

IN THE COMPETITION TRIBUNAL

In the Matter of an Application by Barcode Systems Inc.  
for an Order pursuant to section 103.1  
Of the *Competition Act*, RSC 1985 c. C-35, as amended  
granting leave to bring an application pursuant to  
section 75 of the *Competition Act*

BETWEEN:

Barcode Systems Inc.

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT December 2, 2003 CT- 2003-008	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 0004a

Applicant

AND:

Symbol Technologies Canada ULC

Respondent

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WRITTEN SUBMISSION OF THE RESPONDENT TO THE APPLICATION  
FILED ON BEHALF OF BARCODE SYSTEMS INC. SEEKING  
LEAVE PURSUANT TO SECTION 103.1 OF THE COMPETITION ACT

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1. This document constitutes the written submission of the Respondent, Symbol Technologies Canada ULC ("Symbol Canada"), with respect to the Application For Leave ("Application") filed on behalf of Barcode Systems Inc. ("BSI") on November 4, 2003.

2. The purpose of this written submission is to set forth Symbol Canada's views with respect to the Application and certain issues which Symbol Canada believes have either not been addressed or are inadequately addressed in the Application. These views and issues require consideration by the Competition Tribunal ("Tribunal") in determining whether to grant leave to BSI to pursue a "private action" against Symbol Canada via section 103.1 of the *Competition Act* ("Act").

### **Grounds Upon Which The Application Is Opposed & Material Facts On Which Symbol Canada Relies In Opposing The Application**

#### **The Purpose Of The Act**

3. The purpose of the Act has been defined as:

...maintain[ing] and encourag[ing] competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

***See section 1.1 of the Act***

4. Symbol Canada is opposed to the Application on the grounds that it has not been brought on behalf of BSI to address anti-competitive behaviour on the part of Symbol Canada. Rather, it is submitted, the Application has been filed on behalf of BSI in a misguided attempt to assist it in litigation that has been commenced by BSI against Symbol Canada in both Manitoba and British Columbia.

5. The purpose of the Act is to protect the process of competition, not to protect individual business interests. In short, the Application is not in line with the purpose(s) of the Act. Leave should not be granted to BSI pursuant to section 103.1 of the Act.

### **The History Of Section 103.1 Of The Act**

6. Until recently, the Commissioner had the sole authority to bring an action under the Act.
7. In June 2002, several amendments to the Act came into force. Arguably the most significant amendment to the Act was the introduction of “private access” to the Tribunal for individuals or companies who wish to challenge the (alleged) anti-competitive conduct of others.
8. In order to avoid the abuse of applicants filing frivolous and vexatious actions against others, the Tribunal has been vested with the authority to act as a “gatekeeper” to the “private access” section of the Act. Applicants are required to seek leave from the Tribunal prior to being able to commence a “private access” action.
9. In this Application, BSI is seeking 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 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 [emphasis is added].

10. Of note is that subsection (e) was added as a requirement to section 75 at the same time that the “private access” provision of the Act came into force in June 2002. It is clear that subsection (e) was added to section 75 to prevent litigants from abusing the “private access” provision of the Act.

11. Symbol Canada is opposed to the Application on the grounds that it is frivolous and vexatious and that it is an abuse of the Tribunal’s process. BSI is not able to meet the requirements of section 75 of the Act as:

- a) any contractual dispute between it and Symbol Canada will not have and is not likely to have “an adverse effect on competition in the market”;
- b) there is more than ample competition in the market; and
- c) BSI has not been able to meet the “usual trade terms” of Symbol

Canada.

12. This is the first Application under the “private access” provision of the Act that has been opposed. As a “gatekeeper” to the Act, the Tribunal must **not** grant leave to allow BSI to proceed with its action against Symbol Canada beyond this stage of the proceeding to prevent similar abuses from occurring in the future.

### **Material Facts**

13. Symbol Canada denies the material facts contained in the Application insofar as they relate to it, except as hereinafter expressly admitted.

### **The Parties**

14. Symbol Canada admits the material facts set out in paragraphs 1 and 2 of the Application.

### **Description Of The Industry**

15. Symbol Canada admits the material facts set out in paragraphs 3, 4 and 5 of the Application.
16. In further reply to paragraphs 3, 4 and 5 of the Application, Symbol says that it must be emphasized that Symbol and its competitors are in the business of selling equipment related to retrieving information from bar codes and then transmitting that information to other locales. Bar codes are standardized as the

Universal Product Code (hereinafter "UPC"). Although there are different versions of bar codes, standardized by UPC, all bar codes are intended to accomplish the same purpose - a fast, easy and accurate data entry and retrieval method. The manufacturers of equipment to print bar codes and the manufacturers of product to read bar codes all manufacture equipment to comply with the UPC. In other words, all manufacturers that manufacture bar code scanners all produce bar code scanners that can read the same types of bar codes.

**See Affidavit of Mike Reid, sworn December 1, 2003 ("Reid Affidavit"), paragraphs 7, 8 and 9**

17. In reply to paragraphs 6 and 7 of the Application, Symbol Canada admits that BSI carries on business as a distributor and installer of bar code scanning systems.
  
18. In reply to paragraphs 8 and 9 of the Application, Symbol Canada admits that Symbol Technologies, Inc. (hereinafter "Symbol US") is a corporation incorporated under the laws of the State of Delaware and has its principle executive office in the City of Holtsville, New York. Symbol Canada is a wholly owned subsidiary of Symbol US and is a warehouse, distributor, seller and servicer of the product manufactured by Symbol US (Symbol US and Symbol Canada will be collectively referred to throughout this document as "Symbol").

**See Affidavit of Todd Abbott, sworn November 26, 2003 ("Abbott Affidavit"), paragraphs 3, 6 and 7**

**See Reid Affidavit, paragraphs 3, 4 and 5**

19. In further reply to paragraphs 8 and 9 of the Application, Symbol Canada says that Symbol US is a manufacturer, distributor, seller and servicer of portable data terminals, bar code scanners and wireless LANS (wireless LANS are wireless local area networks for transmitting voice and data. The three types of equipment (hereinafter the "product") manufactured by Symbol US are intended to provide customers with a complete line of equipment to retrieve bar code data and to convey the information to clients' databases.

**See Abbott Affidavit, paragraphs 4 and 5**  
**See Reid Affidavit, paragraphs 3, 4 and 5** \_\_

20. In further reply to paragraphs 8 and 9 of the Application, Symbol admits that it has a patents relating to its laser scan engines, but says that its competitors also manufacture, sell and have patents related to, laser scan engines. In addition to selling bar code scanners, which incorporate the Symbol laser scan engine, Symbol sells its laser scan engines to five (5) other companies who compete in the market.

**See Reid Affidavit, paragraphs 18 and 19**  
**See Affidavit of Jim Estill ("Estill Affidavit"), paragraphs 7, 8 and 9**

21. Symbol markets the products directly and through distributors and resellers (also known as value-added resellers or "VAR's" or integrators) to end-user customers. The market in which Symbol operates is very competitive for each of the products that are manufactured by Symbol US. For instance, there are eleven (11) competitors that Symbol competes with in the "scanning" segment of the market.

**See Abbott Affidavit, paragraph 9**  
**See Reid Affidavit, paragraph 10, 11 and 12**

22. While Symbol believes it is a world leader in its business and may be the single largest manufacturer of bar code equipment in the world, it does not dominate the market in either the United States or Canada. Symbol's global market share for all of its products range from less than 1% to a maximum of 48%.

**See Abbott Affidavit, paragraph 10**

23. Symbol does not substantially or completely control, throughout Canada or the United States, a class or species of business. The market in which Symbol operates is very competitive for each product manufactured by Symbol US. There are over fifteen (15) major competitors of Symbol in the market in which Symbol operates.

**See Abbott Affidavit, paragraphs 9 and 10**  
**See Estill Affidavit, paragraph 19**

24. Clearly, there is vigorous competition in the market for the supply of product. Symbol is one of several competitors in the supply of product, some of whom provide for a range of services, as does Symbol, whereas others provide some, but not all, of the available services. Bar code scanners represent approximately 12% of the revenues earned by Symbol Canada in the last fiscal year. Competitors of Symbol were not, nor have they ever been, precluded in any way from making proposals to, and negotiating with, customers that are currently involved (or formerly involved) in a business relationship with Symbol.

**See Reid Affidavit, paragraphs 13 & 14**



See Estill Affidavit, paragraph 19 & 20

**Symbol's Alleged Refusal To Deal**

25. In reply to paragraph 10 of the Application, Symbol admits that BSI was one of the resellers that contracted with Symbol to sell Symbol products. Symbol further says, as the material facts are, that there were a series of agreements entered into between Symbol and BSI commencing in as early as November, 1991 through to January 30, 2001, the earlier agreements being superceded and replaced by the latter.

See Abbott Affidavit, paragraphs 11 and 12  
See Reid Affidavit, paragraph 21

26. In further reply to paragraph 10 of the Application, and to the Application as a whole, Symbol says:
- a) The most recent agreement governing the business relationship between Symbol and BSI is the Agreement with Integrator (hereinafter "Integrator Agreement") entered into on January 1, 2001;
  - b) After the Integrator Agreement was executed, the business that was conducted between Symbol and BSI was pursuant to the Integrator Agreement regardless of whether product was supplied to BSI from Symbol Canada or Symbol US;
  - c) Symbol also was party with BSI to a Distribution Agreement, dated as of April 4, 2001 (the "Distribution Agreement ") and a Reseller Agreement, dated as of September 7, 2001 (the "Reseller Agreement"), whereby Symbol agreed to distribute and resell certain software referred to as "RF

Supernet" provided by BSI;

- d) In late 2002 and early 2003, Symbol determined that it would introduce a "Partner Select Program";
- e) By letter dated March 25, 2003, the Distribution Agreement and the Reseller Agreement were terminated by Symbol, effective April 25, 2003, for BSI's failure to supply the RF Supernet software pursuant to its obligations under both agreements;
- f) On November 8, 2002, BSI was notified that Symbol was terminating its "Stock Rotation Program" for all of its Integrators, as governed by the Stock Rotation Addendum, dated as of January 30, 2001, to the Integrator Agreement, effective as of December 10, 2002;
- g) In the same letter, BSI was specifically notified of Symbol's plans to institute the "Partner Select Program" and certain actions that all resellers would be required to take in connection with the "Partner Select Program" were specified;
- h) BSI, after receipt of the notice of termination of the Stock Rotation Program, via an email dated November 19, 2002, took the position that the termination did not apply to it;
- i) More specifically, BSI insisted that it was entitled to more favorable terms and conditions than Symbol offered its other resellers. Symbol refused to enter into any agreement with BSI on more favorable terms and conditions than it extended to its other resellers;
- j) Although Symbol maintains that BSI was bound by the terms and

conditions of the Integrator Agreement, Symbol, by letter dated December 2, 2002, terminated the last agreement between it and BSI wherein BSI provided its address in Canada;

- k) Further discussions were held between Symbol and BSI in which BSI continued to insist that it was entitled to more favourable terms and conditions than Symbol offered its other resellers, including a higher rebate; and
- l) Symbol reiterated that it would not enter into any agreement with BSI on more favourable terms and conditions than it extended to its other resellers.

**See Abbott Affidavit, paragraphs 12 to 18**  
**See Reid Affidavit, paragraphs 23 to 34**

27. In reply to paragraph 11 of the Application, Symbol admits that Symbol US and some of its former officers have been the subject of an investigation by the SEC. Symbol submits that this investigation is of no relevance to the Application.

**See Abbott Affidavit, paragraph 28**

28. In reply to paragraph 12 of the Application, it is inferred that Symbol has made the decision to sever its relationship with BSI because David Sokolow was interviewed by SEC as part of its investigation. Symbol has actively encouraged any of its resellers and distributors that have been subpoenaed by SEC to cooperate fully with the investigation and to make full disclosure of any and all information. Symbol denies that there is any relation whatsoever between any interview that Sokolow may have had with the SEC and Symbol's decision to

terminate its relationship with BSI. More specifically, Symbol says that the circumstances leading up to the termination of its relationship with BSI were initiated well in advance of any interview that Sokolow may have had with the SEC.

**See Abbott Affidavit, paragraphs 28 to 30**

29. In reply to paragraph 13 of the Application, Symbol admits that on March 19, 2003 an Amended Statement of Claim was filed in the Manitoba Court of Queen's Bench, naming BSI as a plaintiff and Symbol as defendants.
  
30. In further reply to paragraph 13 of the Application, Symbol says, as the facts are, that it has defended the action and counterclaimed against BSI in the amount of \$1,281,402.34, representing the unpaid balance due to Symbol for goods and services provided by it to BSI. BSI is in breach of the usual trade terms and conditions under which it received Product for which it has not made any payment. Symbol has also sought damages against BSI for its unauthorized use of the Symbol trademark.

**See Abbott Affidavit, paragraphs 19 & 24 to 26**  
**See Reid Affidavit, paragraph 33**

31. The unauthorized use of the Symbol trademark by BSI was, and currently is, of serious concern to Symbol. Pursuant to its standard agreements with its business partners, Symbol products are sold to its distributors and resellers with the Symbol trademark prominently displayed and a full manufacturer's warranty. Without the prior written agreement of Symbol, no business partner of Symbol is

permitted to modify a product, leave Symbol's trademark prominently displayed and advertise and sell the product as a Symbol product. Moreover, the terms of all of Symbol's standard agreements state that once a product is modified, Symbol's warranty attached to that product is void. There was no such separate agreement with BSI and thus BSI is using the Symbol trademark and marketing and selling Symbol product in an unauthorized manner. BSI has in the past and continues to pass themselves off as Symbol for the purpose of supply of product and warranty service.

32. Symbol categorically denies the allegations contained in paragraph 14 of the Application.
  
33. In reply to paragraphs 15 and 16 of the Application, Symbol says:
  - a) As late as March of 2003, it attempted to negotiate a settlement with BSI whereby BSI would, in exchange for a one time rebate credit of \$100,000:
    - (i) pay the full amount owed to Symbol that was in arrears,
    - (ii) cease the unauthorized use of Symbol trademarks and logos  
and
    - (iii) otherwise agree to comply with the terms of Symbol's "Partner Select Program" applicable to all other resellers;
  - b) BSI refused to accept these terms;
  - c) Its attempts to resolve the differences that existed between it and BSI broke down not because Symbol refused to enter into the "Partner Select

Program” with BSI but rather because BSI continued to insist that it receive uniquely favourable terms and conditions than Symbol’s other resellers under Symbol’s “Partner Select Program”; and

- d) The position maintained by BSI was not acceptable to Symbol and, as a result, by letter dated March 20, 2003, Symbol served notice on BSI that it was terminating the Integrator Agreement pursuant to clause 12.2.

See Abbott Affidavit, paragraphs 21 to 23  
See Reid Affidavit, paragraphs 23, 26, 31 & 33

- 34. In reply to paragraphs 17, 18 and 19 of the Application, Symbol says that it has legitimate business reasons for not supplying Product to Barcode. These legitimate business reasons include, *inter alia*:

- a) BSI was improperly using the Symbol trademark;
- b) BSI was required to make payment for product within 45 days of the date of shipment pursuant to the Integrator Agreement and was in breach of this obligation;
- c) BSI was indebted to Symbol in the amount of \$1,281,402.34; and
- d) BSI refused to meet the normal trade terms by which Symbol supplied product.

See Abbott Affidavit, paragraph 31

- 35. In reply to paragraph 20 of the Application, Symbol denies that it has actively approached customers of BSI with the view of taking over customer service contracts. Symbol’s success in the market has been achieved through superior competitive performance. Symbol has effectively served the interest of its

customers by providing excellent service in customer support. This superior competitive performance has enabled Symbol to attract and retain other customers.

36. BSI was in breach of the Integrator Agreement and this is what led to its termination. Corporations that are in the business of failing to pay delinquent and/or overdue accounts should not be conferred **any** benefits under the Act.

**Alleged Affect On BSI's Business**

37. In reply to paragraphs 21, 22, 23, 24 and 25 of the Application, Symbol says:
- a) The business of BSI has not been substantially affected, nor has BSI been precluded from carrying on business, by any actions which Symbol may have taken;
  - b) Any loss incurred by BSI, which is not admitted but expressly denied, results directly from either the breach by of its contractual obligations with Symbol or to matters which have no connection with Symbol;
  - c) Any decline in the business of BSI, which decline is not admitted but is expressly denied, is as a result of a number of factors unrelated to any actions taken by Symbol, including but not limited to, a general decline in the market for the purchase of scanning equipment, changes in currency exchange rates and increased competition from other manufacturers and suppliers;
  - d) In the alternative, in the event that there has been any decline in the

business of BSI, which is not admitted but is expressly denied, such decline is as a result of BSI's failure to meet the usual trade terms of alternative suppliers of product.

See Estill Affidavit, paragraph 19 and 20

38. In reply to paragraphs 26 and 27 of the Application, Symbol says that BSI has not been supplied product due to its failure to meet the usual trade terms for the purchase and supply of Product from Symbol and for its failure to meet the usual trade terms for the purchase and supply of Product from distributors.

See Estill Affidavit, paragraph 17

See Abbott Affidavit, paragraph 31

#### **Basis For Application Pursuant To Section 103.1**

39. Symbol denies that Barcode has provided sufficient evidence upon which the Tribunal can grant leave pursuant to section 103.1 of the Act.

40. Barcode must provide sufficient credible evidence to the Tribunal to establish that the actions of Symbol could be subject to an Order pursuant to section 75 of the Act.

See *National Capital News Canada v. Milliken*, (2002) 23 CPR (4<sup>th</sup>) 77

41. This test has not been met in the present Application as there is **no evidence whatsoever** that the alleged "refusal to deal is having or is likely to have an adverse effect on competition in the market..." [see section 75(e) of the Act]. BSI's entire complaint is that as a result of Symbol's actions, BSI's business, and



only BSI's business, has been harmed. There is not a single allegation showing or even claiming any adverse effect on competition in the market, such as higher prices to end users or unavailability of equipment. Indeed, in paragraph 27 of its Application, BSI admits that "there is no shortage of Symbol Products in the market." In fact, the evidence filed on behalf of Symbol clearly establishes that there is a great deal of competition in the market and that any ongoing civil dispute between BSI and Symbol would have no effect whatsoever on the market.

See Abbott Affidavit, paragraphs 9, 10 & 30  
See Reid Affidavit, paragraphs 9 - 13

42. As a result, Symbol could not be subject to an Order under section 75. The Application should therefore be dismissed.

### **Concluding Submissions**

43. In closing, Symbol functions in a competitive environment, the basic features of which include the following:
- a) In addition to many competing products currently available to customers, many large corporate enterprises around the world devote very substantial resources to research and development relating to scanners. This is, and will continue to lead to, new and improved scanners being made available in the market;
  - b) There are several manufacturers of scanning equipment other than Symbol, many of whom have successful businesses. These competitive forces will continue to increase. All such manufacturers can sell in

Canada as easily as Symbol; and

- c) Many of Symbol's customers are large enterprises and most are sophisticated buyers. They can readily choose and shift among competing products and suppliers.
44. Symbol has not engaged in and is not engaging in a practice of anti-competitive acts which has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market. The market conditions described do not warrant intervention by the Tribunal.
45. It is respectfully submitted that BSI should not be granted leave to pursue its claim against Symbol under the Act. The Application has nothing to do with anti-competitive behaviour and is a frivolous and vexatious action that has been initiated by BSI for the purpose of injuring and frustrating Symbol and as a strategic maneuver in a misguided attempt to gain leverage in civil suits filed by BSI in British Columbia and Manitoba.
46. This is the first opposed Application filed under section 103.1 of the Act. BSI's Application must be dismissed to prevent similar abuses from occurring in the future. Interestingly, the Canadian Bar Association warned of such abuses occurring in a publication titled *Submission on Bill C-23 Competition Act Amendments*, which was published prior to the "private access" provision coming into force:

For example, the proposed right of private access under section 75 could permit a terminated distributor to bring an application against a supplier who elected to adopt a more efficient method of distribution. This method might have entailed no reduction in competition, although it might have adversely affected the ability of the terminated distributor to compete. In a regime of private access, terminated distributor challenges under section 75 may become commonplace. Yet an order requiring a supplier to reinstate the distributor could actually reduce the efficiency of the Canadian economy. Reduced efficiency would be a typical result of a private access application in an era of rapid development of new and efficient distribution regimes and technologies such as the internet. Unless there is a clearly demonstrable substantial anti-competitive impact in any relevant market, it is inappropriate to allow any such challenges under a statute designed to promote competition. The applicable standard for granting a remedy for all other forms of reviewable conduct is substantial prevention or lessening of competition. The new adverse effects test would in practice create a completely new and different standard. The Commissioner has said that proving a substantial lessening of competition imposes too high a standard on a private applicant. However, the test of "adverse effect on competition in a market" is wholly insufficient. "Adverse effect on competition" creates a significantly lower threshold than a "substantial prevention of lessening of competition". How much lower is anybody's guess.

The purpose of Canada's competition law is to protect the process of competition, not to protect individual firms. The *Act* therefore does not provide an actionable civil remedy for every negative impact on competition. It only addresses effects which are "substantial". Any person who is refused supply of a product can demonstrate an adverse effect on its ability to compete in a market, regardless of whether that refusal is based on sound economic grounds. However, there should not be a remedy unless there is a substantial lessening or prevention of competition in the market. The proposed lower standard for refusals to deal would allow one business to challenge another's decision about the entities with which it chooses to deal. Without the need to demonstrate a substantial prevention or lessening of competition in a relevant market, this is dangerous.

47. Symbol wishes to use the English language in opposition to the Application.
48. Symbol respectfully submits that the Tribunal should consider exercising its discretion to allow for Symbol to cross-examine Sokolow on his Affidavit and that

this transcript form part of Symbol's written representations as contemplated by section 103.1(6) of the Act.

49. As a party to the Application, Symbol hereby requests that the Director, BSI and any intervenor in this matter provide it with copies of all submissions respecting the Application at the following address for service:

Aikins, MacAulay & Thorvaldson LLP  
30<sup>th</sup> Floor - 360 Main Street  
Winnipeg, Manitoba  
R3C 4G1  
Attention: Mr. Colin MacArthur, Q.C. / Mr. Curtis Unfried  
Phone: (204)957-4627 / (204)957-4686  
Facsimile: (204)957-4400 / (204)957-4223

50. Symbol submits that the Application should be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of December, 2003.

AIKINS, MACAULAY & THORVALDSON LLP

Per: \_\_\_\_\_

  
Colin MacArthur, Q.C.

Counsel for Symbol Technologies Canada ULC