

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
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File No. CT 2003 008

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 75 of the *Competition Act*.**

BETWEEN:

SYMBOL TECHNOLOGIES CANADA ULC,

Applicant,

- and -

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

Respondent.

RESPONSE OF BARCODE SYSTEMS INC.

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(Matter No. 0070689 EWO/LJC)
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RESPONSE OF BARCODE SYSTEMS INC.

1. Barcode Systems Inc. ("BSI") opposes the within Application by Symbol Technologies Canada ULC ("Symbol") under Section 106 of the Competition Act, RSC 1985 c. C-35 to rescind the Order granting leave issued by the Competition Tribunal on January 15, 2004. The grounds on which this Application is opposed are as follows:
 - (a) BSI and PricewaterhouseCoopers Inc ("PWC") are separate entities with separate interests. The fact that there is an order requiring Symbol to deal with PWC does not directly affect BSI;
 - (b) The fact that BSI is claiming damages in a separate action for the loss of BSI's business as a going concern does not prevent BSI from seeking to rebuild its business at a later date;

- (c) Symbol has unduly delayed bringing this Application; and
- (d) It would be unjust to deny BSI the opportunity to seek relief in circumstances where the interim receivership of BSI was precipitated by Symbol's refusal to deal with BSI.

Separate Entities

2. The December 19, 2003 Order of Mr. Justice Schulman (Exhibit "B" to the Affidavit of Mike Reid) appoints PWC interim receiver of all the property, assets and undertaking of BSI. While this Order grants PWC the authority to deal with the property of BSI, the corporate entity BSI remains intact and is not subject to control by the interim receiver.
3. As its title suggests, the interim receiver is not a permanent appointment. After completion of the receivership proceedings, the shell of the corporate entity BSI will continue to exist.
4. It is possible for BSI to recommence operations at a future date. The principals of BSI still possess knowledge of how to run a business in the barcode industry and still retain contacts within the barcode industry community.
5. The order sought by BSI from the Competition Tribunal requiring Symbol to deal with BSI would enable BSI to re-establish itself in the industry.
6. Although the January 15, 2004 Order of Mr. Justice Schulman (Exhibit "E" to the Affidavit of Mike Reid) requires Symbol to supply product to the interim receiver, BSI itself cannot rely on this Order. Once the receivership is completed, the Order will no longer be of any effect.
7. The sale of *certain* of BSI's assets to q.data (as per the February 26, 2004 Order of Mr. Justice Schulman attached at Exhibit "K" to the Affidavit of Mike Reid)

does not prevent BSI from attempting to rebuild its business from scratch at a later date.

Claim for Damages

8. It is acknowledged that BSI is claiming against Symbol in a separate civil action for damages arising from breach of contract. It is submitted that the claim for damages is not inconsistent with the relief BSI seeks from the Competition Tribunal. The civil claim seeks compensation for the loss BSI's previous operations as a going concern. The Competition Tribunal proceedings seek relief which will enable BSI to rebuild its business anew in the future.

Delay


9. A majority of the facts relied upon by Symbol in its Application have been known to Symbol since early in 2004. The time for making this Application should have been one year ago. Symbol ought not be allowed to raise these issues at the present time.

Unjust to Deny BSI the Ability to Seek Relief

10. From a policy perspective, it would be unjust to deny BSI the ability to seek relief due to the interim receivership, in circumstances where the interim receivership was precipitated by Symbol's refusal to deal.
11. Section 103.1 private access applications are a new and developing area of competition law. An unfavourable precedent could be set whereby suppliers would endeavour to delay and complicate matters until the private access applicant is in receivership. Suppliers could effectively defeat private access applications by use of delay tactics and thereby prevent the merits of an application from ever being considered by the Competition Tribunal.

12. It is therefore submitted that the within application be dismissed with costs against the applicant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of March, 2005.



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AND TO: Gaston Jorré
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AND TO: PricewaterhouseCoopers Inc.
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