

CT-2004-009

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 section 75, 103.1 and 104 of the *Competition Act*.

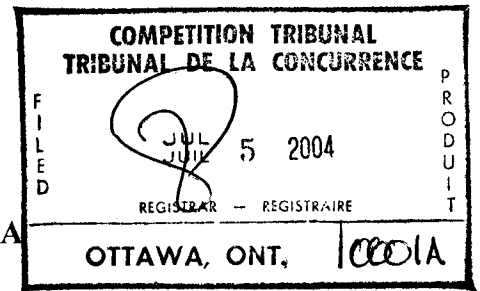
BETWEEN:

QUINLAN'S OF HUNTSVILLE INC.

Applicant

- and -

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



Respondent

**APPLICATION FOR LEAVE PURSUANT TO SECTION 103.1
OF THE COMPETITION ACT**

TAKE NOTICE THAT:

1. The Applicant, Quinlan's of Huntsville Inc. hereby applies to the Competition Tribunal pursuant to section 103.1 of the *Competition Act*, R.S. 1985, c. C-34, as amended (the "Act"), seeking leave to bring an application for an Order under section 75 of the Act that the Respondent, Fred Deeley Imports Ltd. carrying on business as Deeley Harley-Davidson Canada, accept Quinlans as a customer of Harley Davidson products on the usual trade terms, forthwith upon issuance of said Order.

AND TAKE NOTICE THAT:

2. The person against whom an Order is sought is the Respondent, Fred Deeley Imports Limited. Its address is:

830 Edgeley Boulevard
Concord, Ontario
Canada, L4K 4X1

3. If leave is granted, the Applicant will seek an interim order for the relief sought in the Application and directions from the Competition Tribunal for expedited hearing of this Application.

4. The Applicant requests that this Application proceed in English.

5. The Applicant requests that documents be filed in paper form.

6. The Applicant will rely on the Statement of Grounds and Material Facts attached hereto and on the Affidavit of Jim Quinlan, sworn on June 26, 2004, and such further and other material as counsel may advise and the Competition Tribunal may permit.

DATED at Toronto, Ontario, this 30th day of June, 2004.

STATEMENT OF GROUNDS AND MATERIAL FACTS

The Parties

1. The Applicant, Quinlan's of Huntsville Inc. ("Quinlans"), is a corporation, incorporated under the laws of the Province of Ontario. Quinlans is engaged in the business of selling *inter alia* Harley-Davidson ("H-D") products including motorcycles, parts, accessories, apparel, and other H-D merchandise at its H-D dealership store located in Huntsville, Ontario. Quinlans is the only H-D dealer in the area and has been an authorized H-D dealer for 17 years.

2. The Respondent, Fred Deeley Imports Limited, carrying on business as Deeley Harley-Davidson Canada ("FDI") is a corporation incorporated in the Province of British Columbia and is established as Ontario company no. 305708, with its principal Ontario place of business in Concord, Ontario. FDI is the exclusive distributor of H-D products in Canada, which are provided through 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.

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

3. In 1987, Quinlans became an authorized H-D dealership store 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.

4. In 1990, Quinlans acquired a large parcel of land and built upon it a new dealership store, 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. This was consistent with the long-term plans of FDI and Quinlans to build large, new dealership premises in order to develop and service a larger market area. 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.

5. 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.

6. Quinlans has also been an authorized Honda motorcycle dealer over the years. H-D products represent 65% of Quinlans’ sales and Honda represents 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 would dedicate from 50% to 90% of its floor space to H-D products in accordance with or in excess of the conditions set by FDI.

7. 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”).

8. 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 chart:

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%

FDI's Refusal to Deal

9. 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. The various dealer agreements stipulated FDI's approval for many material aspects of Quinlans' dealership business. 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 Dealer Agreement to July 31, 2004.

10. 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, explore areas of mutual profitability, 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.

11. 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.

12. 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.

13. 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".

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.

Substantial Detrimental Effect

14. 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.

15. 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, and to build interest and brand awareness.

16. 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 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.

17. The devotion and effort expended by Quinlans to the H-D marketing strategy is also illustrated by the incidence of repeat sales of H-D products to customers, since many of its 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".

18. 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.

19. 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 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. Quinlans attributes this drop in sales directly to customer uncertainty resulting from FDI's disclosure that it will no longer supply Quinlans after July 31, 2004.

20. 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; it will also adversely affect Quinlans' customers.

21. FDI is the exclusive supplier of H-D products in the Area and its H-D products occupy a dominant position in the marketplace. Quinlans would 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.

22. 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 continually meet the usual trade terms of FDI.

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

24. 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.

BASIS FOR APPLICATION PURSUANT TO SECTION 103.1

25. 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:

“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”.

26. In this application, Quinlans seeks leave to bring an application for an order

pursuant to section 75 of the Act, which states as follows:

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.

27. In *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, the Competition 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.”

28. In *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1, the Competition Tribunal 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.”

29. The above propositions were cited with approval in *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4, where the Competition Tribunal stated that at the leave stage, the applicant is not required to meet any higher standard of proof threshold.

30. The evidence on this application demonstrates:

(a) 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;

(b) Quinlans' business will be directly and substantially affected by FDI's refusal to deal with it in that more than 65% of Quinlans' sales revenue will be eliminated, which will gravely impair the viability of Quinlans' business being able to continue;

(c) H-D products are in ample supply through FDI, and Quinlans has and is willing and able to meet the usual trade terms of FDI on a continuous basis;

(d) 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.

(e) The H-D product class has no equivalent substitutes in that they are set in a different market than non-H-D products.

31. Quinlans relies upon the Affidavit of Jim Quinlan sworn June 26, 2004.

32. 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 that section in that the Tribunal may order FDI to accept Quinlans as a customer on the usual trade terms.

DATED at Toronto, Ontario, this 30th day of June, 2004.

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