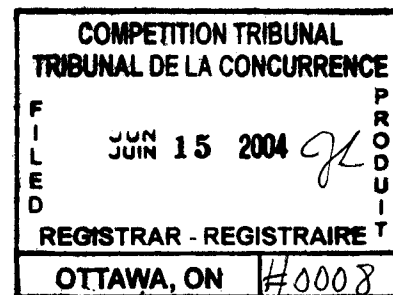


THE COMPETITION TRIBUNAL
File No.: CT2003009
Registry Document No.: 0008



BETWEEN: ALLAN MORGAN AND SONS LTD.

APPLICANT

AND: LA-Z-BOY CANADA LIMITED

RESPONDENT

APPLICATION PURSUANT TO SECTION 75 OF THE *COMPETITION ACT*

TAKE NOTICE THAT:

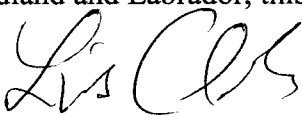
1. The Applicant, Allan Morgan and Sons Limited (“Morgan’s Furniture”) is applying to the Competition Tribunal pursuant to section 75 of the *Competition Act*, R.S. 1985, c.19 (2nd supp.), as amended (the “*Act*”), for an Order that the Respondent, La-Z-Boy Canada Limited (“La-Z-Boy”) accept Morgan’s Furniture as a customer and dealer of La-Z-Boy’s Products (the “Product”) on the “usual” trade terms, forthwith upon issuance of said Order.

AND TAKE NOTICE THAT:

2. Morgan’s Furniture will rely on the Statement of Grounds and Material Facts attached hereto and on the Affidavit of Perry Morgan, duly sworn to before a Barrister of the Province of Newfoundland and Labrador on November 18, 2003, and previously filed with the Competition Tribunal on November 26, 2003.
3. The person against whom an Order is sought is the Respondent, La-Z-Boy. It’s address is set out below.

4. Morgan's Furniture will seek directions from the Competition Tribunal for the expeditious hearing of this application.
5. The Applicant requests that this application proceed in English.
6. The Applicant requests that documents be filed in paper form.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 14th day of June, 2004.


for **Deborah L.J. Hutchings**
McInnes Cooper
Solicitors for the Applicant
5th Floor, Baine Johnston Centre
10 Fort William Place
P.O. Box 5939
St. John's, NL A1C 5X4
Telephone: (709)722-8254
Facsimile (709) 722-1763

Address for Service:

TO: The Registrar
The Competition Tribunal
The Thomas D'Arcy McGee Building
600 - 90 Sparks Street
Ottawa, ON K1P 5B4
Telephone number: (613) 957-7851
Facsimile number: (613) 952-1123

AND TO: Mr. Gaston Jorré
Commissioner of Competition, Acting
Industry Canada
50 Victoria Street
Gatineau, Quebec K1A 0C9
Telephone number: (819) 997-3301
Facsimile number: (819) 953-5013

AND TO: LA-Z-Boy Canada Limited
55 Columbia Street East
Waterloo, Ontario N2J 4N7
Telephone: (519) 886-3440
Facsimile: (519) 746-3936

The Applicant's address for service is as follows:

c/o McInnes Cooper
5th Floor, Baine Johnston Centre
10 Fort William Place
P.O. Box 5939
St. John's, NL A1C 5X4
Attention: Deborah L.J. Hutchings
Telephone: (709)722-8254
Facsimile (709) 722-1763
E-mail: deborah.hutchings@mcinnescooper.com

STATEMENT OF GROUNDS AND MATERIAL FACTS

MATERIAL FACTS

The Parties

1. The Applicant, Morgan's Furniture, is a corporation, duly incorporated under the laws of the Province of Newfoundland and Labrador. It has its head office in Bay Roberts, Newfoundland and Labrador.
2. The Respondent, La-Z-Boy, is a corporation incorporated pursuant to the laws of the Province of Ontario with its registered office at 55 Columbia Street East, Waterloo, Ontario.

Description of the Industry

3. The retail home furniture industry in the area in question, being from Conception Bay North to St. John's, Newfoundland and Labrador, as well as throughout the Avalon Peninsula (the "Area"), is market specific in that a given retail furniture store will generally tailor itself to serve one particular market group: either that group who will purchase low quality furniture or that group who will purchase middle to high quality furniture.
4. La-Z-Boy's products fall within the latter category, being middle to high quality furniture.

Morgan's Furniture

5. Morgan's Furniture was established in 1957 and has operated since that time as a family business by the Morgan Family as a furniture retail store serving primarily the Area. It sells middle to high quality home furniture.
6. The Morgan family has built a successful furniture retail business which is second to none in the Area and which draws a significant clientele from the City of St. John's, which is situated approximately 100 kilometres (highway travel) from Morgan's Furniture Store,

itself. The products which Morgan's Furniture offers to its customers, the service it provides and its reputation, which have been built on a long standing goodwill, have contributed to the success of Morgan's Furniture.

La-Z-Boy

7. La-Z-Boy is a Canadian based company with its head office in Waterloo, Ontario. La-Z-Boy is perhaps the single largest manufacturer of recliner chairs in the home furniture industry and its reputation for the quality of this product has allowed La-Z-Boy to expand to other furniture styles, such as moveable and stationary sofas, moveable and stationary sectional sofas and stationary chairs.
8. Realistically, La-Z-Boy occupies a dominant position in the recliner marketplace over other manufacturers of moveable or reclining furniture products. Any furniture retailer wishing to obtain La-Z-Boy products in Canada must obtain them through La-Z-Boy, either directly or indirectly through specific distributors representing La-Z-Boy.

La-Z-Boy's Refusal to Deal

9. In the 1970's, Morgan's Furniture, then a well established furniture retail store, secured the dealership for La-Z-Boy products.
10. Over the course of in excess of 25 years, Morgan's Furniture developed a significant market for the Product, including La-Z-Boy's recliners, in the Area. In fact, because the Product comprised such a significant portion of Morgan's Furniture's sales, it displayed the La-Z-Boy logo on its storefront and delivery vans for a number of years, up to and including the end of the year 2002. Morgan's Furniture kept its account with La-Z-Boy throughout the relationship current and, therefore, obtaining credit was never an issue. As well, Morgan's Furniture was able to meet all "usual" trade terms with La-Z-Boy. In turn, La-Z-Boy and

Morgan's Furniture have enjoyed a long and mutually prosperous relationship. Morgan's Furniture's loyalty to the Product can not be disputed.

11. Throughout the period when Morgan's Furniture had the dealership for the Product, Morgan's Furniture developed a significant market for the Product, including the recliners, in the Area. In fact, the Product comprised a significant portion of Morgan's Furniture's sales. For instance, as noted at paragraph 108 of Perry Morgan's affidavit, the sale of the Product in 1998 represented 89% of Morgan's Furniture's operational profit.
12. During its dealership of La-Z-Boy products, Morgan's Furniture continuously and diligently maintained prominent La-Z-Boy representation and product promotion. Morgan's Furniture advertised the Product during daily local radio newscasts, in the local newspaper, in the regional newspaper and displayed the La-Z-Boy logo on its delivery vans and storefront, as noted above.
13. Until 1997, Morgan's Furniture enjoyed a good relationship with La-Z-Boy.
14. In or about 1997, La-Z-Boy appointed Danny Burbine as its representative in Atlantic Canada. Morgan's Furniture was instructed to place all its purchases for the Product exclusively through Mr. Burbine and not through La-Z-Boy directly, as it once did. It was immediately after Mr. Burbine's appointment that Morgan's Furniture started to experience restrictions placed upon it by La-Z-Boy in the Product it could obtain from La-Z-Boy. These restrictions were not only upon the style and fabric which Morgan's Furniture could order for its regular store sales and for specific customer sales ("tag orders"), but as well, restrictions were placed upon the style and fabric which Morgan's Furniture could display on its floor. On this latter point, La-Z-Boy introduced a policy which restricted dealers to selling only those styles which it displayed on its floor. Consequently, because La-Z-Boy started to exclude Morgan's Furniture from the purchase of certain styles and fabrics, such restrictions affected seriously Morgan's Furniture's ability to have available to it a variety

of styles and fabrics on display and to market the Product. These restrictions progressively increased which, in turn, increasingly limited the Product available to Morgan's Furniture and its customers. As a consequence thereof, the Product Morgan's Furniture could offer to its customers and the market, in general, in the Area seriously diminished. In turn, Morgan's Furniture's sales of the Product decreased significantly. By the year 2001, Morgan's Furniture's sales of the Product was down by 46%.

15. Morgan's Furniture restrictive access to the Product was an aggressive process arising directly from the actions of La-Z-Boy and its agents, in particular, Mr. Burbine. The actions of La-Z-Boy referred to herein include, but are not limited to: (a) excluding Morgan's Furniture from vital product information to which retail dealers of the Product would normally have access; (b) restricting Morgan's Furniture from purchasing certain of the Product, which are high market product styles, for display to customers on its store floor and, in turn, preventing Morgan's Furniture from marketing such styles to its customers, while making such Product available to Morgan's Furniture's major competitor, Island Furniture ("Island Furniture"); (c) excluding Morgan's Furniture from the purchase of certain of the Product's style which are popular market items with Morgan's Furniture's customers while making these same styles available to Island Furniture; and (d) excluding Morgan's Furniture from advertising and promotional campaigns, while making such advertising and promotional campaigns available to Island Furniture. These actions are further particularized in the Affidavit of Perry Morgan filed in support herewith.
16. These actions effectively discouraged customers from shopping at Morgan's Furniture and encouraged customers to shop at Island Furniture.

Effect on Applicant's Business

17. After the restrictions were implemented by La-Z-Boy, the gross profits which Morgan's Furniture enjoyed from La-Z-Boy sales dropped by 34% over the course of the four years

subsequent to 1998. Morgan's Furniture has been substantially affected in its business, due to its inability to obtain any supplies of the Product which were once available to Morgan's Furniture, but are now exclusively available to Island Furniture by La-Z-Boy who controls access to and distribution of the Product. The Product formed a significant portion of the Applicant's retail sales. As noted previously, the Product represented as much as 89% of Morgan's Furniture's operational profit.

18. Morgan's Furniture's position is that the sales and profit information noted above demonstrates the substantial effect which the restrictions, which were placed upon Morgan's Furniture in the lines, styles and fabrics which it could obtain from La-Z-Boy, has had upon Morgan's Furniture. In fact, the quality and nature of La-Z-Boy's actions have not only caused Morgan's Furniture to suffer damages by loss of Product sales, but undoubtedly, by equal portions, increased the sales activity of Island Furniture.
19. La-Z-Boy Canada Limited is the only supplier of La-Z-Boy products in Canada and, consequently, Morgan's Furniture can not obtain La-Z-Boy products from an alternative supplier. Morgan's Furniture has tried to obtain an equally successful replacement brand for its La-Z-Boy line, but without success. Due to insufficient competition among suppliers of similar products in the market there is no reasonable or economically viable alternative for Morgan's Furniture. The other lines are unable to break even or even compete in the same market as La-Z-Boy. In this respect, it has been noted by Morgan's Furniture that when its customers come to its store looking for a recliner product, and often coordinating pieces, such as sofas, sectional sofas, love seats and chairs, they only want La-Z-Boy. No other brand is satisfactory to the customer. Consequently, Morgan's Furniture has been unable to sell a replacement product and, consequently, Morgan's Furniture is losing its customers to Island Furniture.
20. The name "La-Z-Boy" connotes a good quality product and no other brand or generic equivalent is a suitable replacement. Realistically, La-Z-Boy products occupy a dominant

position in the marketplace. The dominant position that La-Z-Boy occupies means that the ability of Morgan's Furniture to carry on business with respect to the Product will be substantially affected unless Morgan's Furniture has access to the Product.

21. As noted above, Morgan's Furniture has been established as a retail home furniture store since 1957. Since the 1970's, Morgan's Furniture has been selling the Product, willing and able, and meeting and surpassing the usual terms and all other known requirements of La-Z-Boy. Morgan's Furniture is still willing and able to meet the usual trade terms and other known requirements of La-Z-Boy. Morgan's Furniture has had and continues to have the expertise and financial wherewithal to properly service La-Z-Boy's Product.
22. The Product is in ample supply. La-Z-Boy would not need to expand capacity in order to supply Morgan's Furniture. La-Z-Boy supplied Morgan's Furniture and Island Furniture with the Product in the past. La-Z-Boy continues to supply Island Furniture, however, Morgan's Furniture has been denied access to such Product.
23. Island Furniture is virtually the exclusive supplier of the Product in the Area and, consequently, the refusal of La-Z-Boy to continue to deal with Morgan's Furniture is likely to have an adverse effect on competition in the Area. The exit of Morgan's Furniture from the market of this Product, due to the refusal of La-Z-Boy to deal with Morgan's Furniture, reduces the number of major suppliers of this Product to one, i.e. Island Furniture. This reduction in competitors provides less product choices for consumers. Further, customers who do not reside in St. John's, where Island Furniture is located, will have to travel further to purchase La-Z-Boy products. Furthermore, perhaps of great concern for customers, there is a risk that La-Z-Boy products will rise in price as Island Furniture will have no competition.

Basis for Application Pursuant to Section 103.1

24. The test for granting leave under section 103.1 of 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 application is directed and substantially affected in the Applicant’s business by any practice referred to in one of those sections that could be subject to an order under that section.”

25. In this application, Morgan’s Furniture seeks leave to bring an application for an order pursuant to section 75 of the *Act*, which states as follows:

“(1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

- 1. 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,**
- 2. 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,**
- 3. 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,**
- 4. 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,**

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.”

26. In *National Capital News Canada v. Milliken*, (2002) 23 C.P.R. (4th) 77, the Competition Tribunal defined the test which must be met before leave under section 103.1 of the *Act* is granted:

“ . . . the appropriate standard under the 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.”

27. This test is clearly satisfied in this Application, as the following points are unequivocally established on the evidence before the Tribunal:
1. La-Z-Boy engaged in activity which constitutes a refusal to deal under section 75 of the *Act*; and
 2. Morgan’s Furniture’s business is directly and substantially affected by La-Z-Boy’s refusal to deal, and refusal to allow others to deal, with it.
28. In relation to the foregoing, Morgan’s Furniture refers to the Affidavit of Perry Morgan sworn on November 18, 2003, more particularly at paragraphs 18 to 83 and paragraphs 84 to 111, respectively, thereof.
29. The actions of La-Z-Boy in refusing to deal with Morgan’s Furniture and refusing to allow its agents to deal with Morgan’s Furniture clearly falls within the scope of activity prescribed by Section 75 of the *Act* and clearly amounts to a practice which, at the very least, could be subject to an Order under that section.

DATED at St. John’s, in the Province of Newfoundland and Labrador, this 14th day of June, 2004.



Deborah L.J. Hutchings
McInnes Cooper
Solicitors for the Applicant
5th Floor, Baine Johnston Centre
10 Fort William Place
P.O. Box 5939
St. John’s, NL A1C 5X4
Telephone: (709)722-8254
Facsimile (709) 722-1763