

THE COMPETITION TRIBUNAL

IN THE MATTER OF an Application by the Director of Investigation and Research for an Order pursuant to section 75 of the Competition Act, R.S. 1985, c.C-34, as amended, requiring that the Respondent accept the Exdos Corporation as a customer for the supply of a product.

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE		P R O D U I T
CT-8914 JAN 5 1990 AB		
REGISTRAR -- REGISTRAIRE		
OTTAWA, ONT.	#6	

B E T W E E N:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

XEROX CANADA INC.

Respondent

RESPONSE ON BEHALF OF XEROX CANADA INC.

A. INTRODUCTION

1. Xerox Canada Inc. ("Xerox") opposes the Notice of Application (the "Application") of the Director of Investigation and Research (the "Director") on the following grounds:

- (a) S.75 of the Competition Act is not applicable to the sales and service activities of Xerox for post 1983 copiers or parts therefor in the context of its operation;
- (b) there has been at all relevant times and there remains adequate supplies of photocopiers and parts therefor in the market place;

- (c) that any loss incurred by Exdos Corporation ("Exdos"), which is not admitted, results directly from either the breach by Exdos of its contractual agreements with Xerox or matters which have no connection with Xerox;
- (d) that Xerox has, and is, prepared to sell both copiers and parts therefor on the same trade terms as to other customers.

B. MATERIAL FACTS RELIED ON

2. Xerox accepts for the purpose of this response the definitions referred to in paragraph 1 of the Application of the Director other than to clarify that the reference to a "model year" is inaccurate. The first of the 10 series copiers were introduced in 1983, however, in the copier industry products are identified by model number and not by year of introduction.

3. Xerox accepts for the purposes of this proceeding paragraphs 3, 4 and 5 of the Application with the addition of the following. There are a number of manufacturers and suppliers of photocopiers in Canada. Xerox is one of very few suppliers which manufacture and sell photocopiers of all sizes.

4. Xerox has no specific knowledge of the matters referred to in paragraphs 6, 7 and 8 of the Application.

5. Mr. Terrance Reid ("Reid") is a former employee of Xerox and fully familiar with the marketing, service and parts policies of Xerox for copiers. To the knowledge of Xerox it has not had a business relationship with Nezron Office Products ("Nezron") as described in paragraph 7 of the Application.

6. Xerox has always had an organization to sell, lease and rent copiers and to service, repair and, if necessary, replace parts of all copiers sold, leased or rented by the company regardless of the year of such sale. As of July 1st, 1990 Xerox will no longer offer service on certain older pre-1983 copiers, with parts availability for used copiers declining and in some instances discontinued.

7. Except as referred to hereafter, Xerox has had a corporate policy of ensuring that all replacement parts for Xerox copiers were sold directly to the end users (ie those who used the machines) to enable Xerox to be satisfied that genuine Xerox parts would be installed in machines marketed by Xerox since Xerox guaranteed the quality of the service performed on the machines and would only do so if it knew what parts were used or were installed by it.

8. As Xerox introduced its new technology, the 10 series copiers, to its customers in 1983 it recognized that there was a potential market for pre-1983 copiers to potential customers who

had not previously owned, leased or rented Xerox copiers. This recognition came about as a result of work done by Reid and others while employed by Xerox.

9. As a result Xerox decided to test the market for non factory (used) equipment in a different way. Copiers would be sold by Xerox to a used equipment dealer who would recondition the equipment and market it to customers who might want to acquire older technology. The copiers in question were only pre 10 series Xerox copiers. Xerox determined that its sales force would not sell used equipment at least during the test period. Although Xerox was willing to conduct this test, it continued for a period of time to market some of the same pre-10 series models that Exdos was purchasing from Xerox.

10. Reid, while still an employee of Xerox, approached management with a suggestion that Xerox enter into a contract with him and a company to be incorporated to enable Reid to sell used equipment, namely pre 10 series Xerox copy machines. In addition, parts would as well be sold to Reid to enable servicing of the pre 10 series machines that he would sell, lease or rent to end users.

11. What Exdos in effect was purchasing from Xerox was older pre 10 series models which Xerox would likely (and in fact did) stop marketing once the 10 series products were successfully

launched into the market place. The prices Xerox charged to customers were different from that charged to Exdos who acquired the units without any factory processing having been applied thereto by Xerox.

12. Both the discussion and the agreement between Reid and Xerox clearly and unequivocally related only to the pre 10 series copy machines. At no time was it agreed between Xerox and Reid that the contract between them would extend to the 10 series copiers.

13. Both the May 1983 agreement between Xerox and Exdos and the later 1985 agreement between the same parties, referred only to pre 10 series used copiers and supplies and replacement parts therefore.

14. As a purchaser from Xerox of 10 series copiers, Exdos was entitled to, and did, purchase parts therefore for use in the said copiers. Xerox presumed that Exdos was an end user of the purchased copiers. These purchases were at standard prices available to any purchaser, unlike the used equipment which Exdos purchased at substantial discount during the term of the agreements.

15. At no time did Xerox knowingly sell to Exdos post 10 series copier parts for re-sale, or to be inserted by Exdos in

copiers apart from those owned and used by Exdos as an end user for its internal copying needs. No such copiers or parts were included in the 1983 and 1985 agreements between the parties.

16. At no time did Xerox permit or encourage Exdos to purchase or sell any equipment supplies or parts other than provided for in the agreements between them except for its own end use.

17. To avoid the intended policy of Xerox, Exdos was able to, and did, utilize its Xerox customer numbers with Xerox to purchase post 10 series copier parts from Xerox beyond those necessary for its own use. Indeed the number of 10 series copiers and parts Exdos purchased indicate in retrospect that the purchased 10 series copiers and parts were not intended for its own use but as a means to enable it to acquire by subterfuge 10 series copier parts for re-sale to others.

18. During 1987 and 1988 Exdos began to consume enormous amounts of time of Xerox personnel in attempts to acquire parts and equipment. It was becoming apparent the sale of used equipment was not a profitable arrangement and given Exdos continued harassment of Xerox employees and disputes with respect to the quality of equipment being delivered to Exdos, it became clear the effort was not worth the aggravation.

19. It was in the context of the above actions that Xerox declined to continue its agreement with Exdos except to continue to sell and make available for sale to it Xerox parts for both 10 series and pre 10 series machines at retail prices as it would to any customer and in the same manner.

20. When purchases by Exdos of 10 series copier parts for other than its own end use continued Xerox, as of November 1st, 1988, clarified its policy for Exdos and all customers, in particular independent service organizations, that sales of 10 series copier parts would only be sold to, and for, end users.

21. Xerox continued, and indeed continues, to sell pre 10 series copier parts to Exdos and other customers including independent service organizations, all on the same terms and conditions.

22. If Exdos purchased \$1 million of 10 series copier parts from Xerox, as alleged, such sales were not within the agreements between the parties and were not for the end use of Exdos and therefore not within the sales policy of Xerox.

23. At no time have there been sales of 10 series copier parts except as to end users and the usual terms for such sale are restricted to end users.

24. Purchasers from Xerox look to Xerox for replacement parts for 10 series copiers and Xerox undertakes to such customers that such parts will be appropriate both as to type and quality and carry the Xerox brand name and not that of other manufacturers whose parts may be substituted.

25. The Xerox policy was intended to avoid what has in fact occurred, namely organizations such as Exdos being able to pass themselves off as Xerox for the purpose of supply of copy machines, service and of replacement parts.

26. Xerox disputes the allegations in paragraph 24 of the Application that there is not sufficient or adequate supply of Xerox copier parts or that having end users order repair parts is not commercially feasible.

27. The complaint in the Application relative to Exdos in paragraph 25 relates to 10 series Xerox copiers and parts. Xerox denies that Exdos is unable to service customers who require or order from Xerox appropriate parts for such copiers. Customers are entitled to, and do acquire parts for service from Xerox.

28. Xerox is prepared to sell to Exdos as a customer for the purpose of resale pre-10 series copy machines and parts and to sell 10 series machines and parts to Exdos as an end user.

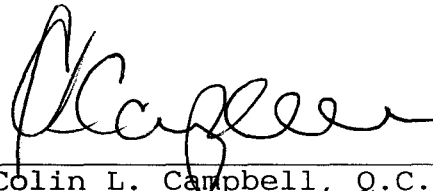
C. RELIEF SOUGHT

29. Xerox requests that the within application be dismissed with costs.

D. ADDRESS FOR SERVICE OF XEROX

30. The address for service on Xerox for all pleadings relating to the Application is McCarthy & McCarthy, Suite 4700, Toronto-Dominion Bank Tower, Toronto-Dominion Centre, Toronto, Ontario, M5K 1E6: Attention: Colin L. Campbell, Q.C. or Howard Kaufman, Vice President, Secretary and General Counsel, Xerox Canada Inc., 5650 Yonge Street, North York, Ontario. M2M 4G7.

Dated at the City of Toronto,
in the Province of Ontario on
this 4th day of January, 1990.



Colin L. Campbell, Q.C.
Counsel for the Respondent

TO: The Registrar of the
Competition Tribunal

AND TO: James W. Leising,
Counsel to the Director of
Investigation and Research,
Department of Justice,
1 Front Street West,
Toronto, Ontario.
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