

Competition Tribunal



Tribunal de la Concurrence

Citation: *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28

File no.: CT-2004009

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

AND IN THE MATTER OF applications by Quinlan's of Huntsville Inc. ("Quinlan") for an order pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"), granting leave to bring an application under section 75 of the Act and for an interim order pursuant to subsection 104(1) of the Act;

B E T W E E N :

**Quinlan's of Huntsville Inc.**  
(applicant)

and

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



Date of teleconference call: October 21, 2004

Presiding Member: Simpson J. (Chairperson)

Date of Order: November 3, 2004

**REASONS FOR THE INTERIM RELIEF ORDER DATED NOVEMBER 3, 2004**

## I. INTRODUCTION

[1] This is the first application for an interim supply order made by a private party under sections 104 and 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”).

[2] Quinlan’s of Huntsville (“Quinlan’s” or the “Applicant”) has been a Harley-Davidson (“H-D”) dealer in Huntsville, Ontario for approximately 17 years. Its most recent dealership or retailer agreement was signed with the respondent on June 9, 1999. It originally expired on July 31, 2001, but was renewed in writing so that it next expired on July 31, 2004 (the “Retailer Agreement”). On December 9, 2003, Quinlan’s was given notice, in writing, that its Retailer Agreement would not be further renewed (the “Non-Renewal”).

[3] Fred Deeley Imports Ltd. (“Deeley” or the “Respondent”), is the exclusive Canadian distributor of H-D motorcycles and related products. Deeley distributes in Canada through a network of independently owned dealerships and the process is governed by retailer agreements between Deeley and its dealers.

[4] On July 5, 2004, Quinlan’s applied to the Competition Tribunal (the “Tribunal”) for leave to seek an order under section 75 of the Act and for an interim supply order under section 104. Leave was granted on August 4, 2004 and, after an interlocutory motion and cross-examinations by both parties on their opponent’s affidavits, this motion for an interim supply order was heard by teleconference on October 21, 2004. Quinlan’s has asked the Tribunal to order that Deeley supply it with H-D motorcycles, parts and accessories for the H-D 2005 product year.

## II. THE APPLICANT’S POSITION

[5] The Applicant submitted that section 104 of the Act gives the Tribunal discretion to grant interim orders . . . “having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.” The principles would normally be those set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. However, in the past, mandatory injunctions have been issued only when a higher standard of a strong *prima facie* case was met. In this regard, the Applicant said that, even though the order it seeks is mandatory, decisions in recent cases, see: *Adair v. British Columbia College of Teachers*, [1999] B.C.J. No. 439 (S.C.)(QL) and *Hedstrom v. Manufacturers Life Insurance Co.* (2002), 8 B.C.L.R. (4<sup>th</sup>) 192, 2002 BCSC 1502, [2002] B.C.J. No. 2463 (QL), have indicated that the test for granting a mandatory injunction is now less onerous. The Applicant says, therefore, that it is only required to satisfy me that its refusal to deal case under section 75 of the Act, “raises a serious issue to be tried” and that the Tribunal should focus on what is just and equitable in all the circumstances.

[6] The Applicant says that, on the evidence, it is clear that its case raises serious issues under section 75 of the Act. It says that, because H-D Products represented 55 to 60 per cent of its business (this figure is admitted), the Non-Renewal will destroy its business. It says that the harm is, therefore, irreparable and that the balance of convenience favours making an interim supply order. The Applicant

asks that the Tribunal order supply under the terms of the Retailer Agreement with some modifications. The Applicant says that the Tribunal should not be deterred from making the Interim Supply Order simply because the Retailer Agreement is complex, gives H-D a great deal of discretion and involves financial institutions and trademark licenses. The Applicant denies that the Tribunal will need to supervise an interim supply order and also denies that it unduly delayed by waiting six months to bring its application for leave to proceed under section 75 of the Act. It says that the prudent course was to try to negotiate a further renewal of the Retailer Agreement before litigating. Finally, the Applicant says that it is entitled to rely on its financial information for the fiscal year ending May 31, 2003, because that was the most current information available when this application was made.

### **III. THE RESPONDENT'S POSITION**

[7] The Respondent submits that, because it seeks a mandatory order, Quinlan's must show that its case under section 75 of the Act is "unusually sharp and clear", that it has a "strong *prima facie* case" or, put another way, that it has a "significant prospect of succeeding at trial". In this regard, see: *Sheppard Homes Limited v. Sandham*, [1970] 3 All E.R. 402, *Ticketnet Corp. v. Air Canada* (1987), 21 C.P.C. (2d) 38, [1987] O.J. No. 782 (H.C.J.)(QL), *Cellular Rental Systems v. Bell Mobility Cellular Inc.* (1994), 116 D.L.R. 4<sup>th</sup> 514, 56 C.P.R. (3d) 251, *Ausman v. Equitable Life Insurance Co. of Canada* (2002), 46 C.C.L.I. (3d) 14, [2002] O.J. No. 3066 (Sup. Ct.)(QL), *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720 (Gen. Div.)(QL) and *Pasknak v. Chura* (1999), 2 B.L.R. (3d) 107, 1999 BCSC 1934, [1999] B.C.J. No. 2851 (QL). Deeley says that the case on the merits does not meet this standard and that the Applicant's financial records are unacceptably out of date. It also says that the Applicant is not facing the loss of its business because it has been approached to discuss representing other brands of motorcycles and is obliged to mitigate its loss by replacing H-D with other brands.

[8] Deeley submits that, because it has already allocated its 2005 motorcycles to its dealers (excluding Quinlan's), the balance of convenience favours Deeley. It further submits that it will be very difficult to supervise an order that takes the form of the complex Retailer Agreement and that Quinlan's should be denied the order because it waited six months to apply to the Tribunal. Deeley says that, had Quinlan's moved promptly for the Interim Supply Order, Deeley could have included Quinlan's requirement for approximately 100 motorcycles when it ordered its H-D products for the 2005 model year.

### **IV. H-D PRODUCTS**

#### **A. Motorcycles for the 2005 Model Year**

[9] Deeley orders its motorcycles from the H-D factory in the United States (the "Factory"). The Factory is the only manufacturer of H-D motorcycles for the world market. In March 2004, Deeley "locked in" its order for 10,900 H-D motorcycles for the 2005 model year. In order to improve the mix of available motorcycles, it then supplemented its order in July of 2004 by obtaining a further 300 units from the Factory for a total of 11,200 motorcycles for the 2005 model year.

[10] In July 2004, Deeley held a meeting to announce the 2005 models. Mr. Jim Quinlan, the President of the Applicant, deposed that, at the meeting, individual H-D dealers would have been told the total number of motorcycles they had been allocated by Deeley for the 2005 product year. The allocation would have specified the sub-number of motorcycles a dealer could expect to receive from each of the five groupings or “families” of H-D motorcycles. Thereafter, the dealer would have selected the specific models it wanted within each family up to its allocated sub-number. The 2005 motorcycles began to arrive at H-D dealerships with the delivery of one or two models in August 2004.

[11] Deeley considers its allocation of motorcycles to its dealers for the 2005 model year to be commercially sensitive information. Deeley does not inform its dealers of the number of motorcycles allocated to other dealers. Deeley offered to produce the 2005 national allocation to the Tribunal and to Quinlan’s counsel in confidence. However it was not to be disclosed to Quinlan’s. This offer was not accepted. Accordingly, for the 2005 model year, there is no documentary evidence to show whether or not all of the 11,200 H-D motorcycles ordered by Deeley for Canada have been allocated to dealers. Mr. Quinlan stated during his cross-examination, that he does not know whether there is any excess supply of H-D motorcycles in Canada for the 2005 model year.

[12] In his affidavit of August 16, 2004, Mr. Bremner J. Green, Deeley’s General Manager, deposed that all the motorcycles ordered for the 2005 model year had been allocated to H-D dealers. He stated the following:

Paragraph 24. Accordingly, if the Tribunal orders Deeley to continue to supply motorcycles to Quinlan’s, it will be exceedingly difficult for Deeley to do so. If Deeley cannot obtain additional motorcycles from Harley-Davidson, Deeley will have to reduce the quantity of motorcycles that it has already committed to its dealerships. This will not only harm Deeley, but will harm other independent dealerships as well.

Paragraph 33. In short, if Deeley is ordered to supply Quinlan’s on an interim basis, any motorcycles to be provided to Quinlan’s will have to be taken from those already allocated to dealers. This will result in considerable inconvenience to Deeley and will harm its relationship with its remaining dealers and customers.

[13] In response to this evidence, the Applicant argues that, because it is admitted that there are unsold H-D motorcycles at dealers from earlier model years (approximately 1400 to 1500 across Canada); because Deeley has acknowledged that it has ordered more motorcycles for the 2005 year than it ordered for 2004 and because Mr. Quinlan has been told that many (he named three) H-D dealers in Ontario have asked for, and been granted, reductions in their allocations for the 2005 model year, it can reasonably be inferred that, even if all the 2005 motorcycles have been allocated to dealers, there is a situation of excess supply.

[14] The Applicant submits that dealers are permitted by paragraph D(3)(i) of the Retailer Agreements to transfer motorcycles between themselves with Deeley’s approval and says that Quinlan’s could be supplied in this manner.

[15] The Applicant also submits that the retailer agreements give Deeley the power to reallocate the 2005 models to comply with an interim supply order made by the Tribunal. Paragraph D2 of the Retailer Agreement is entitled “Execution of Orders”. It reads as follows:

...Furthermore, during any period of shortage of any Harley-Davidson Products due to any cause whatsoever, Deeley shall have the exclusive right to allocate Harley-Davidson Products to Retailer and all other retailers and customers based upon such criteria as Deeley may establish in its sole and absolute discretion from time to time, notwithstanding anything herein to the contrary.

[16] Finally, Quinlan’s says that it could be supplied by means of a further order placed by Deeley with the Factory.

[17] The question raised by these facts is whether, in the present situation, in which all of the 2005 H-D motorcycles have been allocated to dealers and in which dealers have been advised of their allocations and have picked the specific motorcycles they want, it is possible to conclude that the 2005 year H-D motorcycles are in ample supply.

[18] There are no cases dealing with the meaning of ample supply in the context of section 75 of the Act. In the only two cases decided under section 75, see: *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 and *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1, ample supply was not an issue.

[19] In my view, section 75 and, therefore, interim orders under section 75, are meant to deal with situations in which the product is readily available and unencumbered in the sense that it has not been sold or promised to another purchaser. However, in this case, the only situation in which H-D motorcycles for the 2005 model year can definitely be made available to Quinlan’s is one in which the Tribunal makes an interim supply order. It would, in turn, require Deeley to declare a shortage under paragraph D2 of the Retailer Agreement and withhold motorcycles from dealers to whom commitments have been made.

[20] It may be, as the Applicant argues, that a situation of national oversupply will develop or become apparent. However, at this time, the very limited evidence from Quinlan’s is simply that there is a prospect of oversupply. This is not evidence of ample supply. It may also be that Deeley would be able to obtain more motorcycles from the Factory if an interim supply order were made, but that prospect is uncertain. Finally, motorcycles might be available from other dealers but, again, they are not a reliable source of supply because such motorcycles are only available if dealers are willing to transfer them and if Deeley consents. I have, therefore, concluded on the evidence now before this Tribunal, that the only time of year in which H-D motorcycles for the 2005 product year were in ample supply was before Deeley placed its order with the Factory in March of 2004.

[21] Even though Quinlan’s has shown that H-D motorcycles are in ample supply in some months of the year, it is my view, having regard to all the circumstances of the case, that it is not appropriate to

exercise my discretion in favour of ordering Deeley to supply Quinlan's with 2005 model year H-D motorcycles because they are not now in ample supply.

## **B. Other Products**

[22] This application also dealt with other products, including H-D clothing and accessories ("General Merchandise") and motorcycle parts for servicing motorcycles of all model years ("Parts"). According to Mr. Green's affidavit of August 16, 2004, 40 per cent of the General Merchandise is of a seasonal character and is specially ordered by individual dealers at one of the two dealer shows held each year. Quinlan's was not invited to the dealer shows in January and June of 2004 and no seasonal merchandise was ordered for its account. Accordingly, the seasonal General Merchandise is not in ample supply.

[23] The non-seasonal General Merchandise and Parts are ordered on an "as needed" basis and, on the evidence, appear to be in ample supply. In this context, the preliminary question is whether it makes sense to make an Interim Supply Order for the supply of non-seasonal General Merchandise and Parts when Quinlan's may not have 2005 motorcycles for sale. On reflection, I concluded that, because these items are only supplied under the Retailer Agreement if ordered by Quinlan's, there is no reason not to order interim supply. Quinlan's is then free to order or not as it sees fit.

## **V. THE STANDARD FOR AN INTERIM SUPPLY ORDER**

[24] One of the principles applied by Superior Courts in dealing with interim orders requires the Judge to have regard for all the circumstances of the case, including its practical and statutory context. In that regard, it seems wrong to conclude that a private applicant, who has just been granted leave on the basis of the fact that the Tribunal "could" find the facts necessary to prove a section 75 case, must show a strong *prima facie* case in a subsequent motion for an interim order. In my view, the demonstration of a serious issue (in the sense that it is not frivolous or vexatious) is most consistent with the statutory scheme which sets a relatively low threshold for leave. It is also the case that, in the context of an application under section 75, a mandatory order is not an extraordinary remedy. Rather, it is what the section is all about and it seems to me that, in this context, orders which preserve or resume supply should not be viewed as exceptional.

## **VI. IRREPARABLE HARM**

[25] In my view, when bringing a case under section 75 of the Act, there is no duty to mitigate damages by entering into supply arrangements to replace the items at issue in the case. Quinlan's was a H-D dealer and, if it can prove its case, it may continue to be a H-D dealer. It is unrealistic to suggest that, pending a final ruling on its access to H-D products, it is required to make supply agreements with other motorcycle manufacturers. It may choose to do so, but to require it to do so is contrary to the scheme of section 75.

[26] In this case there is no doubt that the loss of its H-D sales and the goodwill of its H-D

customers constitutes irreparable harm.

## **VII. BALANCE OF CONVENIENCE**

[27] In the case of the non-seasonal General Merchandise and Parts, the balance of convenience favours supply, there being no evidence to suggest that these products are not in ample supply.

## **VIII. CONCLUSIONS**

[28] With regard to non-seasonal General Merchandise and Parts, Quinlan's has raised serious issues on the merits of its case under section 75 of the Act and is entitled to an interim supply order.

[29] As noted above, I have concluded that, with regard to motorcycles, an interim supply order is not appropriate. However, there is another approach which may help Quinlan's generate 2005 motorcycles for sale and which I consider appropriate in the circumstances of this case. In this regard, the Tribunal's order will free Quinlan's from the provisions of paragraph D(3)(i) of the Retailers Agreement so that, if Quinlan's can arrange to purchase motorcycles from other dealers, it may do so without Deeley's consent.

## **IX. ORDER**

[30] For all these reasons, an order will be made requiring Deeley to supply Quinlan's with non-seasonal General Merchandise and Parts until a final decision is made by the Tribunal after a hearing on the merits of this application. The order will reinstate a modified version of the Retailer Agreement so that Quinlan's will again be a H-D dealer. As success has been divided, there will be no order as to costs.

DATED at Ottawa, this 3<sup>rd</sup> day of November, 2004.

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

(s) Sandra J. Simpson

## REPRESENTATIVES

For the applicant:

Quinlan's of Huntsville Inc.

Robert Rueter  
Andy Chan

For the respondent:

Fred Deeley Imports Ltd.

R. Seumas M. Woods  
Christopher Hersh  
Matthew Horner