

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:

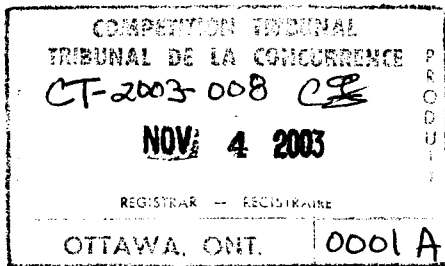
Barcode Systems Inc.

Applicant

AND:

Symbol Technologies Canada ULC

Respondent



APPLICATION FOR LEAVE

TAKE NOTICE THAT:

1. The Applicant, Barcode Systems Inc. ("BSI") is applying to the Competition Tribunal pursuant to section 103.1 of the *Competition Act*, R.S.C. 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, Symbol Technologies Canada ULC ("Symbol") accept BSI as a customer on the "usual trade terms", forthwith upon issuance of said Order.

AND TAKE NOTICE THAT:

2. The Applicant will rely on the Statement of Grounds and Material Facts attached hereto and on the Affidavit of David Sokolow, sworn October 23, 2003.

3. The person against whom an Order is sought is the Respondent. Its address is set out below.

4. The Applicant 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 electronic form.

Dated at Vancouver, British Columbia, this 30th day of October, 2003.



David P. Church
Church & Company
Solicitors for the Applicant

ADDRESS FOR SERVICE

TO: **Registrar**
The Competition Tribunal
Thomas D'Arcy McGee Building
90, Sparks Street, Suite 600
Ottawa, Ontario
K1P 5B4

AND TO: **Gaston Jorre**
Acting Commissioner of Competition
Competition Bureau
50 Victoria Street
Gatineau, Quebec
K1A 0C9

AND TO: **Symbol Technologies Canada, ULC**
5180 Orbitor Drive
Mississauga, Ontario
L4W 5L9

The Applicant's address for service is as follows:

c/o Church & Company
Grosvenor Building
900 – 1040 West Georgia Street
Vancouver, B.C. V6E 4H1
Attention: David P. Church

email: church@churchlegal.com

STATEMENT OF GROUNDS AND MATERIAL FACTS

Material Facts

The Parties

1. The Applicant Barcode Systems Inc. ("BSI") is a corporation incorporated under the laws of Canada. It has a head office in Winnipeg, Manitoba and is registered to carry on business in a number of jurisdictions throughout Canada.

2. The Respondent Symbol Technologies Canada ULC ("Symbol") is a corporation incorporated pursuant to the laws of the Province of Nova Scotia, with a head office in Mississauga, Ontario.

Description of the Industry

3. The bar code industry generally encompasses the manufacture, distribution, installation and maintenance of data capture systems for various different types of industries. Bar code equipment is used for labelling, tracking and identifying equipment, assets and people.

4. Equipment supplied as part of a bar code system will typically allow the end user to create bar code labels, most often with a dedicated bar code label printer, affix the labels to different kinds of products or merchandise, collate the bar code data with specific

items of product or merchandise and scan the bar code label, usually as part of a sales system or merchandise tracking system.

5. Bar code technology is used in various types of industries, such as retail outlets (merchandise tracking, stock replenishment and sales), delivery companies (package tracking) and financial institutions (data management and tracking currency operations).

BSI

6. Since its inception in 1988, the Applicant has been engaged in the business of selling and servicing bar code equipment. The Applicant sells mainly to manufacturers, warehouse clients and institutions such as libraries. The Applicant does not manufacture bar code equipment. Rather, it functions in the bar code industry as a value added reseller (“VAR”).

7. Typically, the Applicant will deal directly with a client, first determining the client’s requirements and then designing or configuring a bar code system to meet those requirements. Once the client places its order, the Applicant then acquires the necessary equipment directly from the manufacturer, or from distributors representing the manufacturer, configures the equipment to meet the client’s requirements and then installs the equipment. Often, the Applicant will then be retained to service, modify and/or upgrade the bar code equipment, as necessary.

Symbol

8. Symbol Technologies Inc. (“Symbol US”) is a US company, with a head office in Holtzville, New York. Symbol US is the single largest manufacturer of bar code equipment in the world. In particular, Symbol US products dominate the “scanning” segment of the bar code industry, as it owns the patent for one of the most widely used trigger / laser mechanisms in the world. That mechanism is incorporated into various types of scanners manufactured by Symbol US, as well as in numerous different application specific scanner-integrated mobile computer systems worldwide.

9. Symbol is the Canadian subsidiary of Symbol US. Symbol US products are sold and distributed in Canada through Symbol. (For the purpose of this Statement of Material Facts, Symbol US and Symbol will be collectively referred to as the “Symbol Companies”. Bar code equipment manufactured by the Symbol Companies will be referred to as “Symbol Products”.) Anyone wishing to obtain Symbol Products for use in Canada must obtain those products through Symbol, either directly or through specific distributors representing the Symbol Companies.

Symbol’s Refusal to Deal

10. BSI began dealing in Symbol Products in or about 1992. In 1994, at Symbol’s request, BSI took over distribution of Symbol Products in Western Canada while operating as “Symbol Western”. Over the next decade, BSI opened offices in a number of

Canadian Provinces, dealing primarily in Symbol Products. By December 2002, the Applicant's business was focussed almost exclusively in dealing with Symbol products. Symbol Products represented approximately 75% of the Applicant's business, including new sales, custom and turn key software and service / maintenance contracts.

11. At some point in 2002, Symbol US and its principals became the subject of an investigation by the Securities and Exchange Commission of the United States (the "SEC"). The SEC investigation, which implicated both Symbol US and its corporate officers, was directed at Symbol US's alleged failure to properly report financial information, including sales revenues.

12. On or about January 30, 2003, David Sokolow, the principal of BSI, was subpoenaed by the SEC. Mr. Sokolow was subsequently interviewed by SEC investigators in respect of the SEC investigation.

13. In March 2003, BSI commenced legal action in Manitoba against the Symbol Companies (the "Legal Action"). The Legal Action was founded upon an allegation that the defendants were in breach of a 1998 agreement.

14. Subsequent to the commencement of the Legal Action, Todd Abbot, the executive vice President of Symbol US, advised Mr. Sokolow that the Symbol Companies were "going to bury" the Applicant. He further stated that the Symbol Companies were

going to approach all of the Applicant's customers directly, or through another VAR, and take all of those customers.

15. On April 9, 2003, Mike Reid, the President of Symbol, advised that neither Symbol nor any of its distributors would accept purchase orders from the Applicant after April 20, 2003.

16. At or about the time the Legal Action was commenced, Symbol produced a new form of VAR agreement. Symbol advised its distributors / VARs that all previous agreements were set aside and required that any party wishing to distribute Symbol products reapply to participate under the new form of agreement.

17. The Applicant applied to participate in the new VAR agreement, but that application was rejected on May 6, 2003.

18. Since May 1, 2003, Symbol has refused to deal with the Applicant and has refused to sell any Symbol products to the Applicant.

19. As a result of Symbol's refusal to supply any of its product to the Applicant, the Applicant attempted to deal through other distributors or VARs of Symbol Products in order to acquire the Symbol Products it required in order to carry out its business. However, on various occasions, Symbol representatives have taken steps to ensure that those suppliers

do not deal with the Applicant. On more than one occasion, Symbol (or the Symbol Companies) has advised its distributors and/or VARs that it would not supply Symbol Products which were to be provided to the Applicant.

20. Further, Symbol has actively encouraged other VARs to approach the Applicant's customers with a view to taking over service contracts.

Effect on the Applicant's Business

21. As a result of Symbol's refusal to deal with the Applicant and the Symbol Companies' refusal to allow any of their distributors to deal with the Applicant, the Applicant has been unable to obtain Symbol Products. The effect on the Applicant's business has been devastating.

22. In the fiscal year ending September 2002, the Applicant realized revenues in excess of \$20 million. The Applicant's revenue for the fiscal year ending in September 2003 will be just under \$10 million. That drop in revenue is directly attributable to Symbol's refusal to deal with the Applicant and the steps it has taken to prevent Symbol distributors or VARs from dealing with the Applicant. Unless the Applicant is able to obtain access to Symbol Products, that drop in revenue will continue until the Applicant can no longer carry on business.

23. In addition to the Applicant's inability to sell Symbol Products to new clients, approximately 75% of the Applicant's ongoing maintenance contracts relate to clients with Symbol Products. In order to fulfil those contracts, the Applicant requires access to Symbol Products and Symbol personnel. As a result of Symbol's refusal to deal with the Applicant, it has been unable to fulfil its obligations to those clients.

24. As a result of its inability to obtain Symbol Products, the Applicant was forced to reduce its operations. To date, it has laid off approximately 50% of its workforce. Further layoffs will occur as revenues continue to drop.

25. In September 2003, as a result of the Applicant's financial circumstances, created by Symbol's refusal to provide Symbol Products to the Applicant, the Applicant's bank, the Royal Bank of Canada in Winnipeg, Manitoba made a demand in respect of outstanding loans owed by the Applicant. The Applicant is presently in negotiation with the Royal Bank, but, if revenues continue to fall as they have been since Symbol stopped dealing with the Applicant, the Applicant will be forced into receivership in the near future.

26. The Applicant is ready, willing and able to meet the usual trade terms for the purchase and supply of Symbol Products, just as it was able to do so during the 11 years prior to the Symbol Companies' refusal to supply Symbol Products.

27. There is no shortage of Symbol Products in the market. The only reason the Applicant has been unable to obtain such products is the refusal of Symbol to supply Symbol Products to the Applicant and the refusal of the Symbol Companies to allow their distributors to provide Symbol Products to the Applicant.

Basis for Application Pursuant to section 103.1

28. 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 application 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.

29. In this application, the Applicant 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

- (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.

30. In National Capital News Canada v. Milliken, (2002) 23 CPR (4th) 77, the Competition Tribunal set out the following test which must be met in order to obtain leave under section 103.1 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.

31. This test is clearly met in the present application, as the following points are clearly established on the evidence before the Tribunal:

- (a) the Respondent is engaged in activity which constitutes a refusal to deal under section 75 of the *Act*; and

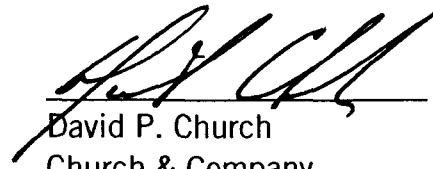
Affidavit of David Sokolow, sworn October 23, 2003 ("Sokolow Affidavit"), paras. 25-35

- (b) the Applicant's business is directly and substantially affected by the Respondent's refusal to deal, and refusal to allow others to deal, with it.

Sokolow Affidavit, paras. 36-40

32. The actions of Symbol in refusing to deal with the Applicant and in refusing to allow its distributors / VARs to deal with Applicant clearly fall 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 Vancouver, British Columbia, this 30th day of October, 2003.


David P. Church
Church & Company
Solicitors for the Applicant