

Competition Tribunal



Tribunal de la Concurrence

#185(a)

CT - 88 / 4

IN THE MATTER OF an application by the Director of Investigation
and Research under section 75 of the *Competition Act*,
R.S.C., 1985, c. C-34, as amended;

AND IN THE MATTER OF a refusal to supply automotive parts for
export by Chrysler Canada Ltd. to Richard Brunet.

B E T W E E N :

The Director of Investigation and Research

Applicant

- and -

Chrysler Canada Ltd.

Respondent

REASONS AND ORDER

Date of Hearing:

July 4 - 18 and 21, 1989

Presiding Member:

The Honourable Mr. Justice Max M. Teitelbaum

Judicial Member:

The Honourable Mr. Justice Leonard A. Martin

Lay Member:

Dr. Frank Roseman

Counsel For the Applicant:

Director of Investigation and Research

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John S. Tyhurst
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Amicus Curiae:

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COMPETITION TRIBUNAL
REASONS AND ORDER

The Director of Investigation and Research

v.

Chrysler Canada Ltd.

On December 14, 1988, the Director of Investigation and Research ("Director") filed an application with the Competition Tribunal ("Tribunal") pursuant to section 75 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended ("Act"), requesting the following relief:

1. An order against the Respondent Chrysler Canada Ltd. (Chrysler) requiring that it forthwith and thereafter accept Richard Brunet (Brunet) as a customer on trade terms usual and customary to its relationship with Brunet for the supply of Chrysler Parts (as hereafter defined) to Brunet; and
2. Such other and further orders which in the circumstances may be just, including:
 - a) requiring and directing that Chrysler reverse all steps taken to dissuade any person (including Chrysler franchised dealers) in Canada from conducting business with Brunet with respect to Chrysler Parts;

- b) restraining Chrysler from combining or arranging with any other person to refuse, suppress, hinder or delay the supply of Chrysler Parts to Brunet; and
- c) directing that Chrysler take all such ancillary and necessary steps and actions to restore Brunet to the position he enjoyed before the actions herein complained of.

In 1977 Richard Brunet ("Brunet") opened and began to operate a business in the City of Montreal, Province of Quebec, commonly known as R. Brunet Company ("RBC"). The business was registered as a sole proprietorship.

Brunet's father had operated a similar business in New York City, State of New York, in the United States of America, under the name of G. Brunet Company. This business was involved in the export of automotive parts, including automotive parts of Chrysler Corporation, Ford Corporation and General Motors Corporation. The automotive parts were exported, in the main, to Colombia, Peru and Venezuela. In November 1974, following the death of his father, Brunet took over the operation of his father's business until 1976 when he came to live in Canada.

Brunet, as had his father, exported automotive parts to markets outside of North America, initially to South America, and later to the Middle East, Scandinavia and the United Kingdom.

Although RBC deals with the sale of automotive parts which it purchases from various suppliers, the present application

pertains to the relationship between RBC and Chrysler Canada and the sale by RBC of Chrysler automotive parts in the export market.

Throughout the proceedings, certain terminology relating to the Chrysler parts has been used. The most frequent references are to two groups of Chrysler parts: "A Parts" and "B Parts". On its price lists, Chrysler¹ identifies its parts by a seven-digit number and by one of the above two letters.

B Parts are commonly known as "captive" parts. Mr. Clifford Roy Burnett ("Burnett"), the recently retired Vice-President of Parts and Service and Technical Programs of Chrysler Canada, who since 1974 had the responsibility through various positions for the parts distribution in Canada, testified that some automotive parts that are considered captive parts may in fact be available from a source other than Chrysler. Generally, however, if an owner of a Chrysler motor vehicle must replace a B Part, the part will have to be obtained from Chrysler. Sheet metal parts or interior mouldings were referred to as clear examples of captive parts that could only be supplied by Chrysler.

A Parts are commonly known as "competitive" parts since these parts are available from a variety of automotive parts

¹ "Chrysler" without a modifier refers to the entire Chrysler organization in North America.

manufacturers for a particular application. An example of a competitive part would be a shock absorber or a fan belt.

Automotive parts can also be divided according to the use to which the part is put. When reference is made to "service" parts, this is taken to mean parts that are used to repair a vehicle, consequent upon an accident or some other malfunction, as opposed to "aftermarket" parts which are replaced as a matter of course during routine maintenance. The breakdown according to application relates to the captive/competitive dichotomy in the following way: service parts may be both captive and competitive; aftermarket parts are competitive more than captive.

Certain brand names specific to the Chrysler organization also appear in the evidence. "Autopar" is a line of Chrysler parts which comprises only competitive parts and which is marketed only by Chrysler Canada. "Mopar" is a line of Chrysler parts which, in Canada, includes mainly captive parts.

Finally, mention should be made of the "Interparts" programs of Chrysler U.S. Interparts programs involve a bulk purchase of some minimum quantity of an automotive part from a special production run of that specific part. These programs include both captive and competitive parts and are only available through Chrysler U.S.

RBC had its first dealings with Chrysler Canada in 1977 and continued to buy from them until the events that led to the present application. Apart from selling Chrysler parts Brunet dealt with two major suppliers in the United States (described as "Other U.S." in Table 1 below). He has also purchased small volumes of auto parts from several suppliers in Canada. His principal supplier in the U.S. until 1983 was Ford Corporation. His relationship with this company ended in 1985. The "Other U.S." since 1985 consists, for practical purposes, of purchases from a single source of supply on behalf of a particular customer. The purchases from Chrysler Canada dealers relate to the present proceedings. Table 1 divides the sales of RBC by the aforementioned sources of supply since 1984.

TABLE 1

R. Brunet Company

Gross Sales by Line of Business

<u>Year</u>	<u>Chrys. Canada</u>	<u>Chrys. Canada Dealers</u>	<u>Chrys. U.S.</u>	<u>Inter- parts, M.D.*</u>	<u>Other Canada</u>	<u>Other U.S.</u>
1989 #	-	26,618	67,630	-	21,706	-
1988	-	119,310	52,734	156,464	23,985	376,648
1987	99,154	223,495	24,126	325,872	78,280	140,890
1986	362,245	-	25,180	171,551	50,920	225,207
1985	259,892	-	20,442	95,235	11,984	338,824
1984	300,394	-	27,813	23,631	57,373	508,370

Notes:

* M.D. = Master Distributors

To May 12, 1989 only. Transactions with customers were placed in supplier categories by Mr. Reinke of Arthur Anderson Co. based on the supplier from whom Brunet made the largest purchases in each transaction. As a result, there are some minor discrepancies between the values in the table for 1989 and the actual sources of supply.

Total Gross Sales

<u>Year</u>	<u>Total</u>
1989 #	115,954
1988	729,141
1987	891,817
1986	835,103
1985	726,377
1984	917,581

Notes:

To May 12, 1989 only.

Sources:

Exhibit 10: Statement of Roman Boyko, C.A. / Richard Joly, C.A., Coopers and Lybrand, for the Director of Investigation and Research, Schedules A to H; Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989, prepared by B.J. Reinke, C.A.

It is uncontested that Brunet was encouraged by Chrysler Canada throughout his association with it to expand the sale of Chrysler Canada auto parts in the export market. A number of actions were taken by Chrysler Canada in its treatment of Brunet to allow for the needs of his customers who faced particular problems of exchange controls and import permits with time deadlines. The details of some of the particular services provided by Chrysler Canada will be discussed in connection with the definition of market. Brunet undertook to represent the Autopar line at trade shows in South America with posters supplied by Chrysler Canada. On occasion Chrysler Canada referred potential customers to Brunet.

On August 29, 1986, Brunet received a telephone call from a Mr. P.R. Williams, National Parts and Sales and Marketing Manager for Chrysler Canada, who informed Brunet that all his orders with Chrysler Canada had been placed on hold. By letter dated October 8, 1986, in reply to a letter from Brunet dated October 2, 1986, sent to Burnett and dealing with a matter referred to as "Requirement for Britain",² Burnett advised Brunet that there was "no longer any organizational responsibility for handling these orders in Canada". This letter went on to state that all orders currently in the system would be processed according to "normal practice and/or availability of supply":

October 8, 1986

Mr. Richard Brunet
R. Brunet Company
Suite 918
360 St. James Street West
Montreal, Quebec
H2Y 1P5

Dear Richard:

Your letter of October 2, 1986 is received and since there is no longer any organizational responsibility for handling these orders in Canada I have referred your request to Mr. B.J. Lerner in the U.S. Chrysler Export Sales Office who will handle all of your requirements.

All orders currently in the system will be filled and shipped as per our normal practice and/or availability of supply.

Thank you for your inquiry. You will hear from Mr. Lerner's office in the near future.

Yours very truly,

(s) C.R. Burnett³

² Exhibit 3, Tab 162.

³ Exhibit 3, Tab 164.

The orders currently in the system were filled by Chrysler Canada over the following five to six months. No new orders were accepted by Chrysler Canada after October 8, 1986 causing Brunet to try to find alternative sources of supply. In January 1987, Brunet approached several Montreal-area Chrysler Canada dealers in order to source parts to service his customers. It did not take long for Chrysler Canada to become aware that Brunet was purchasing parts from its dealers. This information was relayed to Chrysler Canada's head office by Chrysler Canada field representatives through its Montreal office. Suspicion was also aroused by a large order placed by a Chrysler Canada dealer through the Chrysler Canada computer system. This order contained an unusually large number of older automotive parts, far in excess of normal domestic demand. A representative of Chrysler Canada (head office) contacted the Sales Manager of the Regional Office in Pointe Claire, Province of Quebec, a Mr. Jacques St. Pierre, and asked St. Pierre to have his district managers instruct their dealers not to sell Chrysler automotive parts for export.

This initiative was followed up by a bulletin to all Chrysler Canada dealers dated May 8, 1987:

Bulletin No. 87-37
May 8, 1987

TO ALL DEALERS AND AUTOPAR DISTRIBUTORS
OF CHRYSLER CANADA LTD.

EXPORT PARTS SALES

We have received several inquiries recently from Dealers regarding the sale of Chrysler Parts for **Export Sales** purposes. The requests may have resulted from recent articles in the press that Chrysler would be expanding sales of some North American-built products into foreign markets.

The sales of Mopar and Autopar Parts by Chrysler Canada is strictly to service our Canadian customers, not for export. If you receive an inquiry concerning export sales, please contact your Regional Parts Sales Manager, for referral to our Export Sales Office in Detroit. All Chrysler Canada Export Sales will be handled in this manner.

We would appreciate your co-operation in this matter.

(s) P.R. Williams

P.R. WILLIAMS
National Parts Sales
and Marketing Manager⁴

Bulletin n^o 87-37
Le 8 mai 1987

AUX CONCESSIONNAIRES ET DISTRIBUTEURS
AUTOPAR DE CHRYSLER CANADA LTÉE

VENTE DE PIÈCES POUR L'EXPORTATION

Plusieurs concessionnaires nous ont récemment contactés au sujet de la vente de pièces Chrysler **pour l'exportation**. Les demandes sont peut-être reliées à la parution de certains articles dans la presse déclarant que Chrysler étendrait la vente de certains produits de fabrication nord-américaine aux marchés étrangers.

La vente des produits Mopar et Autopar par Chrysler Canada est strictement réservée à nos clients canadiens et non à l'exportation. Pour toute demande concernant la vente pour l'exportation, veuillez communiquer avec votre directeur régional, secteur vente des pièces, qui en référera au bureau des ventes pour l'exportation à Detroit. Toutes les ventes de pièces pour l'exportation de Chrysler Canada seront ainsi traitées.

Votre collaboration dans cette affaire sera grandement appréciée.

Le Directeur national,
vente et commercialisation
des pièces,

(s) P.R. Williams

P.R. Williams⁵

⁴ Exhibit 4, Tab 230 (underlining added).

⁵ *Ibid.* (underlining added).

Despite the general language of this bulletin, the Tribunal is satisfied, from the testimony of Burnett, that the bulletin *was aimed at preventing Brunet* from obtaining Chrysler parts to service his customers.

Q. Now, in the second sentence in that first paragraph, it says:

"The request may have resulted from recent articles in the press that Chrysler would be expanding sales of some North American-built products into foreign markets."

Given your evidence to this point on this bulletin, would you agree with me that the specific impetus for the bulletin was Mr. Brunet and not any articles that may have appeared in the press?

A. That is true, although there were articles in the press about Chrysler entering the European market.

Q. But I put it to you that, in the absence of Mr. Brunet's activities, you would not have sent this memorandum.

A. Probably not, sir.⁶

Notwithstanding the issuance of the bulletin Brunet was still able to purchase, with difficulty, Chrysler parts from Chrysler Canada dealers. On September 27, 1987 a second bulletin was issued by Chrysler Canada.⁷ This second bulletin was much the same as the first. It emphasized, as did the first, that parts were not to be sold for export and that all requests for parts for export should be

⁶ Cross-examination of Burnett at p. 1534 of the transcript.

⁷ Exhibit 16.

referred to the dealer's Regional Manager who, in turn, would refer the matter to the office of Export Sales in Detroit.

Some time after the May 1987 bulletin, Chrysler Canada commenced a review of all of its dealer agreements which culminated in the re-signing of all the Chrysler Canada dealers to new dealer agreements. A clause was inserted in order to restrict parts sales to the domestic market in the following terms:

Whereas the parties hereto have heretofore entered into a Sales and Service Agreement relating to, among other things, a means for the sale, in Canada, of parts and accessories and other products and services manufactured or distributed by CHRYSLER

And to provide parts to the Canadian domestic market to assure service to those vehicles sold in Canada for the full extent of their service requirements.⁸

Although no sanctions or penalties have as yet been applied against any of its dealers by Chrysler Canada for breach of the clause, Burnett is of the view that the new agreement gives Chrysler Canada the power to terminate the franchise of a dealer who sells parts to Brunet. Changes were also made to the computerized ordering system of Chrysler Canada to flag atypical orders involving large volumes or unusual parts.

⁸ *Parts Wholesale Sales Agreement*, Exhibit 6, Tab 338 (underlining added). See also *Parts Merchandising Sales Agreement*, Exhibit 26.

Section 75 of the *Competition Act*

On the basis of the above facts the Director instituted the proceedings pursuant to section 75 of the Act. Section 75 reads:

75. (1) Where, on application by the Director, 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, and

(d) the product is in ample supply,

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.

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

In order for the Tribunal to exercise its discretion to make an order pursuant to the section the Director must establish all of the elements contained in each of the paragraphs (1)(a) to (1)(d). Paragraphs (1)(c) and (1)(d) are not in serious dispute. The Tribunal is satisfied that Brunet is willing and able to meet the usual trade terms of Chrysler Canada and that the product is in ample supply. No evidence was led to the contrary. Before turning to the determination of whether the elements of (1)(a) and (1)(b) have been met, it is necessary to establish the meaning of "product" and "market".

Product

Is the product in question Chrysler Canada auto parts as submitted by the Director, Chrysler auto parts, or auto parts in general as submitted by the respondent? The definition of market is closely tied to the answer to this question. The Tribunal is satisfied that the relevant product is, for the reasons explained below, Chrysler auto parts.

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 paragraph 75(1)(a), the ultimate test concerns the effect 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 section 75 is the buyer's customers.

Although Brunet's business is the export of auto parts, the definition of the product in relation to Brunet's dealings with Chrysler Canada depends on the demand of customers who purchased Chrysler auto parts. The issue is whether they treated Chrysler auto parts as a distinct product or as one for which they would readily accept substitutes. The evidence shows that Brunet responded to direct orders of customers, that customers *specified* that they wanted genuine Chrysler parts, and that they used numerical codes specific to Chrysler's parts system when ordering. There was no question of substituting parts of other suppliers for those of Chrysler. The product in question is thus Chrysler auto parts.

The respondent submits that subsection 75(2) severely constrains the definition of the product as Chrysler auto parts: "the effect of subsection 75(2) with its reference to class of articles is that the Tribunal must define a product by a genus or class or kind

description, unless the product meets the single exception thereto."⁹ The applicant takes the position that the subsection "adds little to the analysis. In a buyer-derived demand situation alternative branded goods are of little utility and the particular sought branded goods will always be of importance."¹⁰

In the view of the Tribunal subsection 75(2) does not enter into the definition of the product as Chrysler auto parts. The product is Chrysler auto parts not "only because it is differentiated from the other articles in its class by a trade mark, proprietary name or the like".¹¹ It is not only the existence of the trademark that determines the definition but rather the demand of Brunet's customers. Subsection 75(2) forecloses reliance being placed on trademarks (save for the specified exception) to define products in spite of the existence of acceptable substitutes to customers. This factor, the presence or absence of acceptable substitutes to customers, is of paramount importance in arriving at the appropriate definition of the "product" and was the determining factor in the present case.

The evidence is that it is primarily service parts and within that group mainly captive parts that are ordered from Brunet. This is consistent with the designation of other parts as competitive

⁹ Respondent's Memorandum of Law at para. 40.

¹⁰ Memorandum of Law of the Applicant at para. 35.

¹¹ *Competition Act*, R.S.C. 1985, c. C-34, as am., s. 75(2) (underlining added).

because for these parts there are numerous alternative sources of supply and active price competition. Looking to the fact that sales by Brunet of the Autopar line, which consists only of competitive parts, were very limited, Chrysler Canada would have the Tribunal exclude the Autopar line from the product definition. The Director has stressed, through the evidence of Brunet, that in Brunet's experience competitive parts are ordered in the same way as captive parts (as a seven-digit number) and with the same insistence on genuine Chrysler parts. Virtually nothing turns on the finding of a distinction; no element of the decision depends on whether the product in question is Chrysler auto parts, captive and competitive, or exclusively captive Chrysler auto parts since the volume of competitive parts ordered from Brunet appears to have been minimal. A finding for Chrysler Canada would require that Brunet's sales and gross profits be modified to exclude sales of Autopar. This was not done by the Respondent's accounting expert. Given the foregoing and the fact that from Brunet's perspective (if not that of his customers insofar as they shop for cheaper sources of supply prior to ordering from Brunet) there is no difference between competitive and captive parts, the Tribunal makes no distinction between captive and competitive Chrysler parts.

The economist, Professor Ralph A. Winter, who appeared as an expert witness on behalf of the respondent, submits that the Tribunal should approach the definition of product and market not from the point of view of Brunet as a buyer, but from the viewpoint

of determining whether Chrysler has substantial market power. This, he submits, can only be done by considering what Chrysler sells and with whom it competes. He concludes that the relevant market is synonymous with the worldwide sale of automobiles since the price of auto parts is established in conjunction with the pricing of vehicles. It is Winter's view that Chrysler's pricing of parts is constrained by the effect this can have on the sale of its vehicles and that it faces very stiff competition in the sale of its vehicles. Winter concludes that since Chrysler does not have substantial market power as a seller of vehicles, its decision to discontinue supplying Brunet was motivated by concerns for efficiency and not to increase its market power.

This argument is presented by Winter in relation to the definition of product and market and also in conjunction with the Tribunal's use of its discretion to grant an order in the event that it finds that all of the elements have been satisfied by the applicant. The Tribunal is satisfied that a broad consideration of Chrysler's market power is not required in determining whether the specific elements of section 75 of the Act have been satisfied but may be relevant in the Tribunal's exercise of its discretion.

Market

Having defined the product as Chrysler auto parts, the Tribunal must now determine the market in which Brunet buys

Chrysler auto parts. The applicant contends that the relevant market comprises Canada, that Chrysler Canada is the sole supplier and Brunet, in the event, is the sole buyer. The respondent submits that the market consists of both the U.S. and Canada, that Chrysler U.S. is the supplier and exporters of Chrysler auto parts are the buyers. The Tribunal is satisfied that the relevant market is Canada, and that the U.S. and Canada are separate markets. This conclusion is discussed in the following section that deals with the differences between purchases from Chrysler Canada and from Chrysler U.S. in small and large volumes.

(a) Parts Purchased in Small Volume

This refers to the number of units of each part and to the fact that the parts are individually packaged. It does not refer to the size of the total order.

The automotive parts purchased from Chrysler Canada or Chrysler U.S. are physically identical. However, Chrysler Canada and Chrysler U.S. each publish separate price lists for these parts. The evidence is that prices in Canada are established with respect to market conditions in Canada. According to the evidence of Burnett, Chrysler Canada used the U.S. price list as a point of departure and made its modifications to price in the light of domestic conditions, subject to meeting the financial tests within Chrysler.

The reason why prices (*denominated in a common currency*) for some parts are cheaper in Canada than in the U.S. was addressed in the evidence of Burnett and, more speculatively, in the evidence of Professors Schwindt and Winter. Burnett states that Canadian prices are primarily cheaper for parts used for older models of cars. He also said that Chrysler Canada tends not to change the prices of inventory until it is necessary to reorder and since the turnover of inventory is much slower in Canada than in the U.S., reordering occurs less frequently and thus price increases lag behind those in the U.S.

Winter hypothesizes that parts prices in Canada fell at the time of the decline in the Canadian dollar as compared to the American dollar in late 1970s. He reasons that Chrysler, in common with other companies, is reluctant to incorporate the effect of exchange rate changes in their prices because this would be too disruptive. Professor Richard Schwindt concludes that prices of vehicles and parts in Canada are more sensitive to import competition than in the U.S. and thus tend to be lower. All the explanations share the common feature that, *whatever the cause, market conditions in the U.S. and Canada are different and the differences are reflected in different parts prices.* The percentage of all Chrysler parts that were priced lower in Canada is not in evidence. The only specific evidence is that it is primarily older parts that are affected.

The evidence generally indicates that customers tended to buy exclusively or primarily from Brunet those parts that were cheaper to source through Chrysler Canada. Parts that were generally less expensive to source in the U.S. were purchased through other suppliers.

In addition to the price differences between Chrysler Canada and Chrysler U.S., there were several other important differences between them as sources of service parts. Chrysler Canada offered Brunet (and thus Brunet's customers) "price protection" against changes in prices between the time of order and delivery. This protection was offered for a period of up to four months, covering two bi-monthly changes in price lists. Only recently, in February 1989, was this protection made available to Brunet by Chrysler U.S.

Furthermore, when an order was sent to Chrysler Canada it responded with an "availability report" which identifies the parts that were immediately available and the length of the delay that would be required in supplying each of the remaining parts.

Brunet also asserts, with some corroboration from correspondence with customers, that Chrysler Canada offered superior service in other ways. Brunet claims that the percentage of orders immediately filled by Chrysler Canada was much higher than was the case with Chrysler U.S. and that the latter tended to fill orders

through a series of relatively small shipments to Brunet's designated port. The result was slower shipment to Brunet's customers and higher costs. Brunet also claims that the accuracy with which orders were filled was higher in Canada than in the U.S. As a result there were fewer customer claims when supply was obtained from Chrysler Canada. The only evidence offered in contradiction is testimony by Burnett to the effect that the "fill rate" on orders received by Chrysler *from dealers* is 95 per cent in the U.S. compared to 96 per cent in Canada. This evidence does not, however, provide any information on Brunet's experience with Chrysler U.S. since Brunet *is not a dealer and does not make typical dealer's orders.*

The Tribunal does not accept Brunet's allegations that it is cheaper to ship to European destinations from a port in Montreal rather than a port in New Jersey. This evidence, given by Brunet, is contradicted by the evidence of a Mr. Jansson, a witness from Sweden who imports Chrysler Canada vehicles and Chrysler parts from Canada.

The importance to Brunet's customers of all of the foregoing differences between sourcing from Chrysler Canada and Chrysler U.S. that are not directly related to differences in the price lists cannot be accurately assessed. To do so would require evidence on whether Brunet's customers chose to source from Chrysler Canada when its prices were *higher* than those set by Chrysler U.S. In the absence of evidence of this kind, or at least evidence of customer

statements that they clearly preferred to source from Chrysler Canada, the Tribunal concludes that these factors *alone* do not create two distinct sources of supply. This conclusion is supported by evidence that Brunet's customers tend to buy parts that are cheaper to source from Chrysler U.S. through other exporters than Brunet. This suggests that whatever problems there might have been in sourcing from Chrysler U.S., they could be overcome by price concessions or other advantages that these other exporters offered Brunet's customers. Insofar as Brunet's customers were concerned, he was a preferred source of supply primarily for parts that are cheaper to source in Canada.

Brunet earned a considerably higher profit margin on parts sourced from Chrysler Canada than on U.S. orders as the Canadian price list necessarily included Canadian federal sales tax and duty on parts imported into Canada. The duty and tax did not apply on parts exported from Canada. The duty and sales tax paid by Chrysler Canada were returned to Brunet and constituted the major part of his profit margin. The higher profitability Brunet earned on parts obtained in Canada put him in a position to offer discounts on the published price lists or to absorb some of the cost of higher prices, as may be the case when he buys from dealers. Thus, customers could be encouraged to purchase Canadian-sourced parts when list prices in the U.S. and Canada were similar. Whether discounts were in fact offered by Brunet is less important than his ability to do so.

Schwindt is of the view that the separate price lists in the two countries and the other differences discussed above create a separate "product bundle" with respect to Chrysler parts sourced in Canada and those sourced in the U.S., even though the parts are physically identical. He concludes that the differences are sufficiently great to create two distinct markets:

When sourcing his purchases, Brunet considered a number of elements which were important to his purchase decision. These elements include: the physical characteristics of the automotive part; the delivery point; the probability that the order would be filled in a single delivery; the reliability of the supplier in meeting promised delivery dates; the predictability of trade terms; the probability of unauthorized substitutions; the probability of missing, misplaced or damaged goods; the supplier's cancellation policy; and price. Generally the physical characteristics of Chrysler automotive parts supplied by Chrysler Canada Ltd. were identical to those supplied by Chrysler U.S. However, the other elements of the product bundle could differ significantly between these suppliers.¹²

As indicated above, the Tribunal concludes that the critical difference between the two sources of supply is price.

Winter concludes that the physical identity of the parts obtained from the two sources is critical in establishing market boundaries, and since the only difference between the two sources is price (or other claimed advantages that can be translated into a price

¹² Exhibit 22: Exhibit "A" to the Affidavit of Richard Schwindt, dated June 4, 1989 at p. 7.

difference), parts supplied from Chrysler Canada and from Chrysler U.S. are in the same market:

Products that are physically identical, and are perfectly substitutable in their end uses are properly regarded as in the same market unless geographical distance and directly related costs preclude their substitutability. Almost all of the items that Professor Schwindt lists, such as higher handling costs of U.S. sourced product, less price protection, less accommodation of timing requests, a stricter cancellation policy, and the unilateral substitution of technically equivalent parts, are equivalent to a higher cost of purchasing from Chrysler U.S., or a higher price paid to Chrysler U.S. The physical products from the two sources were identical; from the buyer's point of view all differences in terms of trade are equivalent to differences in price.¹³

He states that to conclude, as does Schwindt, that Chrysler Canada is in a different market than Chrysler U.S., is to arrive at the odd result that there is one supplier and one customer. He states that the effect of denying Brunet supply from Chrysler Canada is to place Brunet on the same footing as exporters operating from the U.S., whereas before he had the advantage of being able to sell from both price lists and to buy from both sources:

The prices paid by Brunet to Chrysler U.S. and the trade terms available to Brunet from Chrysler U.S., were the same terms faced by every other distributor of Chrysler parts for export from North America (*supra*, Section II, paragraph 9). If a buyer of a particular article can obtain perfectly substitutable products at a modest or moderate price or cost increase, which price increase puts the buyer on an equal footing with other buyers of the product, then the substitute products should properly be included in the same market definition. The perfect

¹³ Exhibit 29: Report Prepared by Ralph A. Winter, dated June 20, 1989 at para. 9.

substitutability of the parts from Chrysler U.S. and Chrysler Canada fulfils the essential criterion for inclusion of products in the same market.¹⁴

Whether Brunet is placed on the same footing as exporters in the U.S. (described by Burnett as the "level playing field") is not relevant to a determination of market definition, but may be relevant in deciding whether the Tribunal should exercise its discretion in issuing an order in the event that the applicant is successful in the present proceedings.

The existence of separate price lists in the U.S. and Canada and the fact that they are intended, according to the evidence of Burnett, to respond to different market conditions in the two countries strongly implies the existence of separate markets. No convincing evidence to the contrary has been presented. The price lists are used by the vast dealer networks in the two countries. It is difficult to believe that anyone would question that dealers in the U.S. and Canada are in separate markets with respect to the purchase of their parts. Yet Winter and the respondent submit that Brunet is in the same market as the numerous U.S.-based exporters with whom he competes for non-North American business. The Tribunal does not accept this conclusion, given that Chrysler Canada and Chrysler U.S. are in separate markets.

¹⁴ *Ibid.* at para. 10.

In the case of Brunet it is clear that the market niche he occupies is based on the fact that some Chrysler auto parts are cheaper in Canada than in the U.S. The price differences are maintained by Chrysler for its own purposes. Similarly, the apparently anomalous situation where there is a single seller and a single buyer is also a result of Chrysler corporate policy. The decision to allow Brunet to address the non-North American markets from Canada was taken by Chrysler. It would similarly be able, apart from the question of the application of section 75 of the Act, to decide that all non-North American exports will originate in the U.S.

(b) Interparts - Parts Purchased in Large Volume

Are parts purchased under the Interparts programs in the United States in the same market as service parts purchased from Chrysler Canada? Although they are physically identical, parts purchased through Interparts and parts from Chrysler Canada are not generally substitutes and hence are not in the same market. This conclusion follows from the features of the Interparts programs: very large minimum purchase requirements; orders must be placed in advance for later manufacture and hence it may take considerable time for an order to be filled; parts are packaged in bulk rather than individually; prices are much lower than for parts ordered in small volumes. The dollar value of minimum purchases was recently raised by a large multiple in conjunction with the creation of Master Distributors of Interparts. The effect of this change is the virtual

elimination of any substitution that may have occurred between sourcing of service parts in Canada and from Interparts.

The Law

As previously stated, the present application is made pursuant to section 75 of the Act. In order for the Director to succeed in his present application, he must satisfy the Tribunal of the existence of each element contained in the section.

(a) Business Substantially Affected

The establishment of the product and market as being Chrysler auto parts available in Canada allows a consideration of the element found in paragraph 75(1)(a), that is, whether Brunet was "substantially affected" in his "business" by the refusal of Chrysler Canada to supply Brunet with Chrysler auto parts.

The applicant submits that the "business" in issue relates to the "specific line or product within the overall enterprise affected by the refusal", that is, Brunet's business is exporting Chrysler Canada auto parts.¹⁵ The respondent submits that a broader

¹⁵ Memorandum of Law of the Applicant at para. 42.

interpretation is required in light of the definition of "business" found in subsection 2(1) of the Act which states:

"business" includes the business of
(a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and
(b) acquiring, supplying and otherwise dealing in services.

The respondent submits that the evidence shows that Brunet's "business" is the "export business" or "conceivably his business of exporting automotive parts".¹⁶

A majority of the Tribunal agrees with the submission of the respondent that the effect on the entire activity of which the refused supplies are a part should be used. It is clear that a fair analysis of the situation in the present case requires that a broader interpretation is required than the one urged by the applicant. The submission of the applicant, if accepted, would be unnecessarily restrictive since this could preclude a proper understanding of the effects of the refusal to supply.

This does not mean, however, that the effect of the refusal to supply can be established solely by examining the overall sales and profit figures. To understand the effect of the refusal to supply, it is necessary to answer the following:

¹⁶ Respondent's Memorandum of Law at para. 25.

- (a) does the product in issue account for a large percentage of the overall business?
- (b) is the product easily replaced by other products sold by the business?
- (c) does the sale of the product use up capacity that could be devoted to other activities?
- (d) is the product used or sold in conjunction with other products and services so that the effect on the overall results of the business may be much greater than indicated by the volume of the product purchased?

Reliance on an examination of the overall business result may be appropriate where it is difficult to do a more disaggregated analysis. This is not necessary in the case of Brunet's business; it is very small, he has few customers and it is possible to inquire meaningfully whether there is a relationship between transactions. Under the circumstances the figures on his overall business provide information for only an initial step in the evaluation. The accountants called as expert witnesses by the parties did not have any particular familiarity with the auto parts export business in

general, or with Brunet's business in particular. They were not, therefore, in a knowledgeable position to give evidence on how the refusal of Chrysler Canada to sell to Brunet affected his overall sales and profits. Similarly, Winter, who stated the hypothesis that the capacity formerly used on the sale of Chrysler Canada-sourced parts was redirected to the sale of parts from other sources, was not in a position to confirm the factual validity of this submission.

The figures placed in evidence by the accountants for the two sides were similar and served to confirm that the records maintained by Brunet fairly represented his business transactions. There is agreement that the few discrepancies in their treatments are not of material importance in determining whether Brunet is substantially affected in his business.

The respondent stresses that Brunet had larger sales and profit after Chrysler Canada refused to supply Brunet in 1986 (referred to by the Director as the "cut-off") than in the years preceding it and therefore Brunet was not substantially affected by his inability to obtain supply from Chrysler Canada. As noted earlier, in some cases this type of evidence might be conclusive, but only where it is not possible to analyze how the separate parts of the business are related. The Tribunal is satisfied, through the evidence of Brunet, that the gross sales and profits earned from the sale of other products is totally unrelated, by way of the utilization of

capacity or by way of demand, to the sale of Chrysler parts. The sale of other parts took very little of Brunet's time or that of his assistant and his business could easily have accommodated these additional sales if he had not lost sales of Chrysler parts as a result of his inability to obtain supplies from Chrysler Canada. Similarly, the demand for Chrysler auto parts was independent of the demand for other parts. Accordingly, any changes in the sales of other parts and the gross margins therefrom would have taken place whether or not Brunet's relationship with Chrysler Canada had changed. The same conclusion is applicable with respect to Interparts since service parts and Interparts represent separate markets. There is no reason to believe that Brunet's customers would be influenced to increase their demand for Interparts as a result of Brunet's inability to obtain supply from Chrysler Canada. If the cut-off had any effect on the sale of Interparts it would be a negative one to the extent that Brunet lost customers as a result of Chrysler Canada's refusal to supply auto parts.

Large sales of other auto parts to a single customer in 1987 and in 1988 virtually disappeared during the first four months of 1989. The large sales and resulting gross profits from these transactions were an essential part in the overall sales and gross profit figures that the respondent relies on to state that the cut-off does not have a substantial effect on Brunet's business because overall sales and gross profits did not fall after 1986. The most

recent figures submitted show that overall sales and gross profits are much lower, on an annual basis, than before the cut-off.¹⁷ This illustrates the danger of relying on aggregate data when more specific and relevant information is available. The Tribunal is satisfied that the evidence shows that both the increase in the sales of other auto parts and the subsequent decline are unrelated to the extent to which Chrysler parts are available to Brunet in Canada.

Following the cut-off Brunet was able to obtain parts from Chrysler Canada dealers. Under his arrangement with them he paid them their acquisition cost plus five per cent. It is noteworthy that Canadian-sourced parts were sufficiently more price attractive than those obtainable from Chrysler U.S. that Brunet and his customers preferred to pay the additional five per cent rather than purchase from Chrysler U.S.

A review of the extent to which Brunet was able to replace Chrysler Canada by its dealers must take into account the steps that Chrysler Canada took to discourage its dealers from selling to Brunet. The verbal warnings to particular dealers, the bulletins to all dealers and, finally the re-signing of all dealers to new contracts with a clause that is designed, according to the evidence of Burnett,

¹⁷ Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989; Table 1, *supra* at p. 7-8.

to give Chrysler Canada the authority to discontinue supplying a dealer in the event that the dealer sells for export, have progressively changed the conditions under which Brunet can buy from Chrysler Canada dealers. Chrysler Canada has modified its computer software to more readily enable it to detect orders that may be intended for export. As a result of these efforts by Chrysler Canada, Brunet is forced to split his orders and to spread them over some time to attempt to avoid detection. There is evidence that three dealers openly sell to Brunet. The evidence is not clear on whether any of them have wholesale dealer status. If they do not, the prices that they pay for captive parts are more than those which Brunet paid to Chrysler Canada. In addition, it must be assumed that the dealers are earning some profit margin on their sales to Brunet, such as the five per cent referred to previously, thus causing Brunet to pay a substantially higher price for the auto parts than that paid by Brunet to Chrysler Canada.

Table 2 shows Brunet's gross profit and sales resulting from purchases from Chrysler Canada, Chrysler Canada dealers and Chrysler U.S. from 1984 to May 1989.

TABLE 2

Gross Sales and Profit*: Parts Sourced from Chrysler Canada,
Chrysler Canada Dealers and Chrysler U.S.

1984-1989

<u>Year</u>	<u>Chrys.</u> <u>Canada</u>	<u>Chrys.</u> <u>Canada</u> <u>Dealers</u>	<u>G r o s s</u> <u>Profit</u> <u>Chrys.</u> <u>Canada</u> <u>&</u> <u>Dealers</u>	<u>Chrys.</u> <u>U.S.</u>	<u>G r o s s</u> <u>Profit</u> <u>Chrys.</u> <u>U.S.</u>
1984	300,394		49,161	27,813	1,410
1985	259,892		39,407	20,442	1,019
1986	362,245		47,202	25,180	1,885
1987	99,154	233,495	43,554	24,126	1,555
1988	—	119,310	14,706	52,734	4,321
1989**	—	26,618	3,856	67,630	6,140 #

Notes:

* Gross profit (or gross margin or mark-up) is gross sales minus cost of goods sold. The Coopers & Lybrand report prepared on behalf of the applicant uses the terminology "mark-up" rather than "gross margin". There does not in fact appear to be any difference between the two terms except when expressed as a percentage, which involves the use of a different denominator. The principal discrepancy between the gross margins of Arthur Anderson and the mark-up of Coopers & Lybrand is with respect to dealers in 1988. Arthur Anderson arrived at a figure of \$18,495, which compares to \$14,706 in the table. The figures in all other cases are the same or very close. The Arthur Anderson study provided gross margins for fewer years for the categories shown in the table and thus the decision to use the Coopers and Lybrand information was, so to speak, by default.

** January 1 - May 12.

Includes purchases from Chrysler U.S. and from Master Distributors of Interparts.

Sources:

Exhibit 10: Statement of Roman Boyko, C.A. / Richard Joly, C.A., Coopers and Lybrand for the Director of Investigation and Research, Schedules A to D; Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989.

The effectiveness of Chrysler Canada's efforts in preventing Brunet from exporting from Canada is shown in the above table. There is a marked decline in sales and profits on purchases of Chrysler auto parts in Canada between 1986 and 1988 and on through somewhat more than the first quarter of 1989. The figures for 1989 are taken as providing only an order of magnitude because the period is relatively short. The 1989 figures are based on an analysis by Mr. Reinke of Arthur Anderson & Co. who appeared as an expert witness on behalf of the respondent. Reinke prepared the figures in response to a request made to him during cross-examination. He examined the ledger cards used by Brunet and included only those transactions for which both a purchase and a sale were recorded. In the view of the Tribunal, this was the only reasonable course. Ledger cards on which only one part of a transaction are recorded cannot be included as part of sales for the period in question. Some transactions started in 1988 are part of the partial 1989 figures and it is to be expected that some transactions started between January 1 and May 12, 1989 will be completed and recorded as such after May 12, 1989. There is no obvious bias imported into the 1989 figures by this factor. The only legitimate concern that the volume of sales is understated relates to the possibility that Brunet failed to make entries on the ledger cards for completed transactions. No evidence of this was presented to the Tribunal.

The respondent points to variations in demand that are unrelated to the cut-off as a possible explanation for any decline in sales and gross margins experienced by Brunet. This is a possibility that must be taken into account. Variation in demand certainly accounted for swings in the sale of other auto parts. In considering this factor the Tribunal notes that neither party attempted to provide a benchmark against which the changes in Brunet's sales of service parts might be measured (such as, for instance, the total exports of Chrysler service parts from North America during the years in question). The Tribunal is not satisfied that the large changes in sales experienced by Brunet were caused by variations in demand that are unrelated to the cut-off.

To evaluate the changes in sales and profits experienced by Brunet, it is necessary to determine the meaning of "substantially affected". The applicant submits that "substantially affected" simply means more than a *de minimis* effect. This conclusion is based on the fact that an earlier draft of the Act required only that the person be "adversely affected" which could mean a negative effect to a small degree.

The respondent submits that "substantially" does not simply mean "some" or "to a degree" but rather "major" or "significant". The respondent takes the position that the ordinary dictionary definition should be used in the absence of strong reasons to the contrary. The Tribunal agrees that "substantial" should be given its

ordinary meaning, which means more than something just beyond *de minimis*. While terms such as "important" are acceptable synonyms, further clarification can only be provided through evaluations of actual situations.

The cut-off resulted in a decline of over \$200,000 in sales between 1986 and 1988. 1987 was a year of transition during most of which Brunet was able to obtain parts from Chrysler Canada dealers and Chrysler Canada continued to fill orders received by Brunet before October 1986. The slight rise in 1988 sales of Chrysler U.S.-sourced parts suggests that some substitution may have occurred between Chrysler Canada and Chrysler U.S. sourced parts, perhaps because of the increasing difficulty of obtaining parts in Canada. If such substitution did occur, it was far too limited to alleviate the decline in sales and gross profits from Chrysler auto parts. The decline in profits between 1986 and 1988 from sourcing Chrysler parts in Canada was in excess of \$30,000. Losses of the order of magnitude of \$200,000 in sales and \$30,000 in gross profits constitute a substantial effect for a small business such as Brunet's. The figures for more than a third of 1989 and the fact that Chrysler Canada has put in place contracts that will permit it to discipline dealers who sell for export suggest that even greater losses may be anticipated in the future.

(b) *Inadequate Competition in the Market*

The issue as to whether Brunet is unable to obtain supplies because of inadequate competition in the market turns on whether Chrysler Canada dealers are in the same market as Chrysler Canada as suppliers to Brunet. The Tribunal concludes that the restrictions placed by Chrysler Canada on its dealers clearly make them inferior sources of supply to Brunet and that they therefore do not provide adequate competition to Chrysler Canada.

Exercise of Discretion

The Tribunal is satisfied that the Director has proven, through the evidence presented, all of the elements of section 75 of the Act. Once this prerequisite is met, the Tribunal has the discretion to issue an order requiring Chrysler Canada to resume supplying Brunet with Chrysler auto parts within a specified time on usual trade terms.

There are several areas of evidence and argument that bear on the exercise of the Tribunal's discretion. These are: the reasons behind Chrysler Canada's decision to discontinue supplying Brunet; the market position of Chrysler and the changes that it was making in its distribution system; the long association between Brunet and

Chrysler Canada; the unquestioned encouragement that Chrysler Canada provided Brunet; and the manner in which the cut-off was implemented.

(a) The Decision to Discontinue Supply to Brunet

The respondent takes the position that the decision to no longer permit Brunet to buy from Chrysler Canada was taken in response to Brunet breaking one of the conditions attached to such supply, that Brunet not sell to franchised dealers outside of North America in competition with Chrysler U.S.

The existence of such a condition is in dispute. Burnett alleges that this condition, along with the condition that Brunet not divert supplies into the North American market, were clearly set out in a verbal arrangement between himself and Brunet. There is no written agreement between Chrysler Canada and Brunet. Brunet denies that it was ever understood that he was not to sell to Chrysler dealers outside of North America. The Tribunal accepts his evidence.

Associated documentary evidence supports Brunet's position. Correspondence between Chrysler Canada and Brunet corroborates that Chrysler Canada was concerned that parts sold to Brunet not be diverted into the domestic market. Procedures were established to ensure that such diversion was prevented. In contrast, there is no

mention in any of the correspondence between Brunet and Chrysler Canada prior to 1986 that the latter was concerned about the possibility that Brunet might be selling to franchised dealers outside of North America. Concern about Brunet competing with Chrysler U.S. is first raised in May 1986 in connection with Brunet's approach to an "Interparts distributor" (rather than a franchised dealer) in Peru:

May 1, 1986

Mr. R. Brunet
R. Brunet Company
Suite 918
360 St. James Street West
Montreal, Quebec
H2Y 1P5

Dear Richard:

This letter will serve to confirm our telephone conversation regarding your letter of March 19, 1986, to Colonial Motors in Peru. Your letter suggests that in some cases, it is more advantageous to purchase parts from yourself than it is to purchase from Chrysler Corporation. Colonial Motors is an authorized Interparts Distributor.

I would like to remind you that when you are representing Chrysler Canada Ltd. in the export market, your objective is to compliment (*sic*) the Corporation's Interparts Division's sales activities, not to compete for their Distributors' business. We would appreciate your co-operation in this matter.

Yours very truly,

CHRYSLER CANADA LTD.

(s) P.R. Williams
National Parts Sales
and Marketing Manager

cc: C.R. Burnett¹⁸

The context and the language of the letter create ambiguities. This sole written reference to the claimed Chrysler Canada understanding with Brunet is not persuasive.

Most importantly, sales to a Mr. Karlsson, a franchised dealer in Sweden, took place against a backdrop of a visit by Karlsson to the central Chrysler Canada parts depot. Brunet introduced Karlsson to the manager of the warehouse and sent Burnett a copy of a letter that Brunet sent to the manager following Karlsson's visit. Burnett passed on the letter to Williams, the author of the May 1986 letter referred to above.¹⁹ It is difficult to believe that Brunet would have been so open in presenting and discussing Karlsson if he knew that sales to Karlsson's company would have been in contravention of a condition of purchase from Chrysler Canada. Furthermore, Brunet claims that he was referred to Karlsson by an employee of Chrysler Canada, a Mr. Barton, through a Mr. Hedlund who was acting as Canadian agent for Karlsson. This evidence is not contradicted. It is also undisputed that the same employee, Barton, had referred a Mr. Jansson, a non-franchised dealer in Sweden who had purchased vehicles from Chrysler Canada and needed parts, to Brunet. Burnett states that he did not know that Karlsson was a franchised dealer although Chrysler Canada had access to this information. More critical to the issue is the fact that Burnett never

¹⁹ *Ibid.*

inquired, leaving the impression that whether Brunet was selling to franchised Chrysler dealers outside of North America was of no concern to Chrysler Canada.

(b) Consolidation of Control of Chrysler Exports

Although the evidence does not support the respondent's position that Chrysler Canada had an agreement with Brunet with respect to export to Chrysler franchised dealers, this does not mean that Chrysler was not concerned by such exports. It does not require specific evidence to conclude that the Chrysler export arm would find it embarrassing to have to compete with Brunet for the trade of its dealers. But beyond any such potential embarrassment, it is easy to accept that Chrysler would want to consolidate control of exports in one country and not be concerned with pricing differences between Canada and the United States affecting export markets. One does not have to go so far as Winter and conclude that the motive for consolidating exports is strictly to enhance efficiency in order to conclude that the decision is not solely intended to protect a separate price structure in Canada. Although Burnett denies that the Chrysler organization was in disarray in the early 1980s when Chrysler was in financial difficulty, the evidence shows that plants outside North America were sold off and the sale of Chrysler vehicles through (foreign) Chrysler franchised dealers was stopped. The evidence shows that, in recent years, Chrysler vehicles are once again being sold through (foreign) franchised dealers. It is

easy to understand that Chrysler would want to make organizational changes that can better accommodate its changing distribution system.

The respondent has not attempted to provide a cohesive explanation of the Chrysler distribution system. The principal argument put forward is that Brunet was being placed in the same position as U.S.-based exporters who, according to the evidence of Burnett, numbered somewhat more than one hundred and had combined annual sales of \$80 million (U.S.). No details were provided regarding who these firms are, who they sell to or their relation with Chrysler U.S.

The Tribunal must consider that the respondent has not presented any evidence that the granting of an order pursuant to section 75 of the Act would disadvantage the respondent. A point that has been raised in connection with the attempt to prevent dealers from selling for export is that exporting some parts that are in short supply (this applies particularly to older vehicles) could deprive domestic consumers. It strikes the Tribunal that this concern could most effectively be dealt with by having Brunet deal directly with Chrysler Canada. To the extent that Brunet is successful in buying from dealers, Chrysler Canada cannot identify the orders from dealers that are destined for export, which was not the case when it was selling directly to Brunet.

(c) Brunet's Long Association with Chrysler Canada

It is uncontested that Brunet was encouraged throughout his association with Chrysler Canada. A number of actions were taken by Chrysler Canada to accommodate its treatment of Brunet to allow for the needs arising from dealing with customers who faced problems of exchange controls and import permits with time deadlines. Burnett confirmed that Chrysler Canada had encouraged Brunet in his efforts to expand the sale of Chrysler Canada auto parts. Chrysler Canada on occasion referred potential customers to Brunet. In spite of this long and friendly relationship, no attempt was made by Chrysler Canada to resolve any problems that they perceived in Brunet selling to Karlsson in Sweden or attempting to sell to Colonial Motors, an Interparts dealer in Peru. There was no warning that he might be cut off and there was no face-to-face meeting to discuss the situation. Brunet was shown little consideration apart from Burnett agreeing to fill orders received by him prior to the cut-off date.

Conclusion

Section 75 is different than other sections in Part VIII of the Act. The test for whether the elements in the section are satisfied is not the effect on competition or efficiency. These considerations enter, where applicable, in the exercise of discretion.

The Tribunal accepts that Chrysler or Chrysler Canada does not occupy a very strong market position in the automobile industry (even though, as might be expected, it is in a very strong position with respect to the distribution of its products) and that it may have legitimate business interests that it is trying to protect. Weighing against this consideration is the long relationship between Brunet and Chrysler Canada, the manner in which sales to Brunet were terminated, and the fact that the respondent has not made any effort to establish that the granting of an order by the Tribunal would prejudice it in any way. Brunet has been substantially affected by the denial of supplies. He merits relief and it will be provided in the order.

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 section 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. Such an order shall issue.

There shall be no order as to costs. The Tribunal is satisfied that it does not have the jurisdiction to order the payment of costs.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT Chrysler Canada Ltd. accept Richard Brunet as a customer for the supply of Chrysler parts on trade terms usual and customary to its relationship with Brunet as the said terms existed prior to August, 1986.

DATED at Ottawa, this 13th day of October, 1989.

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

(s) M.M. Teitelbaum
M.M. Teitelbaum