

**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

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT April 25, 2005 CT-2005-004	
Chantal Fortin for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	#. 0001a

**NOTICE OF APPLICATION FOR LEAVE PURSUANT TO SECTION 103.1 OF  
THE COMPETITION ACT**

**TAKE NOTICE THAT:**

1. The Applicant Construx Engineering Corporation (“Construx”) will make an Application to the Competition Tribunal (the “Tribunal”) pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “*Act*”), seeking leave to bring an Application for:

(a) an Order under subsection 75(1) of the *Act* directing the Respondent General Motors of Canada Limited (“GM”) to allow Construx to purchase new GM motor vehicles from authorized GM dealers on usual trade terms; and

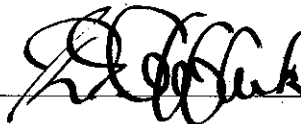
(b) an Order under subsection 77(3) of the *Act* prohibiting GM from engaging in market restriction that prevents Construx from purchasing new GM vehicles.

**AND TAKE NOTICE THAT:**

2. The person against whom the Orders are sought is GM. Its address is:  
  
1908 Colonel Sam Drive  
Oshawa, Ontario L1H 8P7
3. Construx will rely on the Statement of Grounds and Material Facts attached hereto and on the Affidavit of Geoffrey Zaldin, affirmed on April 11, 2005, and such further and other material as counsel may advise and the Tribunal may admit.
4. If leave is granted, Construx will seek an Interim Order for the relief sought in the Application and directions from the Tribunal for an expedited hearing of this Application.
5. Construx requests this Application proceed in English.

6. Construx requests that documents be filed in electronic form.

DATED at Toronto, Ontario, this 25<sup>th</sup> day of April, 2005.



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**AND TO: Sheridan Scott**  
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Tel: (819) 997-3301  
Fax: (819) 953-5013

**AND TO: General Motors of Canada Limited**  
**c/o Neil J. MacDonald, General Counsel**  
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## I. STATEMENT OF GROUNDS AND MATERIAL FACTS

### **A. The Parties**

1. The Applicant Construx Engineering Corporation (“Construx”) a corporation incorporated under the laws of Ontario, is a wholesale dealer and broker of transportation products, including automobiles. It has carried on business as a purchaser of such transportation products, including GM motor vehicles. It purchased those motor vehicles primarily from authorized GM dealers within the Province of Ontario or acquired them from other entities who purchased them from authorized GM dealers in Ontario.

2. The Respondent General Motors of Canada Limited (“GM”) is a corporation incorporated under the laws of Canada with its head office in Oshawa, Ontario. GM is a wholly owned subsidiary of General Motors Corporation, a manufacturer of transportation products, including automobiles, with headquarters in Detroit, United States of America.

3. GM manufactures transportation products, including automobiles, (“GM motor vehicles”) in Canada for sale in Canada and for export to the United States. GM has established a distribution system through which dealers authorized by it sell new GM motor vehicles and motor vehicles manufactured outside Canada by an entity related to GM to customers throughout Canada.

4. GM has refused to sell GM motor vehicles directly to Construx.

5. Once Construx purchases a transportation product it either exports it to a buyer outside Canada or resells it to a buyer located in Canada who generally exports those products.

## **B. GM's Refusal to Deal and Market Restriction**

6. Construx has been carrying on the business of purchasing new transportation products for export from and resale in Canada since 1995. It has been exporting and reselling new transportation products for approximately 10 years.

7. During the period Construx has been exporting and reselling new transportation products, it has acquired a significant quantity of new GM motor vehicles from authorized GM dealers.

8. Construx's ability to purchase new GM motor vehicles directly or indirectly from authorized GM dealers has now been terminated.

9. In an attempt to prevent its authorized dealers from selling new GM motor vehicles to parties such as Construx, GM and all other major Canadian manufacturers and distributors of transportation products have established a uniform policy of preventing the export and resale of new transportation products offered for sale in Canada as well as preventing the import of new transportation products into Canada by such parties.

10. In order to become and remain an authorized GM dealer in Canada, it is necessary for a dealer to execute a number of written agreements with GM. Certain of these agreements are referred to in paragraph 11 hereof.

11. GM has vigorously sought to thwart the export from, resale in and import into Canada of new GM motor vehicles or new motor vehicles manufactured outside Canada by any entity related to GM. It has curtailed the viability of Construx in the following, amongst other, ways:

- (a) GM includes the following Vehicle Export provision in Article 5.1.2(a) of its Dealer Sales and Service Agreement ("Dealer Agreement"):

It is the policy of General Motors not to sell or allocate new Motor Vehicles to Dealers for sale or use outside Canada. ...Therefore, Dealer agrees that this Agreement authorizes Dealer to purchase new Motor Vehicles only for resale to customers located and resident in Canada for personal use or for a primary business use other than resale and that Dealer is not authorized by this Agreement to directly or indirectly sell Motor Vehicles for resale or primary use outside Canada;

- (b) GM includes the following Sale for Resale provision in Article 5.1.2(b) of its Dealer Agreement:

It is the policy of General Motors not to sell or allocate new Motor Vehicles to Dealers for resale to persons or parties engaged in the business of reselling, brokering (including professional auto buying services) or wholesaling. ...Therefore, Dealer agrees that this Agreement authorizes Dealer to purchase Motor Vehicles only for resale to customers for personal use or for primary business use other than resale and that Dealer is not authorized by this Agreement to directly or indirectly sell Motor Vehicles for resale to wholesalers, brokers (including professional auto buying services) or agents. ...;

- (c) GM includes the following Penalty Provision in Article 5.1.2(d) of its Dealer Agreements:

General Motors may, from time to time, issue a policy regarding reasonable charges to be paid by Dealer to General Motors in relation to the sale or lease of vehicles in contravention of this Article 5.1.2 and Dealer agrees to pay the charges set out in such policy;

- (d) GM debits back to its authorized dealer any rebate, refund, credit, incentive, allowance, discount or payment of any kind paid to the authorized dealer by GM on the sale of new GM motor vehicles if the authorized dealer has not complied with GM's policy of Vehicle Exports or Sale for Resale;
- (e) GM compiles and maintains an updated list of individuals and parties who are "suspected" of purchasing new GM motor vehicles for use outside Canada or for the purpose of reselling vehicles in Canada. The list, known as the List of Suspected Exporter/Reseller, is continually updated and is

available on the GMinfoNET website ([www.gminfonet.com](http://www.gminfonet.com)) in order to alert and prohibit authorized GM dealers from selling new GM motor vehicles to persons or companies on the list. Construx and related entities are currently on this list;

- (f) GM refuses to supply an authorized dealer with new GM motor vehicles if the purchaser is a known or “suspected” exporter or reseller of new GM motor vehicles, whether or not a purchase agreement has been entered into between a prospective purchaser and an authorized GM dealer;
- (g) GM threatens to, and does, curtail an authorized dealer’s new GM motor vehicle allocation if it has not complied with GM’s policy of Vehicle Exports or Sale for Resale;
- (h) GM refuses warranty coverage outside of Canada for new GM motor vehicles sold in Canada and put into service on or after September 1, 2002 unless,
  - (i) the motor vehicle has been in service for at least 6 months and has traveled more than 12,000 kilometers, or
  - (ii) the motor vehicle is owned by a Canadian who is outside of Canada as a tourist or by reason of relocation and can provide proof of the same;
- (i) GM includes in its Competitive Assistance Program agreements, which concern the sale of new GM motor vehicles at volume discounts, restrictions and prohibitions against the export from and resale in Canada of such vehicles;



- (j) GM includes in its Enrollment Form for Fleet Customers the following provisions regarding the export from and resale in Canada of new GM motor vehicles:

New Motor Vehicles ordered under fleet programs must be delivered, registered and retained in service in Canada by the first Qualified Fleet Customer for a minimum of six (6) months and 12,000 kilometers for Lease, Commercial and Daily Rental operation from the date of delivery, or as otherwise defined by GM Canada. By executing this enrollment form, the Fleet Customer certifies that no motor vehicles ordered under the Fleet Program, are being or will be purchased or leased, directly or indirectly, for export, sale or use outside Canada, or for resale in Canada. Fleet Customer is hereby notified that the agreement between GM Canada and Dealer prohibits sales by Dealer to persons who export or resell the motor vehicles within Canada.

...The Qualified Fleet Customer agrees to provide, upon request from GM Canada or selling Dealer, business records and registration information confirming that vehicles purchased and registered solely for use in its Canadian operation and transferred only in accordance with GM Canada program requirements. In the event that the Fleet Customer orders new motor vehicles from a Dealer and identifies them as fleet units eligible for GM Canada fleet programs and the vehicles are not used by the Fleet Customer in accordance with program requirements, as determined by the Fleet Customer's business records or registration information, GM Canada will take appropriate action. This may include, but is not limited to, the Fleet Customer or Dealer being disqualified from future participation in fleet programs and Fleet Customer or the Dealer being charged by GM Canada for the amount of any special allowances, incentives, special option packages or other promotional programs which GM Canada paid or credited the Dealer or the Fleet Customer as a result of the Fleet Customer's inaccurate representations;

- (k) GM includes in its Upfitters Program agreements, which concern the sale of incomplete new GM motor vehicles to customers who perform specialized completions, restrictions and prohibitions against the export from and resale in Canada of such GM motor vehicles;
- (l) GM prohibits the import into Canada of new GM motor vehicles or new vehicles manufactured outside Canada by any entity related to GM that were not originally manufactured for distribution, sale, registration and primary use in Canada. In addition, GM refuses to pay for warranty

repairs on such motor vehicles. Construx is accordingly prevented from importing motor vehicles manufactured outside Canada by an entity related to GM for sale in Canada or for export;

- (m) If an authorized GM dealer participates in the purchase or sale of motor vehicles manufactured outside Canada by an entity related to GM and not intended for sale in Canada, GM threatens to, and does:
  - (i) reduce new GM motor vehicle allocations to the authorized dealer;
  - (ii) restrict or discontinue the authorized dealer's opportunity to receive high demand models of new GM motor vehicles; and
  - (iii) charge back to the authorized dealer any payments made on the sale of such motor vehicles.

### **C. Effect on Construx**

12. GM's refusal to allow any of its authorized dealers to supply Construx with new GM motor vehicles and its prohibition against the import into Canada of motor vehicles manufactured outside Canada by an entity related to GM has had a devastating effect on Construx. Construx has suffered and continues to suffer substantial diminution of its business.

13. Between 1997 and 2003, Construx's sales of new GM motor vehicles was \$6,869,817.93 representing some 38% of Construx's total sales. In 2004, however, Construx was unable to acquire and sell any new GM motor vehicles.

14. As a result of GM's efforts to prevent the export from and resale in Canada of new GM motor vehicles, Construx has been unable to fulfil purchase orders from its customers. For example, in 2003, Construx was unable to satisfy orders for 120 sport

utility vehicles and other similar vehicles of which sales would have represented a profit of approximately \$2,000.00 each and 200 Chevrolet Avalanche and heavy duty diesel pickup trucks at an approximate profit of \$1,250.00 each, for a total loss of \$490,000.00.

15. As a result of GM's efforts to prevent the import into Canada of new motor vehicles manufactured outside Canada by an entity related to GM, Construx has also been unable fulfil purchase orders from its customers. For example, in 2003, Construx was unable to satisfy orders for 15 Chevrolet SSRs of which sales would have represented a profit of approximately \$5,000.00 each, for a total loss of \$75,000.00. Chevrolet SSRs are manufactured in the United States by General Motors Corporation.

16. In the year 2003 Construx sold some 53 new GM motor vehicles to customers. Those new GM motor vehicles represented some 67% of all new motor vehicles sold to customers by Construx in 2003. In the year 2004 the number of new GM motor vehicles sold by Construx had dwindled to zero.

17. Construx has always met and is able to continue to meet the usual trade terms of purchasing new GM motor vehicles. The usual trade terms of purchasing a new GM motor vehicle from GM dealers include a small deposit upon placement of a factory order and a subsequent payment by certified funds prior to the release of the motor vehicle. However, provisions regarding vehicle exports or sale for resale in purchase agreements between authorized GM dealers and their customers are not part of the usual trade terms.

18. There is an ample supply of new GM motor vehicles in the market. Authorized GM dealers are more than willing to supply Construx with new GM motor vehicles especially at a time when customer sales are declining and there are too many vehicles in their inventory. Those dealers are restrained from doing so by the restrictions described in paragraph numbered 11 above. One of the reasons why authorized GM dealers face an oversupply of new GM motor vehicles is because of GM's refusal to allow its authorized dealers to sell new GM motor vehicles to parties such as Construx.

19. Customers and potential customers of Construx located in Canada and outside Canada have requested Construx to supply them with new GM motor vehicles. The measures instituted by GM as described above and, in particular, in paragraph numbered 11 have prevented Construx from doing so. Construx is no longer able to compete in reselling new GM motor vehicles in Canada or in exporting new GM motor vehicles to destinations outside Canada.

20. Customers and potential customers of Construx that are located either in Canada or outside Canada must deal with the Export Division and/or Global Fleet Division or a local entity related to General Motors Corporation in order to acquire new transportation products. Such customers no longer have any practicable choice of alternative suppliers of new motor vehicles manufactured by GM, General Motors Corporation or any related entity.

21. It is not possible for Construx to purchase new GM motor vehicles from any sources other than through authorized GM dealers. GM does not supply motor vehicles directly, it supplies new motor vehicles to customers such as Construx through its authorized dealers. In addition, the substantial number of Construx's customers who would place orders for new motor vehicles manufactured outside Canada by an entity related to GM and imported into Canada are authorized GM dealers. If authorized GM dealers are not allowed to sell new GM motor vehicles to Construx or purchase new motor vehicles imported by Construx, Construx will continue to suffer irreparable harm.

22. To remain viable, Construx urgently needs to be able to purchase new GM motor vehicles for export from and resale in Canada. It also needs to be able to import into Canada motor vehicles manufactured outside Canada by entities related to GM.

23. If interim relief is not granted to Construx in the form of an Interim Order that GM take no action to prevent or sanction its authorized dealers from selling new GM motor vehicles to Construx on usual trade terms or from purchasing motor vehicles manufactured outside Canada by an entity related to GM, Construx will lose its remaining customers. Construx cannot continue in business and lose more customers.

24. Should an Interim Order be granted, Construx is prepared to give an undertaking in damages.

## **II. BASIS FOR APPLICATION PURSUANT TO SECTION 103.1**

25. The test for granting leave under section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "*Act*") is set out in subsection 103.1(7) of the *Act* as follows:

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.

26. In this application, Construx seeks leave to bring an application for an order pursuant to subsections 75(1) and 77(3) of the *Act*. Subsection 75(1) of the *Act* provides:

Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

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

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

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

(d) the product is in ample supply, and

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

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

27. Subsection 77(3) of the *Act* provides:

Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

28. Section 103.1(7) of the *Act* was first analyzed by the Tribunal in *National Capital News Canada v. Canada* (Speaker, House of Commons), [2002] C.C.T.D. No. 38 (Comp. Trib.), aff'g [2004] F.C.J. No. 83 (C.A.) ("*National Capital News*") as follows at paragraph 14:

Accordingly on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and jurisprudence referred to above...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.

29. In *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] F.C.J. No. 1657 (C.A.), aff'g [2004] C.C.T.D. No. 1 (Comp. Trib.), Rothstein J.A., delivering a unanimous decision of the Federal Court of Appeal, adopted the test set out in *National Capital News* and stated that the threshold for obtaining leave should not be difficult to meet. Rothstein J.A. went on to say at paragraph 17:

[The applicant seeking leave] need only provide sufficient credible evidence of what is alleged to give rise to a *bona fide* belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.

30. In this case, the test for granting leave is whether there is credible evidence to support a finding that there are reasonable grounds to believe that GM's policy of prohibiting Construx from purchasing new GM motor vehicles for export from and resale in Canada as well as prohibiting the import into Canada of motor vehicles manufactured outside Canada by entities related to GM could be subject to an Order under subsections 75(1) and/or 77(3) of the *Act*.

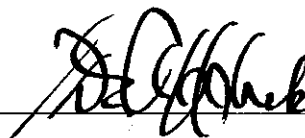
31. The test for granting leave is satisfied because the evidence now before the Tribunal demonstrates that:

- (a) GM is engaging in an activity which constitutes refusal to deal under subsection 75(1) and market restriction under subsection 77(3) of the *Act*; and
- (b) Construx's business is directly and substantially affected by both GM's refusal to deal and refusal to allow its authorized dealers to deal with Construx, and GM's market restriction;

32. The actions of GM in refusing to deal and refusing to allow its authorized dealers to deal with Construx, and GM's market restriction clearly fall within with the scope of activities prescribed by subsections 75(1) and 77(3) of the *Act*. Further, these activities clearly amount to practices with could be subject to an Order under both subsections 75(1) and 77(3) of the *Act*.

33. In support of the foregoing, Construx relies on the Affidavit of Geoffrey Leigh Zaldin, affirmed April 11, 2005.

DATED at Toronto, Ontario, this 25<sup>th</sup> day of April, 2005.



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