

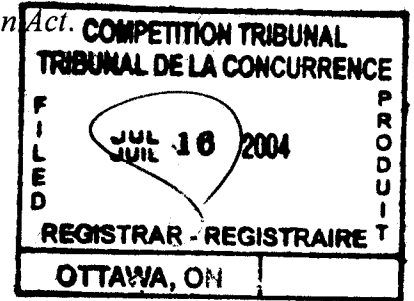
THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an Application by Quinlan's of Huntsville Inc. for relief pursuant to sections 75, 103.1 and 104 of the *Competition Act*.

BETWEEN:

QUINLAN'S OF HUNTSVILLE INC.



Applicant

- and -

**FRED DEELEY IMPORTS LTD.
carrying on business as
DEELEY HARLEY-DAVIDSON CANADA**

Respondent

**WRITTEN REPRESENTATIONS OF THE APPLICANT REQUESTING LEAVE
PURSUANT TO SECTION 103.1 TO BRING AN APPLICATION UNDER
SECTION 75 OF THE *COMPETITION ACT*;
AND FOR INTERIM RELIEF PURSUANT TO SECTION 104**

July 15, 2004

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THE COMPETITION TRIBUNAL

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AND IN THE MATTER OF an Application by Quinlan's of Huntsville Inc. for relief pursuant to sections 75, 103.1 and 104 of the *Competition Act*.

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PART I - OVERVIEW

1. The Applicant, Quinlan's of Huntsville Inc. ("Quinlans"), has filed an application with the Competition Tribunal (the "Tribunal") seeking leave under section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act") to bring an application under section 75 of the Act (collectively referred to as the "Application").

2. If leave is granted, Quinlans will also request that interim relief be granted to it pursuant to section 104 of the Act, requiring that the Respondent, Fred Deeley Imports Ltd. carrying on business as Deeley Harley-Davidson Canada (“FDI”) accept Quinlans as a customer of Harley Davidson (“H-D”) products on the usual trades terms, until there has been a final determination of the Application.

3. The decision to grant leave pursuant to section 103.1 of the Act requires only that the Tribunal have reason to believe that Quinlans will be directly and substantially affected in its business by the actions of FDI and that the Tribunal can make an Order pursuant to section 75 of the Act. It is respectfully submitted that Quinlans has met both requirements.

Section 103.1, the *Competition Act*, R.S.C. 1985, c. C-34.

4. In determining if interim relief should be granted pursuant to section 104 of the Act the Tribunal may issue such order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief. The Tribunal must be satisfied that there is a serious question to be tried in these proceedings. If answered in the affirmative, the Tribunal then needs to be satisfied that Quinlans will suffer irreparable harm should interim relief not be granted, and on the balance of convenience, Quinlans will suffer greater harm if interim relief is refused, than FDI will suffer if interim relief is granted pending a decision on the merits

of the Application. It is respectfully submitted that Quinlans has satisfied the requirements for interim relief.

Section 104(1), the *Competition Act*, R.S.C. 1985, c. C-34.

PART II – THE FACTS

The Parties

5. The Applicant, Quinlan's of Huntsville Inc. ("Quinlans") is an authorized Harley-Davidson ("H-D") motorcycle dealer operating from its dealership store at Old Ferguson Road in Huntsville, Ontario. Quinlans sells Harley-Davidson motorcycles, H-D parts, accessories, apparel, and other H-D merchandise. Quinlans is the only H-D dealer in its area and has been an authorized H-D dealer for 17 years. Quinlans also sells Honda motorcycles. H-D products represent 65% of its sales and Honda represents only 35%. H-D products occupy such a dominant position in Quinlans' market area that Quinlans' business as a motorcycle dealer is not viable if Quinlans does not have access to H-D products.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 2.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 7

6. The Respondent, Fred Deeley Imports Limited, carrying on business as Deeley Harley-Davidson Canada ("FDI") is the exclusive distributor of H-D products in Canada.

FDI has a national network of H-D dealers, of which Quinlans is one. There are no other suppliers of H-D products in Canada. Accordingly, H-D products cannot be obtained from any supplier other than through FDI.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 3.

Developing the Market in Quinlans' Area for H-D Products

7. In 1987, Quinlans became an authorized H-D dealer selling and promoting H-D products in Huntsville, Ontario. FDI would sell H-D products to Quinlans on a wholesale basis and Quinlans would then market and resell H-D products on a retail basis to its customers. Through this arrangement, Quinlans continuously developed the retail market for H-D products throughout its market area for the past 17 years.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 4.

8. In 1990, at the urging of FDI, Quinlans acquired a large parcel of land and built upon it a new dealership store. The new dealership store was configured and outfitted, at the request of FDI, to meet the H-D new store concept and marketing image established by FDI for its H-D dealership stores. Quinlans built this store and its H-D dealership business in reliance upon and consistent with the expectations and representations of FDI that the parties were mutually committed to a long-term H-D dealer/distributor relationship.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 5.

9. Quinlans invested its efforts and expenditure of significant amounts for development and maintenance of the dealership store, building its H-D dealership business using FDI recommended store configuration and merchandise displays, and purchasing additional marketing displays and other H-D paraphernalia to comply with the numerous programs, standards, and requirements set out by FDI. As part of the continuing stipulations of FDI, Quinlans displayed the H-D logo on its store front and situated H-D paraphernalia in and around the dealership to maximize customer exposure to H-D products. Quinlans was also required at its expense to attend ongoing training seminars and to send staff members annually for training programs to learn the H-D way of business. It did so as part of its ongoing “partnership” with FDI as a H-D dealer.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 6.

10. As previously noted, H-D products represent 65% of Quinlans’ sales and Honda products represent 35%. For Quinlans’ market area, Honda customers are a more limited group than H-D customers and Honda products are targeted for an entirely different clientele. The H-D product is in a far higher price bracket with very different appearance and performance features than the Honda product line. Over the years, Quinlans has dedicated up to 90% of its floor space to H-D products in accordance with or in excess of the conditions set by FDI.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 7.

11. Quinlans’ natural geographic market includes towns such as Huntsville, Bracebridge, Gravenhurst, Bala, Parry Sound, North Bay and the many villages and rural

communities located in between. Over the course of its 17 years as a H-D dealer, Quinlans developed significant good will and a substantial market for H-D products in and around Muskoka stretching south to Orillia and north to North Bay; east to Algonquin Park and west to Georgian Bay (collectively referred to as the “Area”).

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 8.

12. The volume of H-D products sold by Quinlans increased year over year and during its most recent fiscal year, Quinlans sold 120 new H-D motorcycles, recording the highest number of sales in its history, and one of the highest of any of FDI’s dealers outside the greater Toronto area. Quinlans’ sales of H-D products by dollar value and as a percentage of its overall sales for the past five years are reflective of its successful efforts to develop the market and good will for H-D products, as shown in the following:

Fiscal Year	Total Sales (\$)	H-D Product Sales (\$)	H-D Product Sales/Total Sales (approximate %)
1999	\$3,615,271.00	\$2,349,926.00	65%
2000	\$4,162,678.00	\$2,705,740.00	65%
2001	\$5,017,867.00	\$3,261,613.00	65%
2002	\$5,705,332.00	\$3,708,465.00	65%
2003	\$5,212,223.00	\$3,387,944.00	65%

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 9.

FDI's Refusal to Deal

13. From time to time FDI presented dealer agreements or renewal or extension agreements for Quinlans to sign, which it did. In June of 1999, FDI submitted a new form of Dealer Agreement to Quinlans for execution, renamed "Retailer Agreement". The substance of the Dealer Agreement remained similar to the previous Dealer Agreements signed over the past 17 years. These agreements were not negotiated between the parties, but were contracts of adhesion, the terms of which were stipulated by FDI. Each Dealer Agreement or renewal contained a stated time duration and FDI's invariable practice was to renew or extend the agreement each time, either by a brief extension agreement or by submitting a new dealer agreement for signature. The June 1999 Dealer Agreement had a stated term to July 31, 2001. Jim Quinlan signed the Dealer Agreement on June 9, 1999. Consistent with past practice as the end of the term approached, the Dealer Agreement was extended by a written "Retailer Extension Agreement" dated July 17, 2001, which extended the Retailer Agreement to July 31, 2004.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 10.

Retailer Agreement between FDI and Quinlans June 9, 1999, Exhibit "A" to the Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4.

Retailer Extension Agreement from FDI July 17, 2001, Exhibit "B" to the Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4.

14. Until recently, Quinlans had enjoyed an excellent relationship with FDI. This changed when FDI learned that the principals of Quinlans, Jim and Lynne Quinlan, participated with other H-D dealers in the establishment of the H-D Dealers' Association for Ontario (the "Association") in or around the summer of 2001. The purpose of the Association was to pursue the collective interests and concerns of H-D dealers across Ontario in order to promote the H-D brand and to generally function as a channel which would allow H-D dealers to have some voice with FDI in respect of their business issues and in particular, the terms of the standard form Dealer Agreement stipulated by FDI.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 11.

15. FDI disapproved of the formation of the Association and in September of 2001, it expressed its disapproval to Jim and Lynne Quinlan, stating that: "The fundamentals around creating a legal entity to better represent the interests of Ontario is somewhat disappointing" and that FDI believed "this type of association would not be necessary". FDI did not, however, mention anything about discontinuing its relationship with Quinlans and the parties continued on in reliance on the mutual expectation and understanding of their continuing "partnership" in selling and developing Quinlans' market Area for H-D products.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 12.

Letter of FDI September 25, 2001, Exhibit "C" to the Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4.

16. During the period following FDI's renewal of the Dealer Agreement, Quinlans continued to invest its efforts and resources in the business, marketing H-D products in its Area. This required Quinlans' sustained expenditure and reinvestment of profits in continuing to maintain and expand its marketing of H-D products. FDI encouraged this spending in order to ensure ongoing development of the market for H-D products in Quinlans' Area.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 13.

17. By a letter dated December 9, 2003, FDI advised that it would not offer Quinlans an "extension" of the Dealer Agreement. No reason was given. When pressed for an explanation, FDI's representative stated only that the reason was "because he could". After further objection and inquiry by Quinlans through counsel, FDI advised through its counsel that FDI's "market studies have demonstrated that there is no natural market for H-D products in the Huntsville area" and that:

"Based upon these market studies, Fred Deeley has determined that there is no longer a need for a Retailer in Huntsville, and as it is entitled to do, has decided not to offer Quinlan's a new Retailer Agreement or renew or extend the existing one on July 31, 2004".

This purported explanation for refusing to deal with Quinlans makes no sense, since there is a 17 year history demonstrating a well-established market for H-D products developed by Quinlans in its Area. Furthermore, Quinlans most recently completed fiscal year demonstrated sales of 120 new H-D motorcycles, the highest number in its history and one of the highest of any FDI dealer outside the greater Toronto area. Nevertheless, FDI

was clear and categorical that it would not supply Quinlans with any H-D products after July 31, 2004 and that its decision was final.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 9.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 14.

Letter of FDI December 9, 2003, Exhibit "D" to the Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4.

Letter of FDI's counsel January 16, 2004, Exhibit "E" to the Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4.

Substantial Detrimental Effect

18. The overall effect of the termination of Quinlans' H-D dealership by FDI will be devastating upon it. If FDI fails to supply Quinlans with H-D products, for all practical purposes Quinlans will be precluded from continuing with its business due to its inability to obtain H-D products to sell. In particular, Quinlans' loss of 65% of its revenue will put it out of business.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 15.

19. Quinlans has developed much of the good will for H-D products in the Area through its efforts and investment in marketing H-D products. This good will built by Quinlans is not transferable by Quinlans to another product line because Quinlans invested it in H-D products as part of FDI's marketing strategy to build strong H-D brand loyalty among its customers.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 16.

20. H-D products are largely unaffected by possible substitutes in the Area because non-H-D products do not carry the mystique developed as a unique attribute of the H-D image. H-D products are viewed by customers as “entirely different products”. Once Quinlans has recruited a customer to the H-D product, generally they are not interested in switching. Non-H-D products have been unable to break into the H-D product market in Quinlan’s market area because they are significantly different products operating in a significantly different market, appealing to a different clientele. There is no equivalent substitute for the mystique and image of H-D products. This view has been at the core of FDI’s marketing strategy and Quinlans has been highly effective in its market Area throughout Muskoka and north central Ontario in establishing the H-D product line as dominant in this area.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 17.

21. The devotion and effort expended by Quinlans to the H-D marketing strategy is illustrated by the incidence of repeat sales of H-D products to customers, since many of Quinlans’ existing customers have successively purchased new H-D products from it. This is consistent with the mission statement in FDI’s written and oral dealer training programs that Quinlans should make its H-D customers, “customers for life”.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 18.

22. The effect of FDI's failure to supply H-D products to Quinlans in these circumstances will deal a staggering blow to its business. It will also result in FDI appropriating at no cost for its own use and benefit a windfall gain resulting from the substantial investment and development of the market and good will for H-D products established by Quinlans in the Area. Quinlans will lose all of its H-D customers as well as 65% of its sales revenue. Quinlans cannot survive on its remaining 35% of revenue from the sale of Honda products.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 19.

23. If Quinlans is unable to obtain adequate supplies of H-D products after July 31, 2004, when the new season of H-D products will be available, its sales for the upcoming season will be significantly prejudicially affected. FDI's refusal to deal will result in Quinlans being unable to fulfill its ongoing business obligations and relationships, which will negatively impact its customers and irreparably harm its customer relationships and ultimately, its business. Quinlans' business has already been substantially adversely affected since sales revenue has fallen 20% over the past two months compared to the same period last year. This drop in sales is directly attributable to customer uncertainty resulting from FDI's disclosure that it will no longer supply Quinlans after July 31, 2004.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 20.

24. If H-D products are no longer sold and serviced in Huntsville, Quinlans' customers will be forced to travel to other H-D dealers a great distance away. The effect of FDI's refusal to deal with Quinlans not only will have an adverse effect on competition in the

market, since the termination of Quinlans will result in reduced competition among H-D dealers; it will also affect Quinlans' customers prejudicially since they will have to travel great distances away for service as well as sales. Currently the H-D dealers closest to Huntsville are located 125 kilometers away in Barrie, 260 kilometers away in Sudbury and 320 kilometers away in Pembroke. The time it takes for customers to travel from Huntsville to each of the above-noted locations is approximately 1 hour, 2.5 hours and 3 hours respectively.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 21.

25. FDI is the exclusive supplier of H-D products in the Area and its H-D products occupy a dominant position in the marketplace. Furthermore, FDI occupies a virtually exclusive position in the marketplace for service to Quinlans' customers with H-D motorcycles, since FDI controls access to authorized H-D parts and to the H-D Diagnostic Technician equipment which Quinlans was required to purchase and install at its premises. This computer system requires access to H-D computerized technical support in Milwaukee and this access is essential in order for Quinlans to be able to service modern H-D motorcycles. In the result, Quinlans will be substantially affected due to its inability to obtain adequate or indeed, any supplies of H-D products anywhere in the market since there are no other suppliers of H-D products in Canada. Moreover, Quinlans will be prevented from providing service to its existing H-D customers since it will not have access to necessary H-D parts and the computerized Diagnostic Technician.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 6.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 22.

26. Quinlans has consistently met FDI's usual trade terms over the past 17 years as a H-D dealer, and it is willing and able to continue to meet the usual trade terms of FDI.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 23.

27. H-D products are in ample supply through FDI.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 24.

28. Quinlans has continuously, competently and diligently maintained prominent and professional H-D representation and product promotion with the highest level of dedication and support, as was required by FDI for over 17 years. Quinlans' results and efforts have been recognized by FDI on many occasions, as reflected in the positive results achieved by it with respect to its representation of the H-D product, as well as comments received from customers.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 25.

29. In February 2004, FDI offered a temporary extension of the existing agreement to October 31, 2004. The letter, however, was drafted in terms of a contract which Quinlans' believed would extinguish its right of action against FDI arising from the termination of Quinlans' Dealer Agreement, if it was accepted. The letter was not signed back by Quinlans for this reason. Nevertheless, the proposal by FDI for an extension

shows that there is no material prejudice to FDI if an interim order is made requiring FDI to supply Quinlans, pending determination of this Application.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 26.

30. Quinlans undertakes to abide by any order that may be made against it arising from the requested interim relief, being granted.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 28.

PART III – THE LAW

Application for Leave

31. The test for granting leave under section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”) is set out in subsection 103.1(7), as follows:

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.

32. It is submitted that Quinlans’ business will be directly and substantially affected by FDI’s refusal to deal, and will gravely impair the viability of Quinlans’ business.

33. Further, it is submitted that the actions of FDI in refusing to deal with Quinlans falls within the scope of activity prescribed by section 75 of the Act, and amounts to a practice which is subject to an Order under section 75 of the Act because it is clearly within the

Tribunal's jurisdiction to order FDI to accept Quinlans as a customer on the usual trade terms.

34. In this application, Quinlans seeks leave to bring an application for an order pursuant to section 75 of the Act, which provides:

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 amply supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in the market,

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 articles in Canada.

(2) When article is a separate product – For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

35. In *National Capital News Canada v. Milliken*, the Tribunal set out the following test for the granting of leave pursuant to subsection 103.1(7) of the Act:

“ ... the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in the applicant’s business by a reviewable practice, and that the practice in question could be subject to an order.”

National Capital News Canada v. Milliken, 2002 Comp. Trib. 41 para. 14.

36. In *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, it was held:

“What the Tribunal must have reason to believe is that Barcode is directly and substantially affected in its business by Symbol’s refusal to sell. The Tribunal is not required to have reason to believe that Symbol’s refusal to deal has or is likely to have an adverse effect on competition in a market at this stage.”

Barcode Systems Inc. v. Symbol Technologies Canada ULC, 2004 Comp. Trib. 1 para. 8.

37. The above propositions were cited with approval in *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, where the Tribunal stated that at the leave stage, the applicant is not required to meet any higher standard of proof threshold.

Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd., 2004 Comp. Trib. 4 para. 21.

38. It is submitted that while Quinlans is not required to meet any higher standard of proof threshold, there is nonetheless “sufficient credible evidence to give rise to a *bona fide* belief” that Quinlans satisfies all the criteria enunciated under section 75 of the Act in that:

(i) Quinlans' business will be directly and substantially affected by FDI's refusal to deal with it in that it will be precluded from carrying on business, be unable to fulfill its ongoing business obligations and relationships, and more than 65% of its sales revenue will be eliminated. Moreover, the substantial investments and expenditures made by Quinlans for the past 17 years will be eliminated.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 6.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 15.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 19.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 22.

(ii) FDI is the exclusive supplier of H-D products in Canada and FDI has stated that it will not supply H-D products to Quinlans after July 31, 2004.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 14.

(iii) Quinlans has and is willing and able to meet the usual trade terms of FDI on a continuous basis.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 23.

(iv) H-D products are in ample supply through FDI.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 24.

(v) The nearest H-D dealers are located a great distance away from Huntsville. If Quinlans' H-D dealership is terminated, competition will be reduced and Quinlans' customers will be adversely affected.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 21.

39. The H-D product class has no equivalent substitutes in that they are set in and targeted for a different market and clientele than non-H-D products. H-D products are largely unaffected by possible substitutes. The core of FDI's marketing strategy is to substantially differentiate its products from non-H-D products by emphasizing the unique attributes of the H-D nostalgia, image and technology, all of which cannot be duplicated. On this basis, H-D products have established a dominant position throughout Muskoka and north central Ontario.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 7.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 17.

40. In respect of providing repair and maintenance service to Quinlans' customers with H-D motorcycles, FDI is in more than a dominant position: FDI is in a virtually exclusive position in this market since Quinlans will be prevented from providing service to these customers without access to H-D parts and the H-D computerized Diagnostic Technician needed to service modern H-D motorcycles.

Interim Relief

41. Section 103.1 of the Act provides that the Tribunal may grant leave to an applicant to bring an application under section 75. If leave is granted, the applicant will then be able to apply to the Tribunal for a order pursuant to section 75 of the Act. Where an applicant has made an application under section 75, section 104 of the Act provides that the Tribunal may issue such interim order as it considers appropriate, including an order that FDI accept Quinlans as a customer of H-D products on the usual trade terms, until there has been a final determination of the Application.

104 (1) Interim Order – Where an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75 or 77, may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

(2) Terms of the Order – An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

(3) Duty of Commissioner – Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

42. The principles ordinarily considered by superior courts when granting interlocutory or injunctive relief is provided in *RJR MacDonald Inc. v. Canada (Attorney General)*, where the Supreme Court of Canada articulated the three-part test in an application for interlocutory relief referred to in *Manitoba (Attorney General) v. Metropolitan Stores*

(MTS) Ltd., [1987] 1 S.C.R. 110: (i) that a preliminary assessment must be made of the merits of the case to ensure that there is a *serious question to be tried*; (ii) a determination as to whether *the applicant will suffer irreparable harm* if the application is refused; and (iii) an assessment must be made as to which of the parties will suffer greater harm from the granting or refusal of the remedy pending a decision of the merits, often referred to as *the balance of convenience*.

RJR MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at 334; S.C.J. 17 at para. 78-80, cited to S.C.J..

43. It is submitted that if leave is granted pursuant to section 103.1 of the Act, there is a serious question to be tried in these proceedings under section 75. In granting leave, the Tribunal will have made a preliminary assessment of the merits of the case and will have determined that there is a serious question to be tried.

44. It is submitted that Quinlans will suffer irreparable harm should interim relief not be granted under the circumstances, where the nature of the harm to Quinlans would result in permanent market loss and irrevocable damage to its business through the loss of 65% of its customers who are dedicated exclusively to H-D motorcycles and other H-D products. If Quinlans is unable to sell H-D products and/or service its H-D customers after July 31, 2004, the commercial viability of the business will be destroyed and a significant portion of its total sales revenue will be lost. The adverse effects of FDI's impending refusal to deal has already been demonstrated in that Quinlans' sales revenue has fallen 20% over the past two months compared to the same period last year due to

uncertainty by its H-D customers as to whether Quinlans will be able to continue to sell and service H-D products.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 20.

45. It is submitted that should interim relief be granted, FDI will suffer no harm over the interim period until the determination of this Application, since FDI will continue to benefit from Quinlans' efforts selling H-D products during the interim period. In this regard, the balance of convenience favours Quinlans because if it is not able to obtain interim relief pending hearing of the Application, it will have no H-D products to sell nor will it be able to service its customers. Effectively Quinlans will be out of business.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 27.

46. Interlocutory injunctions are granted with a view to preserving the *status quo*. It is submitted that the *status quo* for 17 years was for FDI to sell H-D products to Quinlans on a wholesale basis, which Quinlans would then market and resell on a retail basis to its customers. The issuance of an interim order that FDI continue to supply Quinlans with H-D products pending determination of the Application would result in no material prejudice to FDI, as such order merely maintains the *status quo*.

London (City) v. Talbot Square Ltd. (1978), 22 O.R. (2d) 21 (Ont. Div. Court) at 21.

47. The party resisting the granting of an injunction on the ground that damages will be an adequate remedy will bear the burden to establish that contention. It is submitted that

FDI has recognized that Quinlans will sustain irreparable loss should it be unable to obtain supplies and/or servicing of H-D products.

Affidavit of Jim Quinlan, Application Record to the Competition Tribunal, Tab 4, para. 26.

Maker v. Davanne Holdings Limited et al., [1954] O.R. 935-942.


PART IV – ORDER REQUESTED


48. Quinlans respectfully requests that the Tribunal grant leave pursuant to section 103.1 of the Act, for an Order under section 75 of the Act that FDI accept Quinlans as a customer of H-D products on the usual trade terms.

49. Quinlans respectfully requests that the Tribunal grant an interim order pursuant to section 104 of the Act, for an Order that FDI accept Quinlans as a customer of Harley Davidson (“H-D”) products on the usual trade terms until there has been a final determination of the Application or other order of this Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 15, 2004


Robert Rueter


Andy Chan

Counsel for the Applicants
Quinlans of Huntsville

SCHEDULE A

Case law

Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd., 2004 Comp. Trib. 4.

Barcode Systems Inc. v. Symbol Technologies Canada ULC, 2004 Comp. Trib. 1.

London (City) v. Talbot Square Ltd. (1978), 22 O.R. (2d) 21 (Ont. Div. Court).

Maker v. Davanne Holdings Limited et al., [1954] O.R. 935-942.

National Capital News Canada v. Milliken, 2002 Comp. Trib. 41.

RJR MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311.

SCHEDULE B

Statutory Authorities

The *Competition Act*, R.S.C. 1985, c. C-34, s. 75

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 the market,

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 articles in Canada.

(2) When article is a separate product – For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

The *Competition Act*, R.S.C. 1985, c. C-34, s. 103.1(7)

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.

The Competition Act, R.S.C. 1985, c. C-34, s. 104

104 (1) Interim Order – Where an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75 or 77, may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

(2) Terms of the Order – An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

(3) Duty of Commissioner – Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

In the Matter of the *Competition Act*, R.S.C. 1985, c. C-34, as amended.

And in the Matter of an Application by Quinlan's of Huntsville, Inc. for relief pursuant to sections 75, 103.1 and 104 of the *Competition Act*.

BETWEEN:

Quinlan's of Huntsville Inc. (Applicant) -and- Fred Deeley Imports Ltd. carrying on business as Deeley Harley-Davidson Canada (Respondent)

THE COMPETITION TRIBUNAL

**WRITTEN REPRESENTATIONS OF
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