

THE COMPETITION TRIBUNAL

IN THE MATTER OF an Application for rescission of the Order Granting Leave to Barcode Systems Inc. pursuant to Section 103.1 of the *Competition Act*, RSC 1985 c. C-35, as amended, to commence an Application pursuant to Section 74 of the *Competition Act*.

BETWEEN:

SYMBOL TECHNOLOGIES CANADA ULC

Applicant,

- and -

**BARCODE SYSTEMS INC. and PRICEWATERHOUSECOOPERS INC. as
INTERIM RECEIVER of BARCODE SYSTEMS INC.**

Respondents.

**MEMORANDUM OF LAW AND FACT OF
PRICEWATERHOUSECOOPERS INC. as
INTERIM RECEIVER of BARCODE SYSTEMS INC.**

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

September 26, 2005

CT-2003-008

Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

#0029

TAPPER CUDDY LLP
Barristers and Solicitors
1000-330 St. Mary Avenue
Winnipeg, Manitoba
R3C 3Z5

RICHARD W. SCHWARTZ

Telephone: (204) 944-8777

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File No. 032544

ARGUMENT

1. Pursuant to the Order made by Mr. Justice Schulman of the Manitoba Court of Queen's Bench on December 19, 2003 (the "Order"), PricewaterhouseCoopers Inc. was appointed as Interim Receiver (the "Interim Receiver") of Barcode Systems Inc. ("Barcode") pursuant to the provisions of the *Bankruptcy and Insolvency Act*.
2. The Order was made after Barcode had filed a Notice of Intention to File a Proposal.
3. Barcode subsequently filed a Proposal, which was accepted by a majority of its unsecured creditors and approved by Associate Chief Justice Oliphant of the Manitoba Court of Queen's Bench on May 21, 2004.
4. As such, Barcode is not bankrupt, nor can it be said that it is not legally entitled to emerge from the Interim Receivership proceedings and, moreover, carry on business at some point in the future.
5. Pursuant to an arrangement made as between David Sokolow (the principal of Barcode) and the Interim Receiver, Mr. Sokolow on behalf of Barcode was (and continues to be) entitled to carry on with the proceedings that Barcode instituted with the Competition Tribunal in respect of the matters alleged in its complaint.

6. While not taking an active role in these proceedings, the Interim Receiver, on behalf of Barcode's creditors, maintains an interest in them, given the potential benefit to those creditors.

7. Notwithstanding that the Interim Receiver has been content to rely on the material and submission made by Barcode to date, the Interim Receiver has reviewed the Memorandum filed by Symbol Technologies Canada ULC ("Symbol"), and takes issue with certain assertions made therein.

8. In particular, the Interim Receiver notes as follows:

- a. As regards the "Supply Order" as described in paragraph 4 and the submissions made in that regard in paragraphs 18 to 25 of Symbol's Memorandum, it is first noted that it was in fact obtained at the request of Symbol's then counsel (Colin MacArthur, Q.C. of Aikins, MacAulay & Thorvladson LLP).

Attached in that regard at Tab 1 are the transcripts of a series of messages left on the voicemail of counsel for the Interim Receiver by Mr. MacArthur, together with a an email and two letters, all dated from January 9 to January 15, 2004.

By way of background information, it is noted that the Interim Receiver begin discussions with Symbol in January of 2004 in order to *obtain Symbol product directly from Symbol so that it might continue Barcode's business and offer it for sale as a going concern.* Initially, it appeared that Symbol would agree to do so without the

need of a court order, but for its own reasons determined that a court order would be preferable.

(See paragraph 9 of the Affidavit of David Johnson sworn January 14, 2004
– Tab D to Michael Reid's Affidavit sworn February 21, 2005)

It is further noted that discussions as between counsel at the time were specifically premised on the notion that the Supply Order would be without prejudice to anyone's rights, given that it was designed to allow the Interim Receiver a relatively short amount of time to find a buyer (one who, presumably, would have to be acceptable to Symbol) for Barcode's business. That is in fact precisely what happened.

(See paragraph 9 of the Affidavit of David Johnson sworn January 14, 2004
– Tab D to Michael Reid's Affidavit sworn February 21, 2005)

It is also noted that current counsel for Symbol was informed of the background to the Supply Order more than a year ago, but for reasons unknown has taken the position it has in its Application.

Further, and in any event, it is noted that pursuant to the terms of the Supply Order, Symbol itself was entitled to apply to the Manitoba Court of Queen's Bench in the event it wanted to terminate or vary it. It did not, nor of course did Symbol appeal the Supply Order.

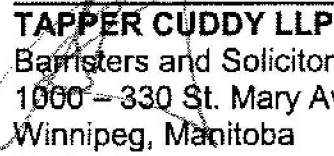
(See paragraph 5 of the Supply Order – Tab E to Michael
Reid's Affidavit sworn February 21, 2005)

- b. As regards paragraph 32 of Symbol's Memorandum, the Interim Receiver refers to what is set out in paragraphs 5 and 7 hereof;

c. As regards paragraph 33 of Symbol's Memorandum, it is the Interim Receiver's understanding that the change in the style of cause was done by the Tribunal at its own instance, and not as a result of any motion or request by the Interim Receiver. As previously noted, the Interim Receiver was satisfied to allow the proceedings to continue in the way they had before as, apparently, was Symbol's previous counsel.

9. Finally, the Interim Receiver notes that Barcode has already filed material in response to Symbol's Application for Recession and that, by letter from its counsel dated August 17, 2005, advised that it did not intend to file anything further. The Interim Receiver takes no issue with that, or in Barcode continuing in the fashion that was agreed upon long ago.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23rd DAY OF SEPTEMBER, 2005.



TAPPER CUDDY LLP
Barristers and Solicitors
1000 - 330 St. Mary Avenue
Winnipeg, Manitoba
R3C 3Z5
Richard Schwartz
Telephone: 944-8777
Counsel for the
Interim Receiver

VOICE MAIL

FROM: Colin MacArthur
DATE: January 9, 2004
RE: PwC - Barcode

Rick, it's Colin MacArthur.

Sorry I missed you.

I do not have instructions from my clients, but I have spoken to them. You may have anticipated or expected that I was receiving instructions, and I am, from the in-house legal people at Symbol so that they have to go to other executive to get a decision with respect to the proposal.

But there are some questions that have arisen that I would like to discuss with you dealing with...to obtain some greater understanding in the manner in which the receiver intends to conduct business in the short term and who it intends to sell product to and some idea of the volume of product that is anticipated that it will be ordering. Those kinds of questions. And as I've already discussed with you, there is very very significant concern on Symbol that nothing it does would be seen to be supplying product to Barcode or in any way authorizing Barcode to continue in business as one of the resellers for Symbol.

I do understand that we may not be able to talk today, Rick. Please do try and get hold of me even if you get in from Court later this afternoon if we haven't talked then. I will be in my office I expect until 5 or 5:30 this afternoon. And I will be in on the weekend as well. So let's keep trying.

Thank you. My number's 957-4627.

VOICE MAIL

FROM: Colin McArthur
DATE: January 13, 2004 (4:03 PM)
RE: PwC - Barcode

Rick, it's Colin McArthur.

I'm back in my office now and I got your message.

I again phoned my client and have left a message for the person I take instructions from requesting that I be provided with instructions concerning your request. I've indicated as you can expect that there is an urgency, that you will be proceeding with your motion unless we are able to respond immediately. And as yet I have not heard from that person, but I've just left a message. I've been in meetings all day until now.

So I'm going back into another meeting Rick, but I'll be looking at my phone for messages a little later this afternoon.

Thanks.

VOICE MAIL

FROM: Colin MacArthur
DATE: January 14, 2004 (10:59 AM)
RE: PwC - Barcode

Rick, it's Colin MacArthur speaking.

I went into a meeting immediately after getting your information about the timing for the motion.

I haven't yet spoken directly to my client, but I did receive a message from them before they even knew that the Receiver would go to Court indicating they've got that there was an agreement they could work out with the Receiver. There were questions that they have that they wanted to ask directly of the Receiver, just in terms of working out the details of the supply of product.

And there were a couple of other questions that were asked that I want to discuss with you. If you could call me please, 957-4627.

Rick, I may not be in my office, I've been working downstairs, but please speak to my secretary and make sure that she comes to find me if you don't get hold of me.

Thank you.

VOICE MAIL

FROM: Colin MacArthur
DATE: January 14, 2004 (11:29 AM)
RE: PwC - Barcode

Rick, it's Colin MacArthur speaking.

I have left messages for Mike Reid. He wasn't immediately available and of course I will speak to you again as soon as I have spoken to him.

Thank you.

Richard Schwartz

From: Richard Schwartz
Sent: January 14, 2004 3:25 PM
To: 'crm@aikins.com'
Cc: 'jeffrey.b.johnson@ca.pwc.com'; Dave Johnson
Subject: Barcode
Importance: High

Colin,

Further to our discussion earlier today, attached is my Notice of Motion.

As discussed, I have not yet filed it. I do, however, intend to have it delivered to Mr. Justice Schulman directly before the day is out under cover of a letter which advises that I hope not to have to file it tomorrow as discussions to resolve the issue are ongoing. The point, of course, is to allow him at least some opportunity to understand what tomorrow's motion is about.

As I write this, it is 3:30 PM, and I am concerned that I have not heard back from you in regards to Mike Reid's contact information. So as to speed that process, I ask that you call Jeff Johnson or Dave Johnson directly (at 926-2441 and 926-2423, respectively) when and if you receive the go-ahead from your client.

Regards,

Rick Schwartz
Tapper Cuddy
1000-330 St Mary Ave.
Winnipeg, Manitoba
Canada
R3C 3Z5
(204) 944-3232 (phone)
(204) 947-2593 (fax)

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TAPPER CUDDY
Barristers and Solicitors

January 14, 2004

Richard W. Schwartz
Direct line: (204) 944-3232
E-mail: rws@tcwpg.com

By fax

Aikins
Barristers and Solicitors
30th Floor - 360 Main Street
Winnipeg, Manitoba
R3C 4G1

Attention: Colin MacArthur, Q.C.

Dear Sir:

Re: Royal Bank of Canada v. Barcode Systems Inc.
Court File No. BK 03-01-36054

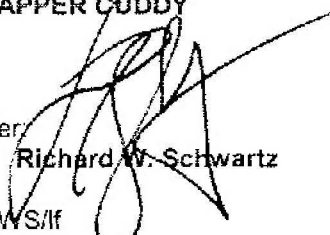
Attached and hereby served upon you is another copy of our find Notice of Motion to be heard before Mr. Justice Schulman on January 15, 2004, at 1:00 PM.

Also attached is a copy of our letter of even date to the Court, the contents of which are self-explanatory.

We will provide you with the Affidavit of David A. Johnson in support of the motion shortly.

Yours truly,

TAPPER CUDDY

Per: 
Richard W. Schwartz

RWS/lf
Enc.

January 14, 2004

Richard W. Schwartz
Direct line: (204) 944-3232
E-mail: rws@tcwpg.com

By fax

Mr. Justice Schulman
Court of Queen's Bench
408 York Avenue
Winnipeg, Manitoba
R3C 0P9

Dear Sir:

Re: Royal Bank of Canada v. Barcode Systems Inc.
- Court File No. BK 03-01-36054

As the writer advised you in the message he left for you yesterday, we act on behalf of PricewaterhouseCoopers Inc., the Interim Receiver of Barcode Systems Inc.

Attached in that regard is our Notice of Motion returnable before you on Thursday, January 15, 2004, at 1:00 PM.

At the request of counsel for the responding party (Symbol Technologies), we have not yet filed it. Indeed, we are hopeful that it will be unnecessary for us to do so and that the matter will in fact be resolved before 1:00 PM tomorrow. In such event, we shall of course advise you immediately.

As it may not be resolved, we are in the process of finalizing the supporting Affidavit of David A. Johnson, which we anticipate being able to fax over later today.

Yours truly,

TAPPER CUDDY

Per:
Richard W. Schwartz

RWS/lf
Enc.

cc. Aikins
Attention: Colin MacArthur

VOICE MAIL

FROM: Colin MacArthur
DATE: January 15, 2004 (9:15 AM)
RE: PwC - Barcode

Rick, it's Colin MacArthur speaking.

I've now spoken to my client. I did... I just hung the phone from speaking with him. They are in the process of giving instructions to Mike Reid as I understand it to work out the fine details of the, you know, way in which this transaction will be put together directly with the Receiver.

Would you give me a call, 957-4627, and I'll put in a call for Kent Paterson. My recollection is that you had indicated he would be appearing with Schwartz and I know that you have obviously other commitments so you may not get my message.

Thank you.

VOICE MAIL

FROM: Colin MacArthur
DATE: January 15, 2004 (11:24 AM)
RE: PwC - Barcode

Rick, it's Colin.

I do have instructions from Symbol now. They would prefer that an order to be obtained. So my suggestion is that you would go down on an uncontested basis to obtain the order.

Now there was one matter that was brought up that we hadn't previously discussed. And Symbol's concerned about just the open-endedness of the supply. And I think the way that that should be addressed is that Symbol would have a right to terminate on two weeks' notice or even three weeks' notice, but a period of time which would allow the Receiver to get into Court if for some reason it had to protect its position at that time.

As well of course Symbol wanted me again to confirm that the Receiver will consent to the continuation of the counterclaim, or excuse me, the continuation of the claim by way of counterclaim that Symbol has against Barcode.

So if you could get back to me, 957-4627.

I haven't called Kent. I hope that we're communicating appropriately and I'll hear from you shortly.

Bye.

■■■■
TAPPER CUDDY LLP
Barristers and Solicitors

September 23, 2005

Richard W. Schwartz
Direct line: (204) 944-3232
E-mail: rws@tcwpg.com

By email and regular mail

The Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 5B4

Attention: Registrar

Dear Sir/Madam:

**Re: Symbol Technologies Canada ULC, Applicant, and
Barcode Systems Inc. and PricewaterhouseCoopers Inc. as
Interim Receiver of Barcode Systems Inc.
File No. CT 2003 008**

Attached is the Memorandum of Law and Fact of PricewaterhouseCoopers Inc. as Interim Receiver of Barcode Systems Inc.

Yours truly,

TAPPER CUDDY LLP

Per: 
Richard W. Schwartz

RWS/lf

cc: Jeff Johnson (w. enc.)
cc: Lindy Choy (w. enc.)
cc: Steven Field (w. enc.)