



Reference: *Symbol Technologies Canada ULC v. Barcode Systems Inc. and Price Waterhouse Coopers Inc. as Interim Receiver of Barcode Systems Inc.*,
2005 Comp. Trib. 32
File No. CT-2003-008
Registry Document No.: 0030a

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

AND IN THE MATTER OF an application, pursuant to subsection 106(1) of the *Competition Act*, for rescission of the Order granting leave to Barcode Systems Inc. to commence an application pursuant to section 75 of the *Competition Act*;

AND IN THE MATTER OF the motion for summary disposition filed pursuant to subsection 9(4) of the *Competition Tribunal Act*, R.S. 1985, c. 19 (2nd Supp.) as amended.

B E T W E E N

Symbol Technologies Canada ULC
(applicant)

and

Barcode Systems Inc. and Price Waterhouse Coopers Inc.
as Interim Receiver of Barcode Systems Inc.
(respondents)



Decided on the basis of the written record.
Presiding Judicial Member: Simpson J. (Chairperson)
Date of Reasons and Order: October 14, 2005
Reasons and Order signed by: Madam Justice Sandra J. Simpson

**REASONS AND ORDER ALLOWING A MOTION FOR SUMMARY DISPOSITION BY
SYMBOL OF ITS SECTION 106 APPLICATION**

PROCEEDINGS TO DATE

A. THE APPLICATION FOR LEAVE UNDER SECTION 103.1

[1] On November 4, 2003, at a time when it was still carrying on business, Barcode Systems Inc. ("Barcode") applied 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"), for leave to file an application under section 75 of the Act ("Leave"). Barcode alleged that Symbol Technologies ULC ("Symbol") was refusing to supply the products necessary for Barcode to remain in business. Leave was granted by the Tribunal on January 15th, 2004 (*Barcode Systems Inc. v. Symbol Technologies ULC*, 2004 Comp. Trib 1).

[2] However, on December 19th, 2003, before Leave was granted, Price Waterhouse Coopers Inc. ("PWC") was appointed Interim Receiver for all of Barcode's assets and undertakings (*Royal Bank of Canada and Barcode Systems Inc.* Man. Ct. Q. B. File No. CI-03-01-36054). The style of cause of the Tribunal proceedings was amended by an order dated May 19th, 2004, to reflect the receivership (*Price Waterhouse Coopers Inc. as Receiver and Manager of Barcode Systems Inc. v. Symbol Technologies ULC*, 2004 Comp. Trib. 6). A stay of proceedings was entered on consent on June 15th, 2004 (*Price Waterhouse Coopers Inc. as Receiver and Manager of Barcode Systems Inc. v. Symbol Technologies ULC*, 2004 Comp. Trib. 9), pending a decision of the Federal Court of Appeal on the Tribunal's decision granting Leave.

[3] The Federal Court of Appeal's decision was issued on October 7, 2004 (*Symbol Technologies ULC and Barcode Systems Inc.* 2004 FCA 339); the Court upheld the Leave. However, none of the applicants applied under section 75 of the Act, or sought an interim supply order under section 104.

B. THE APPLICATION UNDER SECTION 106

[4] On February 24th, 2005, Symbol, the respondent in the Leave application, applied pursuant to subsection 106(1) of the Act (the "s.106 Application") for an order rescinding the order granting Leave, on the basis that the circumstances leading to the order had changed and that, in the new circumstances, the order would never have been made, or would have been ineffective in achieving its intended purpose.

[5] Symbol argues that Barcode no longer exists as a going concern. PWC sold all of Barcode's assets, "including its intangible assets such as customer lists, supplier lists, and copies of accounting records, quotes, proposals and such files relating to the operation of BSI as may be reasonably necessary to enable the purchaser to carry on its business". (Statement of Facts and Material Grounds, para. 6). The Manitoba Court of Queen's Bench approved the sale on February 26, 2004 (*Royal Bank of Canada and Barcode Systems Inc.* Man. Ct. Q. B. Suit No. CI-03-01-36054). The purchaser of Barcode's business was q.data inc.

[6] Symbol submits that the Tribunal would not have granted Leave to Barcode to file an application under section 75 of the Act had all its assets and its business been sold when Leave was sought. In the absence of Barcode as a going concern, there would have been no business to supply, and no way of supplying on usual trade terms.

[7] Barcode submits in its response to the s.106 Application (the "Response") that, although it is seeking damages in the Manitoba Court of Queen's Bench for the loss of Barcode as a going concern, this does not preclude Barcode seeking to rebuild its business at a future date. It adds that it may need a supply order in the future if its business reopens.

THIS MOTION FOR SUMMARY DISPOSITION

[8] Symbol moves for summary disposition (the "Motion") under the provisions found at subsections 9(4) and 9(5) of the *Competition Tribunal Act*, R.S. 1985, c. 19 (2nd Supp.) as amended. These provisions read as follows:

<p>9 (4) On a motion from a party to an application made under Part VII.1 or VIII of the <i>Competition Act</i>, a judicial member may hear and determine the application in a summary way, in accordance with any rules on summary dispositions.</p> <p>(5) The judicial member may dismiss the application in whole or in part if the member finds that there is no genuine basis for it. The member may allow the application in whole or in part if satisfied that there is no genuine basis for the response to it.</p>	<p>9 (4) Sur requête d'une partie à une demande présentée en vertu des parties VII.1 ou VIII de la <i>Loi sur la concurrence</i> et en conformité avec les règles sur la procédure sommaire, un juge peut entendre la demande et rendre une décision à son égard selon cette procédure.</p> <p>(5) Le juge saisi de la requête peut rejeter ou accueillir, en totalité ou en partie, la demande s'il est convaincu que, soit la demande, soit la réponse, n'est pas véritablement fondée.</p>
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[9] By letter dated August 17, 2005, Barcode indicated that, for the purposes of this Motion, it did not wish to add anything to its Response. Barcode did ask for a hearing of this Motion but later withdrew that request. PWC, in a memorandum of fact and law filed on September 26, 2005, acknowledged that Barcode maintained its right to pursue its action before the Tribunal.

[10] The test in this Motion is whether there exists a genuine basis for the Response.

[11] The evidence shows that Barcode exists today only as a shell corporation. It remains a legal entity, but with no business, no assets, no employees, and no means to carry on business. Once granted Leave to apply under section 75, it moved to stay the proceedings. It never applied to lift the stay, and never applied for an interim order to maintain supply, because it was out of business.

[12] In my view, the circumstances that prevailed at the time Leave was granted have changed and, in the circumstances which existed at the time Symbol filed its s. 106 Application, Leave would not have been granted. Further, I am satisfied that there is no genuine basis for the Response.

ORDER

[13] The Motion and the s. 106 Application are allowed. The Order dated January 15th, 2004, granting Leave, is rescinded.

DATED at Ottawa, this 14th day of October, 2005.

SIGNED on behalf of the Tribunal by the Chairperson of the Tribunal.

(s) Sandra J. Simpson

COUNSEL:

For the Applicant:

Mr. Dave Hill
Mr. Steven Field

For the Respondent Barcode Inc.:

Ms. Lindy J.R. Choy

For the Respondent Price WaterHouse Coopers Inc.:

Mr. Richard W. Schwartz