

Competition Tribunal



Tribunal de la Concurrence

Reference: *Robinson Motorcycle Limited. v. Fred Deeley Imports Ltd.*, 2005 Comp. Trib. 6  
File no.: CT2004007  
Registry document no.:0006b

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

AND IN THE MATTER OF an application by Robinson Motorcycle Limited for an order pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, granting leave to bring an application under section 75 of the Act.

B E T W E E N:

**Robinson Motorcycle Limited**  
(applicant)

and

**Fred Deeley Imports Ltd.**  
(respondent)



Decided on the basis of the written record.  
Presiding Member: Simpson J. (Chairperson)  
Date of order: July 16, 2004  
Date of reasons: February 15, 2005

**REASONS FOR ORDER GRANTING LEAVE**

[1] Further to a decision of the Federal Court of Appeal dated November 23, 2004, these are the reasons for my order of July 16, 2004 granting the applicant leave to apply to the Competition Tribunal (the “Tribunal”).

[2] Robinson Motorcycle Limited (the “Applicant”) applied to the Tribunal, pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”), for leave to bring an application under section 75 of the Act. It sought an order requiring Fred Deeley Imports Limited (the “Respondent”) to continue to deal with the Applicant on usual trade terms.

[3] The Applicant is a motorcycle dealership in Wheatley, Ontario. The Applicant has been a Harley-Davidson dealer for twenty-seven years and has been an exclusive dealer since 1990.

[4] The Respondent is the sole supplier of Harley-Davidson motorcycles and related products to Harley-Davidson dealers in Canada. By letter dated January 16, 2004, the Respondent terminated the Applicant’s dealership agreement as of July 31, 2004.

[5] Section 103.1(7) of the Act sets out the test for leave on an application under section 75 of the Act. It reads:

103.1(7) 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.

103.1(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

[6] Given the language of the above section, I must only be satisfied on this application for leave that the Respondent’s practices “could” be the subject of an order under section 75. This a low threshold.

[7] Section 75(1) of the Act reads:

75. (1) 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,

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut:

- a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;
- b) que la personne mentionnée à l'alinéa a) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;
- c) que la personne mentionnée à l'alinéa a) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;
- d) que le produit est disponible en quantité amplement

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.

suffisante;  
e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseur de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

**[8]** With regard to the factors in section 75, I have concluded the following:

- (a) Given its exclusive reliance on the sale of Harley-Davidson products since 1990, I find that the Competition Tribunal could conclude that the Applicant's business is substantially affected by the termination of its longstanding arrangements as an exclusive Harley-Davidson dealer;
- (b) The Respondent acknowledges that it is the sole supplier of Harley-Davidson motorcycles and related products in Canada. The Applicant submits that Harley-Davidson products have a "mystique" and are of such a unique character that other brands are not substitutes. The Respondent argues to the contrary. However, I find that the Competition Tribunal could conclude that Harley-Davidson products are separate products and that the Applicant is unable to obtain adequate supply because the Respondent has refused to supply and has no competitors;
- (c) It is the uncontradicted evidence of the Applicant that it has never acted in a manner which would give the Respondent cause to terminate the dealership agreement, that it has had above average sales that have steadily increased since 2000 and that it has always been able to meet all the Respondent's usual trade terms. Given this evidence, I find that the Competition Tribunal could conclude that the Applicant is willing and able to meet the Respondent's usual terms;
- (d) I have examined the documents submitted by the Respondent regarding sales and market shares. They show that Harley-Davidson products are widely sold. Given this fact and the Respondent's historical ability to supply the Applicant, I find that the Competition Tribunal could conclude that Harley-Davidson motorcycles and related products are in ample supply;
- (e) On this topic, I find that the Tribunal could conclude (i) that the counties of Essex and Kent constitute a geographic market on the basis that sales are linked to a need for a convenient service, (ii) that Harley-Davidson motorcycles, related products and service constitute one or more product markets and (iii) that the elimination of the Applicant's business, which is the only full line competitor for

the exclusive Harley-Davidson dealer in Windsor, Ontario, could have an adverse effect on competition.

[9] For these reasons, I concluded that the Tribunal “could” make an order requiring the Respondent to supply the Applicant. Accordingly, leave was granted on July 16, 2004.

DATED at Ottawa, this 15<sup>th</sup> day of February, 2005.

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

(s) Sandra J. Simpson

## REPRESENTATIVES

For the applicant:

Robinson Motorcycle Limited

Myron W. Shulgan, Q.C.  
Kristina Savi-Mascaro

For the respondent:

Fred Deeley Imports Ltd.

R. Seumas M. Woods  
Christopher Hersh  
Matthew Horner