and its authorized dealers, the manufacturer cannot permit unauthorized or parallel systems of distribution to exist. Such unauthorized distributors are effectively "free riders" who undermine the existence of the authorized dealer franchise system and do not provide the requisite valuable services offered by properly trained and authorized dealers and expected by consumers. (Risebrough Affidavit, para. 20)

36. In addition to the impact on GM's distribution network, the export and sale of grey market vehicles without GM's consent constitutes an unauthorized invasion of GM's exclusive right to use its trademarks and is therefore an infringement of its intellectual property rights. Such unauthorized use has a deleterious effect on the goodwill associated with the GM trademarks and the GM dealer network, since consumers may be confused or deceived into

believing that unauthorized grey market vehicles which have been improperly exported from Canada are identical to conforming vehicles designed for use in the jurisdiction to which they are exported. (Risebrough Affidavit, para. 21)

37. Furthermore, GM authorized dealers are the public face of the GM organization. The reputation of GM Canada, its affiliates and their dealer networks may suffer significant damage if consumers come to associate them with unauthorized exporters who operate under multiple business names out of temporary establishments, do not provide the pre- and post-sales services expected of GM dealers, and engage in potentially unlawful practices to conceal their unauthorized and illicit activities. (Risebrough Affidavit, para. 22)

38. If GM Canada is not able to enforce its reasonable restrictions on unauthorized distribution and grey market exports, it would become necessary for GM to take other steps to protect the viability of its authorized dealer network and the integrity of the GM brand. This may require the reduction in distribution in Canada of vehicles which are attractive to unauthorized exporters / grey marketers. In addition or alternatively, it may be necessary to raise the prices of vehicles sold in Canada in order to make grey marketing activities less attractive. These actions would not benefit Canadian consumers, GM's authorized dealers or GM, but would be necessary to prevent parallel distribution networks from gaining a foothold and putting the authorized dealer network and the goodwill attached thereto at risk. (Risebrough Affidavit, para. 23)

39. Defending the viability of an international distribution and pricing policy was found to be a valid business justification for an export restraint in *Polaroid Canada Inc. v. Continent-Wide Enterprises Ltd.*⁵ Polaroid introduced an export price policy which provided that products purchased by an authorized dealer could not be exported from Canada for resale unless a dealer paid Polaroid a higher price for such products. Breach of the policy was grounds for immediate termination of the purchaser's status as an authorized Polaroid dealer. After being notified of the policy, a Canadian retailer continued to export products for resale in violation of Polaroid's policy and, consequently, Polaroid terminated the retailer's status as an authorized dealer. Polaroid then sued the retailer for breach of contract and the retailer counterclaimed for damages for breach of contract on the basis that the export policy was void as a covenant in restraint of trade.

⁵ (1994), 59 C.P.R. (3d) 257 (Ont. Ct. (Gen. Div.)), aff'd (2000), 7 C.P.R. (4th) 73 (Ont. C.A.).

40. In a decision subsequently affirmed by the Ontario Court of Appeal, the Ontario Court (General Division) granted judgment in favour of Polaroid for damages for breach of contract. In rejecting the retailer's claim that Polaroid's export price policy constituted an illegal contract in restraint of trade, the court applied the test set out in the decision of Blair J.A. in *Tank Lining Corp. v. Dunlop Industrial Ltd.*⁶ The court found that Polaroid's policy was in restraint of trade, but was not against public policy and therefore was not void because it was a reasonable protection of the legitimate interests of Polaroid:

Based on the discussion in the *Tank Lining* decision at pp. 167-9, it appears that for a restraint to be reasonable it must be intended to protect some proper interest of the covenantee, and the restraint must not go beyond what would be adequate to accomplish that end. In the present case, the restraint was seen within Polaroid as a way of eliminating or reducing both interruptions in supply to Canadian customers and grey market selling in foreign markets at prices below those prevailing in those markets. These objectives are addressed to the maintaining and securing of customers for Polaroid products in Canada and the preservation of the international distribution and pricing system of Polaroid. I think it is clear from the evidence that those responsible for these international policies matters had decided that Polaroid's interest in maximizing its sales and sales prices could be achieved best by employing a policy of pricing in different jurisdictions to meet competitive factors in those jurisdictions. The viability of that policy was threatened where Polaroid products could be purchased at low cost in one jurisdiction and sold at a higher price in another. Based on the evidence given at trial by economic experts, the most likely result of such sales, if carried on at significant levels over an extended period, would be to increase Canadian prices towards U.S. prices. Also, such sales posed a competitive concern for Polaroid dealers in the United States. Polaroid had a proper commercial interest in defending the viability of its international distribution and pricing policy. On the evidence, the export price policy was an effective way to mount that defence, because the export prices were so high that it was extremely unlikely that there would be purchases for export resale. It was not suggested that lower prices would have achieved the objective just as effectively.⁷

41. This principle has been recognized by the Tribunal (e.g., in *Canada Pipe*) and the Commissioner of Competition (e.g., in the GSK / Internet pharmacy decision referred to below). It is submitted that GM Canada's restrictions on export and resale are similarly reasonable and justified.

⁶ (1982), 68 C.P.R. (2d) 162 (Ont. C.A.).

⁷ *Polaroid* (Gen. Div.), *supra*, at 276-77.

B. Export/Import Of Grey Market Vehicles Potentially Violates Canadian And Foreign Laws and Should Not Be Encouraged Or Facilitated

42. The unauthorized sale outside Canada of GM vehicles manufactured for sale in Canada creates numerous serious problems for GM, its authorized dealers and consumers. Most significantly, grey marketers such as Construx, which as noted above is not authorized to sell motor vehicles in Ontario, may violate numerous other Canadian and foreign laws. Vehicles manufactured for sale and use in Canada may not comply with the regulatory requirements of the jurisdictions in which they are sold, such as safety and emissions standards. For example, vehicles manufactured for sale in Canada may not comply with vehicle emissions standards in some U.S. jurisdictions such as California, New York, Massachusetts and others. The importation of non-conforming vehicles into the U.S. is of concern to GM Canada and its affiliates because of the broad scope of legal liability under U.S. environmental statutes. Furthermore, any judicial decision that required GM Canada to allow purchases and resale to the United States of the nature sought by Construx could put GM Canada in the position of violating dealer franchise laws of U.S. states whose laws are designed to preserve and protect the existence of a network of authorized dealers to sell and service new GM motor vehicles. (Risebrough Affidavit, para. 24)

43. With respect to vehicles exported overseas, few (if any) vehicles manufactured for sale in Canada would meet European or Japanese emission standards without modifications. Few (if any) vehicles manufactured for sale in Canada would meet European or Japanese safety standards such as side marker turn signals, electronic interference standards and noise standards, without significant modifications or testing. In addition to potentially not complying with local emissions and safety standards, GM Canada has no ability to issue recall notices or provide warranty maintenance service, and in many cases overseas GM authorized dealers and other vehicle repair service providers lack the tools necessary to perform maintenance on GM vehicles designed for use in North America. If consumers are unable to obtain necessary maintenance service, GM's (and its dealers') reputation and the goodwill associated with its brand could be severely damaged. GM only sells vehicles in countries with GM authorized dealer networks. (Risebrough Affidavit, para. 25)

44. GM Canada believes that illicit vehicle export activity may also be associated with unlawful activity such as odometer tampering, document forgery, GST fraud and making false customs declarations. In some cases, vehicles known to have been exported overseas have been reported stolen in Canada in an apparent attempt to obtain payment from an insurer. (Risebrough Affidavit, para. 26)

45. Many of the same considerations referred to above also apply with respect to the importation into Canada of vehicles manufactured for sale and use in the United States or elsewhere. The importation of such grey market vehicles into Canada creates similar problems for GM, authorized GM dealers and consumers and may also result in violations of Canadian and foreign laws. For example, the U.S. versions of GM's Corvette, Cadillac XLR and Pontiac GTO do not meet Canadian safety standards. In addition, many GM vehicles are imported into Canada from the U.S. for the purpose of immediately re-exporting them to other jurisdictions. This enables exporters to avoid the reporting requirements at U.S. ports. In addition to the concerns described above, such sales of GM vehicles in certain countries (such as Libya or Iran) may violate U.S., Canadian or other foreign laws. (Risebrough Affidavit, para. 27)

46. Aside from the very real concern that GM Canada may be seen as abetting the violation of laws (and in some cases, the commission of crimes) in Canada and elsewhere, GM Canada is legitimately concerned that unless it is able to prevent such unauthorized export of grey market vehicles it may be seen by the GM authorized dealer networks in other countries as being party to activities that threaten the viability of those networks and encroach on the authorized dealers' ability to sell vehicles by legitimate means. (Risebrough Affidavit, para. 28)

47. Illicit export activity has also caused confusion and injury to consumers who have purchased grey market vehicles believing that the vehicles were manufactured for sale in the consumer's jurisdiction. As with Construx, it is not unusual for illicit exporters to use various corporate names, pseudonyms, and other aliases, that appear and disappear, denying purchasers any opportunity for redress. (Risebrough Affidavit, para. 29)

48. On March 21, 2003, the Competition Bureau announced that it was not proceeding against GlaxoSmithKline for blocking Canadian-based Internet pharmacies from exporting its products to the United States. As indicated in the Bureau's press release, the infringement of foreign law is a reasonable business justification for a refusal to deal or market restriction:

The US Food and Drug Administration has informed the Competition Bureau that these exports contravene US law. The civil provisions of Canadian competition law pertaining to refusal to supply and market restrictions generally recognize that suppliers may set the terms and conditions of sales to businesses provided that they have reasonable business justification. From the Bureau's perspective, the fact that these cross-border sales violate US law supports the position that GSK has a reasonable business justification for blocking the exports, while continuing to supply the Canadian market.⁸

C. The Competition Bureau Has Determined that No Action Is Warranted Under the *Competition Act* In Connection With GM Canada's Export Policy

49. The Competition Bureau has previously investigated GM Canada's efforts to prevent unauthorized sales outside Canada of motor vehicles manufactured for sale in Canada. On April 24, 1986, the Bureau commenced an inquiry following receipt of an application under s. 7 of the *Combines Investigation Act*. On September 12, 1986, the Bureau commenced an inquiry following receipt of an application under s. 9 of the *Competition Act*. On May 22, 1998, the Bureau informed GM Canada in writing that the inquiries had been discontinued. No enforcement action was taken by the Bureau in respect of those inquiries. (Risebrough Affidavit, para. 30 and Exhibit "I")

50. Construx's complaint has nothing to do with the maintenance or encouragement of competition in Canada. It is essentially a private dispute between Zaldin and (indirectly) GM Canada about whether Zaldin will be allowed to engaged in an unauthorized and illicit export trade. Construx and Zaldin have tendered no sufficient credible evidence that their export trade will have any effect on competition in Canada. Construx's complaint simply does not fall within the ambit of the *Competition Act*. As the Federal Court of Appeal recently noted in *Barcode*:

The purpose of the *Competition Act* is to maintain and encourage competition in Canada. It is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition.⁹

51. Further, it is well settled that there is no general legal obligation for GM Canada to contract with any and all parties that seek supply of its products. Similarly, GM Canada is entitled to enter into contracts with its dealers which impose reasonable obligations on those

⁸ "Competition Bureau Responds to Complaints Regarding Supply of Canadian-Based Internet Pharmacies", Competition Bureau press release, March 21, 2003.

⁹ *Symbol Technologies Canada ULC v. Barcode Systems Inc.* (2004), 34 C.P.R. (4th) 481 at 488 (Fed. C.A.) *per* Rothstein J.A.

dealers, including the obligation to ensure that GM vehicles manufactured for sale and use in Canada are not sold to grey market exporters. As the Federal Court has recently noted:

The Court recognizes that there is no common-law obligation for one party to contract with another, and this was set out in the [*sic*] *Manos Foods International Inc. v. Coca-Cola Ltd. et al.* by the Ontario Court of Appeal, reported at (1999) 2 C.P.R. (4th) 283. In that case the Ontario Court of Appeal at paragraph 8 said, on facts which are analogous to the facts in the case at bar, that the appellants do not have a corresponding common-law obligation to sell goods to the respondent:

“There is no common-law obligation to contract with another party; parties are free to contract as they see fit. The freedom to contract includes both the ability to enter into contracts and to refrain from entering into contracts.¹⁰”

52. In essence, the present application is just another tactical manoeuvre by Zaldin in a longstanding private dispute between Zaldin and (indirectly) GM Canada. One of Zaldin’s other companies engaged in illicit and unauthorized exports, Classic Car, commenced an action against GM Canada in the Ontario Superior Court of Justice in November 2002 raising essentially the same allegations as Construx and Zaldin have raised in this application. Zaldin has taken no steps to pursue that litigation in the last 2 years. While GM Canada is of the view that the claims of Construx’s affiliate in that action are also without merit, GM Canada considers that the Tribunal is not the appropriate forum for resolution of what is essentially a private complaint about the terms of GM Canada’s dealer agreements which only indirectly affect Construx and to which it is not a party. (Risebrough Affidavit, para. 31)

D. The Order Sought by Construx Would Result in an Unwarranted Extra-Territorial Application of the *Competition Act*

53. Construx has stated that once it purchases a vehicle it either exports it to a buyer outside Canada or resells it to a buyer located in Canada who generally exports it. Construx’s inability to obtain GM vehicles for unauthorized export has no impact on competition in any market in Canada. GM Canada’s attempts to limit the sale of grey market vehicles outside Canada raise no issues within the jurisdiction of Canadian legislation and the Tribunal and cannot have been within the ambit intended by the drafters of the *Competition Act*.

¹⁰ *Charette v. Honeywell Limited*, (2003), 40 B.L.R. (3d) 181 at 182-83 (F.C. T.D.).

54. As a general matter, Canada's jurisdiction is confined to its own territory. There is a presumption that legislation is not intended to apply extraterritorially to events outside the boundaries of the enacting jurisdiction.¹¹ Nothing in the *Competition Act* or the *Competition Tribunal Act* suggests an intention to the contrary that would displace this presumption. Furthermore, pursuant to s. 8(1) of the *Interpretation Act*,¹² "every enactment applies to the whole of *Canada*, unless it is otherwise expressed therein" (emphasis added).

V. CONSTRUX HAS NOT ESTABLISHED THE ELEMENTS REQUIRED TO OBTAIN LEAVE

A. Construx Has Not Provided Reason To Believe That It Is Directly And Substantially Affected In Its Business By Any Conduct Of GM Canada

(a) Construx Lacks Standing As It Is Not "Directly" Affected by Any Conduct of GM Canada (s. 103.1(7))

55. Construx appears to make three allegations: (i) Construx is unable to purchase new GM motor vehicles from authorized GM dealers in Canada; (ii) Construx is unable to import into Canada motor vehicles manufactured outside Canada by entities related to GM Canada; and (iii) GM Canada has refused to sell GM motor vehicles directly to Construx.

56. As stated above, GM Canada authorized dealers are contractually authorized to purchase new motor vehicles only for sale to customers located and resident in Canada for personal use or for a primary business use other than resale. While GM Canada's enforcement of its authorized Dealer Agreement may *indirectly* affect customers of GM Canada dealers, Construx is not "directly" affected in its business by any practice of GM Canada in respect of sales by GM Canada dealers. Pursuant to s. 103.1(7) of the *Competition Act*, Construx does not have standing to apply for a Tribunal order against GM Canada in respect of actions by GM Canada dealers.

57. Similarly, the actions of GM Canada's parent company or other affiliates of GM Canada cannot be the subject of a Tribunal order in an application which names GM Canada as the sole respondent. For example, any failure of Construx to reach a contractual agreement with General

¹¹ *Driedger on the Construction of Statutes* (4th ed., 2002) at p. 592, citing *Bolduc v. A.G. Quebec* (1982), 68 C.C.C. (2d) 413 (S.C.C.) at p. 417 and *Arcadi v. The King*, [1932] S.C.R. 158 at p. 159.

¹² R.S.C. 1985, c. I-21, as amended.

Motors Corporation for the supply of vehicles in the United States cannot be the basis of a Tribunal order against GM Canada.

58. The only allegation that appears to relate to an action by GM Canada that “directly” affects Construx is the allegation that GM Canada has refused to sell GM motor vehicles directly to Construx. GM Canada has made inquiries and is not aware of any request by Construx to purchase vehicles directly from GM Canada, and therefore any application by Construx for relief is, at best, premature. Construx has not tendered any sufficient credible evidence to the contrary. (Risebrough Affidavit, para. 32)

59. Furthermore, s. 77 of the *Competition Act* refers to requirements or penalties imposed by a supplier on a customer, and provides that the Tribunal may make an order directed to one or more suppliers. Construx is not a customer of GM Canada and is not directly affected by the terms of GM Canada’s agreements with its authorized dealers. Accordingly, Construx does not have standing to apply for an order under s. 77 against GM Canada. This is a sufficient basis to dismiss this application.

(b) There Is Not Sufficient Credible Evidence That Construx Is “Substantially Affected” In Its Business By Any Conduct of GM Canada (s. 103.1(7))

60. The Tribunal has been exacting in requiring an application for leave to provide “sufficient credible evidence”, and not merely bare assertions, that the applicant is directly and substantially affected in its business by the impugned reviewable practice. In prior cases where leave has been granted, this standard has been applied rigorously. As Blais J. recently noted in *Paradise Pharmacy v. Novartis Pharmaceuticals Canada Inc.*:

The applicants must show sufficient credible evidence of a direct and substantial effect. In *Barcode*, for example, the company was in receivership and fifty per cent of the employees had been laid off. In *La-Z-Boy*, the applicant had figures showing a 46 per cent decrease in sales. There was thus a credible basis as to substantial effect. (emphasis added)¹³

61. The Tribunal has also refused to accept merely “speculative and undocumented” evidence in support of a leave application.¹⁴

¹³ [2004] C.C.T.D. No. 22, para. 20.

¹⁴ *1177057 Ontario Inc. (c.o.b. Broadview Pharmacy v. Wyeth Canada Inc.*, [2004] C.C.T.D. No. 24, para. 21, Blais J. See also *Mrs. O’s Pharmacy Inc. v. Pfizer Canada Inc.* (2004), 35 C.P.R. (4th) 171 at 177 (para. 24),

62. In addition, the substantial effect on the applicant's business must be *causally related* to conduct of the respondent. As the Tribunal recently explained in *Mrs. O's Pharmacy Inc. v. Pfizer Canada Inc.*: "The Tribunal must have reason to believe that there exists a causal relationship between the action of the respondent and the business consequences for the applicant".¹⁵

63. In this case, Construx has failed to meet its onus of showing "sufficient credible evidence" that it is directly and substantially affected in its business by practices of GM Canada. The "evidence" it has tendered is at best "speculative and undocumented". Construx makes only bald allegations that it "has been unable to fill purchase orders from its customers", such as "120 sport utility vehicles", "200 Chevrolet Avalanche and heavy duty diesel pickup trucks", and "15 Chevrolet SSRs".¹⁶ Yet despite all these claimed "purchase orders", Construx has failed to put in evidence *even a single documented purchase order from even a single documented customer*. The Tribunal cannot rely on such speculative and undocumented evidence in support of a leave application. This is not sufficient credible evidence. It is merely a bald assertion.

64. The need for non-speculative, documented evidence is of course heightened at the leave stage, because, as the Federal Court of Appeal noted in *Barcode*, "there is no right of cross examination on the affidavit filed in support of the application for leave".¹⁷ The Tribunal in this case should therefore be exacting in what is required, as it has been in previous cases. Otherwise, legitimate business enterprises such as GM Canada could unnecessarily become embroiled in costly litigation before the Tribunal based on mere unsubstantiated assertions.

65. The lack of sufficient credibility of Construx's assertions of the impact on its business can be further assessed by considering the allegations made by Construx's affiliate, The Classic Car Store Inc. (which, as noted, is another of the companies through which Geoffrey Zaldin operates his unauthorized and illicit export trade of GM vehicles) in earlier litigation against GM

Blais J., where the Tribunal found that mere allegations that the applicant suffered a numerically quantified loss of sales (a pharmacy claimed it was able to fill only 20 prescriptions rather than an anticipated 50 as a result of the respondent's conduct) was insufficient. The Tribunal said that it "cannot rely on such evidence to grant the leave".

¹⁵ (2004), 35 C.P.R. (4th) 171 at 177 (para. 25), Blais J.

¹⁶ Applicant's Statement of Grounds and Material Facts, paras. 14-15.

¹⁷ *Barcode* (F.C.A.), para. 24.

Canada. As noted, in November 2002, Zaldin's company commenced an action against GM Canada in the Ontario Superior Court, claiming \$12 million in damages against GM Canada arising out of its inability to obtain new GM vehicles for export and alleging a breach of the *Discriminatory Business Practices Act*¹⁸ and the *Competition Act*. In its statement of claim, Zaldin's company also claimed an interim and permanent injunction against GM Canada enjoining it from enforcing the export policy in its Dealer Agreement. Zaldin's company claimed that it "has suffered and will continue to suffer irreparable harm and substantial damages".¹⁹ Despite these allegations of "irreparable harm" and "substantial damages", neither Zaldin nor his company took any steps whatsoever to pursue his claim or to seek an injunction. Indeed, according to the Corporation Profile Report maintained by the Ontario Ministry of Consumer and Business Services, Classic Car / Art In Motion continues to be active as recently as May 13, 2005. (Risebrough Affidavit, paras. 12-13 and Exhibits "E" and "F")

66. Nor is there any demonstrated causal relationship between any conduct of GM Canada and any alleged business consequences for Construx. Any diminution of Construx's export trade could have been caused by any number of factors such as the appreciation of the Canadian dollar relative to the U.S. dollar, which has largely eliminated the opportunities for cross-border arbitrage for companies like Construx.

67. In this case, Construx's allegations particularly lack sufficient credibility, given that Construx is now not even a registered "motor vehicle dealer" under the Ontario *Motor Vehicle Dealers Act*. As such, it is prohibited by law from carrying on the business of a motor vehicle dealer. It cannot be substantially affected in its business by reason of any conduct of GM Canada, because that business is now proscribed by law. (Risebrough Affidavit, para. 15 and Exhibit "H")

68. For these reasons, Construx has not provided sufficient credible evidence that it is directly and substantially affected in its business by any conduct of GM Canada. This is a sufficient basis for the Tribunal to dismiss this application, without the need to consider the

¹⁸ R.S.O. 1990, c. D.12.

¹⁹ *The Classic Car Store v. General Motors of Canada Limited*, 02-CV-239631CM3, Risebrough Affidavit, Exhibit "E".

further arguments below on whether there is reason to believe that GM Canada's practice could be subject to an order under ss. 75 or 77.

B. Construx Has Not Established the Necessary Elements of a Refusal to Deal

(a) There Is Not Sufficient Credible Evidence of an Inability to Obtain Adequate Supplies on Usual Trade Terms (s. 75(1)(a))

69. Construx's inability to obtain GM vehicles is a result of Construx's practice of engaging in unauthorized grey market exporting for resale. As indicated above, grey marketing of GM vehicles outside the jurisdiction in which those vehicles are intended to be sold creates very substantial problems for GM, authorized GM dealers and consumers and may also result in violations of Canadian and foreign laws. The export restrictions in GM Canada's dealer agreements are necessary to protect the viability and integrity of GM's worldwide distribution and dealer organizations, to protect GM's brand, to protect GM's reputation with its customers, and to protect against the damage caused to its customers and dealers from vehicles exported improperly. These restrictions are an integral, necessary and reasonable component of GM Canada's usual trade terms. Moreover, there is no obligation for GM Canada to permit vehicles to be sold to a company controlled by an individual who has repeatedly attempted to deceive and mislead GM Canada and its dealers. (Risebrough Affidavit, paras. 24-29)

70. GM Canada has entered into dealer agreements with approximately 780 authorized dealers in Canada who have agreed to obtain GM vehicles on GM Canada's usual trade terms. Construx has provided no evidence that it has been unable to obtain adequate supplies of GM vehicles on GM Canada's usual trade terms, because Construx has provided no evidence that it is willing to comply with those terms. In fact, as indicated above, through Construx and other corporate entities, in order to deceive GM Canada and its dealers, Mr. Zaldin has repeatedly agreed to abide by GM Canada's usual trade terms and then intentionally breached those terms. (Risebrough Affidavit, paras. 2 and 8-15)

71. The Ontario Superior Court in *Polaroid* found that Polaroid's export price policy was a "usual trade term". The Court noted that "[n]o authority was adduced as to the proper interpretation of [usual trade terms]. In the absence of authority, I would think the term would mean the trade terms generally prevailing at the time in question. Those terms would include the

export price policy [...]”.²⁰ In this case, there is no dispute that the no-export policy in the Dealer Agreement is one of the “trade terms generally prevailing at the time in question”, and as such, is unquestionably a “usual trade term”.

(b) There Is Not Sufficient Credible Evidence Of An Inability To Obtain Adequate Supplies Because Of Insufficient Competition Among Suppliers (s. 75(1)(b))

72. As indicated above, Construx’s inability to obtain GM vehicles is due to its unwillingness to comply with GM Canada’s usual trade terms, not because of any lack of competition among suppliers. Construx has filed no evidence, far less sufficient credible evidence, to the contrary.

73. In fact, there is vigorous and extensive competition among vehicle suppliers in Canada. GM is only one of many vehicle suppliers in Canada. GM’s principal competitors in passenger cars and trucks in Canada and the United States include Ford Motor Company, DaimlerChrysler AG, Toyota Corporation, Nissan Motor Corporation Ltd., Mazda Motor Corporation, Mitsubishi Motors Corporation, Volkswagen A.G., Hyundai Motor Company, Ltd., Bayerische Motoren Werke AG (BMW), Honda Motor Company Limited and Kia Motors Corporation. As of December 31, 2004, other than Volkswagen and Kia, all of these principal competitors operated vehicle manufacturing facilities in Canada and/or the United States. For the year ended December 31, 2004, GM estimates that its share of total new motor vehicle unit sales in North America was approximately 27%, well below the 35% “safe harbour” threshold that is used as a proxy for market power in the Competition Bureau’s Merger Enforcement Guidelines and Abuse of Dominance Guidelines. (Risebrough Affidavit, para. 33)

74. Automotive vehicles are distributed through numerous authorized dealers. According to the Canadian Vehicle Manufacturers’ Association, as of December 31, 2004 there were almost 4,000 authorized retail vehicle dealer outlets in Canada. Of these approximately 780 are authorized GM Canada dealers. (Risebrough Affidavit, para. 34)

²⁰ *Polaroid (Gen. Div.)*, *supra*, p. 280.

75. While the Tribunal in *Chrysler*²¹ and *Xerox*²² defined the relevant markets for the purpose of applying s. 75 as a function of a particular brand of product, as a result of amendments to s. 75 which provide for consideration of the competitive effects of the market of the alleged refusal to deal, it is submitted that such an approach is not appropriate in this case. In both *Chrysler* and *Xerox*, the market was defined as a function of the product that customers of the complainant wanted to acquire:

Products and markets can only be meaningfully defined in a particular context and for a particular purpose. *The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition* and the definition must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition. In the case of para. 75(1)(a), the ultimate test concerns the effects on the business of the person refused supplies. Where products are purchased for resale, the effect on the business of the person refused supply will depend on the demand of the person's customers and whether substitutes are acceptable to them. Therefore, the starting point for the definition of "product" under s. 75 is the buyer's customers.²³ (emphasis added)

76. Since *Chrysler* and *Xerox*, s. 75 has been amended to include an "adverse effect on competition" test in s. 75(1)(e). As a result, the focus is no longer exclusively on the "business of the person refused supplies", and the market definition must be consistent with the attempt to determine whether the impugned practice "will result in an increase in prices or other effects consistent with a lessening of competition." As a result of this amendment, the approach taken in *Chrysler* and *Xerox* is no longer appropriate since the section now requires consideration of broader market effects, not just the effect on the applicant. Accordingly, the relevant market cannot be limited to GM vehicles alone but must properly include others with which GM vehicles compete. As noted above, there are many other suppliers of vehicles against whom GM Canada competes and from whom Construx and Zaldin could seek supply. Any inability to obtain supply is not due to insufficient competition among suppliers.

²¹ *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1990), 27 C.P.R. (3d) 1 (Comp. Trib.); aff'd (1991), 38 C.P.R. (3d) 25 (Fed. C.A.).

²² *Canada (Director of Investigation and Research) v. Xerox Canada Ltd.* (1991), 33 C.P.R. (3d) 83 (Comp. Trib.).

²³ *Chrysler*, *supra* at 10.

77. Furthermore, *Chrysler* and *Xerox* are factually distinguishable, since in those cases the complainants' customers provided after-sales service to consumers or businesses who had previously purchased Chrysler or Xerox products, respectively. In those circumstances, it is evident that the complainants required access to replacement parts suitable for Chrysler vehicles or Xerox machines, respectively, in order to carry on their intended business. In this case, Construx's customers are seeking to purchase new vehicles, and in deciding what vehicles to purchase they will compare competing vehicle makes and models in the same manner as consumers who purchase from authorized dealers. Accordingly, there is no reasonable basis on which to restrict the definition of the relevant product market to GM vehicles. Indeed, Construx indicates in its application that non-GM vehicles accounted for approximately 62% of Construx's total sales between 1997 and 2003. (Risebrough Affidavit, para. 33)

(c) There Is Not Sufficient Credible Evidence That Construx Is Willing And Able To Meet GM Canada's Usual Trade Terms (s. 75(1)(c))

78. As indicated above, Construx has presented no evidence that it is willing and able to meet GM Canada's usual trade terms, which include a prohibition on unauthorized export sales. On the contrary, Construx's application indicates that it does in fact engage in unauthorized export of vehicles designed for sale and use in Canada, and in the unauthorized sale of vehicles to buyers in Canada who export such vehicles.

79. Construx has also presented no evidence of its willingness and ability to meet GM Canada's other usual trade terms, such as provision of pre-sales and after-sales service.

80. To the extent that Construx is claiming that it is willing and able to meet the usual trade terms of GM Canada dealers, it is a usual trade term applicable to GM Canada dealers that their customers not engage in unauthorized export or resale, as required by the terms of the Dealer Agreement. In any case, the Tribunal does not have jurisdiction under s. 75 to order that GM Canada allow Construx to purchase vehicles from other persons (*i.e.*, GM Canada authorized dealers), which appears to be the relief sought by Construx.²⁴

²⁴ Applicant's Notice of Application For Leave Pursuant to Section 103.1 of the *Competition Act*, para. 1(a).

81. In *Chrysler*, the Director of Investigation and Research (now the Commissioner) sought an order requiring and directing that Chrysler reverse all steps taken to dissuade any person (including Chrysler franchised dealers) in Canada from conducting business with the complainant, Richard Brunet, with respect to Chrysler parts. The Tribunal found that its authority under s. 75 was limited to ordering the respondent to supply its parts on usual trade terms:

The Tribunal is of the view that a proper balancing of interests in this case might be better accomplished with an order that was limited with respect to time, or perhaps with respect to the category of buyers that would be open to Brunet. Such an order could probably best be achieved through negotiations between the parties.

The Tribunal is satisfied, however, that its authority under s. 75 is limited to the issue of an order that requires the respondent to supply Brunet Chrysler parts under the usual trade terms as it had done up to October, 1986.²⁵

82. Chrysler appealed the Tribunal's decision and the Director cross-appealed on this issue. The Federal Court of Appeal dismissed the Director's cross-appeal without hearing from Chrysler.

The cross-appeal was concerned with the failure of the tribunal to order Chrysler Canada to delete the prohibition of sale for export from its dealership agreements. The tribunal had concluded that it was without jurisdiction under s. 75(1) to make that order.

We did not hear Chrysler Canada on the cross appeal and heard the respondents only on an aspect of issue 1(a), namely whether the tribunal had erred in law by not excluding competitive parts from the scope of its order, as well as on issue 2.²⁶

83. For the same reason, the Tribunal does not have jurisdiction in this case to order that GM Canada allow Construx to purchase new GM motor vehicles from authorized GM dealers, the relief sought by Construx under s. 75.

(d) There Is Not Sufficient Credible Evidence of An Adverse Effect On Competition (s. 75(1)(e))

84. GM Canada's enforcement of contractual provisions in its dealer agreements, designed to prevent unauthorized export sales of GM Canada vehicles, has no adverse effect on competition in Canada. Construx has filed no sufficient credible evidence to the contrary. As indicated above,

²⁵ *Chrysler* (Comp. Trib.), *supra* at 28.

²⁶ *Chrysler* (Fed. C.A.), *supra*, at 28.

there is substantial competition in the North American vehicle industry. GM Canada's 780 authorized vehicle dealers compete vigorously with each other and with other vehicle dealers in Canada. In fact, GM Canada's prohibitions on unauthorized resale for export purposes are pro-competitive, as they protect the viability and integrity of GM's distribution and dealer organizations, protect GM's reputation with its customers, and protect against the damage caused to its customers and dealers by the unauthorized sale of exported vehicles. If a dealer knows that the manufacturer will support the dealer distribution system, it then has the incentive to make the necessary investment and provide the facilities and personnel necessary to effectively market vehicles and to perform post-sales service, free of the threat of unauthorized dealers. As a result, consumers benefit by having access to knowledgeable dealers who are able to provide proper sales information and expert servicing at competitive prices, and from a network of coast-to-coast dealers who can provide emergency service in small towns and remote locations when required. (Risebrough Affidavit, paras. 2, 16-23 and 33-34)

85. Furthermore, Construx has stated that it either exports vehicles to buyers outside Canada or resells them to buyers in Canada who in turn export them. Since vehicles purchased by Construx are not used in Canada, there is no reasonable basis to conclude that Construx's inability to obtain GM Canada vehicles could have an adverse impact on competition in Canada. Even if GM Canada's export restrictions had an adverse impact on competition in a jurisdiction outside Canada (which is denied), any such impact is beyond the purview of the *Competition Act* and beyond the territorial jurisdiction of the Tribunal, as discussed above.

C. Construx Has Not Established the Necessary Elements of Market Restriction

(a) There Is No Market Restriction (s. 77(1))

86. GM Canada's prohibition on the unauthorized export of GM vehicles outside Canada is not a "market restriction" for the purpose of s. 77 of the *Competition Act*.

87. The purpose of the *Competition Act* is, among other things, to maintain and encourage competition in Canada. GM Canada's export prohibition does not restrict the sale of its products in any Canadian market.

88. Even if GM Canada's export prohibition substantially lessened competition in a market outside Canada (which is denied), any such impact would be outside the jurisdiction of the *Competition Act* and the Tribunal, as discussed above.

(b) There Is Not Sufficient Credible Evidence Of A Substantial Lessening Of Competition (s. 77(3))

89. As stated above, GM Canada submits that its restrictions on unauthorized distribution and grey market exports have no adverse effect on competition in Canada. Accordingly, there is no basis to conclude that those restrictions are likely to substantially lessen competition in Canada as required under s. 77.

90. If GM Canada is not able to enforce its restrictions on unauthorized distribution and grey market exports, it would become necessary for GM to take other steps to protect the viability of its authorized dealer network and the integrity of the GM brand. This may require the reduction in distribution in Canada of vehicles which are attractive to grey marketers. In addition or alternatively, it may be necessary to raise the prices of vehicles sold in Canada in order to make grey marketing activities less attractive. These actions would not benefit Canadian consumers, GM's authorized dealers or GM, but would be necessary to prevent parallel distribution networks from gaining a foothold and putting the authorized dealer network, their investments, employment and the goodwill attached thereto at risk. Each of these alternatives to the export restrictions is less competitively desirable than GM Canada's restrictions on unauthorized distribution and grey market exports. (Risebrough Affidavit, para. 23)

91. In any case, any lessening of competition which might occur outside of Canada (which GM Canada denies is the case) as a result of GM Canada's restrictions on unauthorized grey market exports is beyond the purview of the *Competition Act*.

92. Even if some vehicles resold by Construx are or would be used in Canada, GM Canada's efforts to prevent such unauthorized resale do not substantially lessen competition. Construx claims that between 1997 and 2003, Construx's total sales of new GM motor vehicles was \$6,869,817.93, or approximately \$1 million per year. The total value of sales of new GM vehicles by authorized GM Canada dealers between 1997 and 2003 was approximately \$85 billion, or approximately \$12 billion per year. Even assuming that all of Construx's sales were in Canada and not for export, and that the relevant market was GM Canada vehicles alone (which it

is not), Construx's sales represented less than .01% of new GM vehicle sales in Canada, and therefore cannot reasonably be said to have a material impact on competition in Canada. (Risebrough Affidavit, para. 33)

(c) GM Canada, General Motors Corporation And "Related Entities" Are Affiliated (s. 77(4))

93. To the extent that Construx's complaint alleges market restriction between or among GM Canada, General Motors Corporation and/or any other subsidiaries of General Motors Corporation, those entities are affiliated. Pursuant to s. 77(4), no order may be made under s. 77 in respect of market restriction between or among companies that are affiliated.

VI. THE TRIBUNAL SHOULD EXERCISE ITS DISCRETION IN FAVOUR OF GM CANADA

94. Even if Construx has established the elements necessary to obtain leave of the Tribunal (which is denied), the Tribunal should exercise its discretion to refuse to grant leave.

95. GM Canada has no right of cross-examination on the affidavit filed in support of Construx's application for leave. The time limits for responding to a leave application are short, and the Tribunal is asked to grant or refuse leave on the basis of the written record. In these circumstances, it is incumbent on the applicant to make full disclosure of all relevant facts in its application, which it has not done. On the contrary, Construx appears to have concealed or omitted material facts.

96. As indicated above, Mr. Zaldin, the President and directing mind of Construx, has repeatedly breached his agreements with GM Canada dealers, induced or attempted to induce GM Canada dealers to breach the terms of their Dealer Agreements, and at various times through several different corporations, engaged in or attempted to engage in the unauthorized and illicit export of GM Canada vehicles designed for sale and use in Canada and in the unauthorized and illicit sale of GM vehicles to buyers in Canada for the purpose of exporting such vehicles. (Risebrough Affidavit, paras. 8-11)

97. Through one of these corporations, Classic Car, Mr. Zaldin has commenced litigation in the Ontario Superior Court of Justice in regard to essentially the same allegations as are made in Construx's application to the Tribunal. Classic Car has failed to diligently pursue that litigation.

Classic Car has not sought to have its action set down for trial and has taken no steps in the last two years to pursue its action. Construx's claim that it will seek an expedited hearing of its application should be considered by the Tribunal in this context. Furthermore, the Tribunal is not the appropriate forum for resolution of what is essentially a private complaint about the terms of GM Canada's dealer agreements. The Federal Court of Appeal reached a similar conclusion in *Symbol v. Barcode*, referred to above. (Risebrough Affidavit, paras. 12, 31)

98. Construx has also failed to disclose that it is no longer permitted by law to engage in the business of a motor vehicle dealer in Ontario. (Risebrough Affidavit, para. 15)

99. The activities engaged in by many grey market resellers may violate numerous Canadian and foreign laws. As indicated by the Bureau in the context of its Internet pharmacy investigation, referred to above, preventing the infringement of foreign law is a reasonable business justification for refusal to deal or market restriction, and is a valid reason not to take enforcement action against such activities.

100. Unlike *Chrysler* and *Xerox*, this is not a case where the respondent has actively encouraged the complainant in its business and subsequently refused to deal with the complainant. To the contrary, GM Canada has consistently applied its policy of prohibiting unauthorized export and resale of GM vehicles for nearly five decades, and has never encouraged the applicant nor acquiesced in the applicant's activities. Each time GM Canada has learned of Mr. Zaldin's many attempts to engage in unauthorized export and resale through a new corporate vehicle, GM Canada has taken steps to prevent such activity. It has done so to preserve a distribution system that is best able to serve the consumer of the vehicle and protect its distribution and service network. (Risebrough Affidavit, paras. 5 and 10-11)

101. For these reasons, Construx has not satisfied the requirements for obtaining leave to commence an application under ss. 75 and 77. In addition or in the alternative, in the circumstances the Tribunal should exercise its discretion to refuse Construx's application for leave.

VII. OTHER MATTERS

102. GM Canada admits the grounds and material facts in paragraphs 2, 3, 25, 26, 27, 28 and 29 of Construx's application for leave.

103. GM Canada denies the grounds and material facts in paragraphs 4, 9, 10, 11, 17, 18, 30, 31, 32 and 33 of Construx's application for leave.
104. GM Canada has no knowledge of the grounds and material facts in paragraphs 1, 5, 6, 7, 8, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23 and 24 of Construx's application for leave.
105. GM Canada requests that the proceedings be conducted in English.
106. GM Canada does not oppose Construx's request that documents be filed in electronic form.
107. Should Construx's application for leave be granted, GM Canada reserves its right to make further submissions in response to Construx's application for an interim order and Construx's application for an order under sections 75 and 77.

DATED at Toronto, Ontario, this 20th day of May, 2005.

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