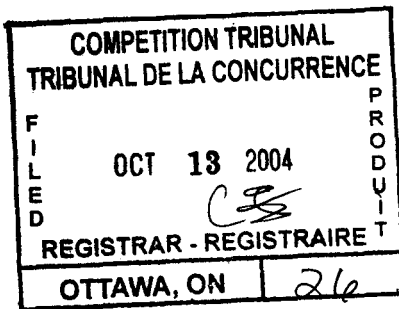


COMPETITION TRIBUNAL

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

SUPPLEMENTARY WRITTEN REPRESENTATIONS ON THE INTERIM ORDER APPLICATION

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**SUPPLEMENTARY WRITTEN REPRESENTATIONS ON THE INTERIM ORDER
APPLICATION**

PART I - OVERVIEW

1. The Respondent, Fred Deeley Imports Ltd. ("Deeley") provides these supplementary written representations in response to the facts raised in the supplementary affidavit of James Quinlan, sworn September 8, 2004. These representations supplement those Deeley provided to the Tribunal on September 3, 2004.

2. In Mr. Quinlan's initial affidavit of June 26, 2004 and his first supplementary affidavit of August 20, 2004, the Applicant ("Quinlan's") failed to provide any evidence of the irreparable harm that would be suffered by Quinlan's business if no Interim Order was granted. On September 8, 2004, over two months after commencing its application, Quinlan's provided a further supplementary affidavit ("Supplementary Affidavit"), in which it purported to provide evidence of such irreparable harm.

3. Deeley submits that the Supplementary Affidavit has failed to provide any additional facts upon which this Tribunal could make a finding of impending irreparable

harm. In particular, the income statements provided as Exhibit "A" to the Supplementary Affidavit fail to establish that Quinlan's sales of Harley-Davidson products constitute the significant portion of its total sales that it had originally indicated and relied upon at paragraph 9 of its original affidavit.

4. Moreover, during the course of his cross-examination, Mr. Quinlan provided information regarding the geographical location of many of his customers. This evidence indicates that the market area for Quinlan's motorcycles comprises a large portion of Ontario, the rest of Canada, and the United States. As such, Quinlan's section 75 application cannot be said to have raised a serious issue, as there is little chance that it will be able to establish an adverse effect on competition.

5. Finally, Deeley submits that the eleventh hour attempt by Quinlan's to provide additional evidence, supplemental to the Supplementary Affidavit, at the cross-examination of Mr. Quinlan on his Supplementary Affidavit is highly irregular and inappropriate. The Tribunal should reject such evidence.

PART II - FACTS

A. Background

6. On December 9, 2003, Deeley notified Quinlan's that it would not be renewing its Retailer Agreement with Quinlan's. Nearly seven months later, on July 5, 2004, Quinlan's applied to the Tribunal for leave to bring an application under section 75 of the *Competition Act*. Quinlan's was granted leave to commence its section 75 application on August 4, 2004. The hearing of Quinlan's Interim Order motion was scheduled for September 7, 2004, and was subsequently adjourned to September 9, 2004. Cross-examinations were conducted on August 30 and 31, 2004.

7. On September 8, 2004, the day before the motion was scheduled to be heard, Quinlan's attempted to file the Supplementary Affidavit. In written reasons, Justice Simpson allowed Quinlan's to make this last minute addition to the record, noting that:

I also agree that the Supplementary Affidavit is an effort to place evidence about irreparable harm on the record after it was discredited on cross-examination. However, it is my

conclusion that, because of the importance of the information appended to the Supplementary Affidavit, it would not serve the interests of justice to deny leave.

Reasons for Decision of the Honourable Madam Justice Simpson, dated September 10, 2004 at paras. 8, 9.

8. Cross-examination of James Quinlan's Supplementary Affidavit of September 8, 2004 was conducted on September 16, 2004.

B. Supplementary Affidavit of September 8, 2004

9. In his Supplementary Affidavit of September 8, 2004, Mr. Quinlan provided excerpts from Quinlan's income statements from fiscal years 1999, 2000, 2001, 2002 and 2003. No income statements from fiscal year 2004 (which ended on May 31, 2004), or from fiscal year 2005 have ever been provided. This Tribunal therefore has no financial information for any period after May 31, 2003, a date over 16 months ago.

C. Quinlan's Income Statements

10. In some instances, the accounts found in Quinlan's income statements indicate whether the sales are attributable to a Harley-Davidson product. In other instances, however, there is no indication of the relationship between the revenues and sales of Harley-Davidson products or services.

11. In particular, the three accounts entitled "Sales-Labour-Internal", "Sales-Labour-Warranty" and "Sales-Labour-Retail" do not provide any indication of the division between labour revenues relating to Harley-Davidson motorcycles, and those relating to other brands of motorcycles, snowmobiles or other products. For instance, the income statements for fiscal year 2003, found at the second page of Tab 1A of Quinlan's Supplemental Application Record, indicate that Quinlan's took in a significant amount of revenue – over \$119,000.00 – under the category "Sales-Labour-Retail". However, nothing in the income statements indicates the proportion of those revenues that are attributable to Harley-Davidson related sales. This was confirmed by Mr. Quinlan during the course of his cross-examination:

Q: And then after that you get into three accounts that all deal with labour, right?

A: One, two, three. Internal, warranty and retail.

Q: And these particular accounts on this statement are not broken out by Harley-Davidson, Honda or –

A: Not on this statement. We've done it.

Q: So with respect to what you see on this statement, those numbers that you see, let's just take the biggest – let's just take the first one, labour/internal/current year-to-date, I'm going to read off of the other Exhibit 7 because it's a lot clearer to me, it's about \$76,948?

A: Yes.

Q: If I go down, warranty 5,000 plus and then retail 119,000 plus, correct?

A: Yes.

Q: And in the 119,000, there will be some Harley labour relating to Harley products, right?

A: Yes.

Q: But there will also be labour relating to Honda products?

A: We've broken all that out here on the – off the general ledger.

Q: There will be Honda labour?

A: No, just Harley.

Q: In 119 – in the 119 –

A: In that, on the list here?

Q: Yes.

A: It's everything.

Q: Okay. Honda, Polaris –

A: Everything.

Q: Kawasaki, Yamaha, right?

A: Yeah.

Cross-examination of James Quinlan on his Supplementary Affidavit of September 8, 2004, dated September 16, 2004 ("Quinlan Supplementary Cross-Examination") at 27-29.

12. In further cross-examination, Mr. Quinlan confirmed that Quinlan's performs service on a variety of different brands of motorcycles:

Q: And just in terms of your shop, if I have a Kawasaki and I come in and I want to have you repair my motorcycle, you'll do it, won't you?

A: It's listed as other in our income statement.

Q: Okay, but that is the kind of work you'll do work on my bike even if it's not a Honda or Harley-Davidson?

A: Because of where we're located, it's a part of good customer service to keep people on the road.

Quinlan Supplementary Cross-Examination at 32-33.

13. In addition, the income statements provided by Quinlan's indicate, contrary to Mr. Quinlan's earlier statements, that Quinlan's sales of Polaris snowmobiles continued through at least fiscal year 2003. In that year, Quinlan's income statements indicate \$91,585.00 in revenues from the "Sales-New-Polaris" account. This was confirmed by Mr. Quinlan in his cross-examination:

Q: Just while you mention Polaris, sir, this is showing that you had sales of Polaris vehicles in fiscal 2003?

A: Yes.

Q: And that – I have a better column. A better column in Exhibit 7, it looks like \$91,585 worth of Polaris sales, right?

A: Yes. Yes.

Q: So that's the fiscal year ending May 2003?

A: Yes.

Q: Correct? So that within that fiscal year, you were still selling Polaris snowmobiles, right?

A: Yes.

Q: So when you testified earlier on that it was three seasons ago that you last sold Polaris things, Polaris snowmobiles, you were wrong, weren't you?

A: There's carryover inventory there. I remember what you said, but –

Q: Actually, it was in response to a question from your counsel himself.

A: You didn't – this is carryover. This is inventory that's still sitting in the inventory but we weren't – we didn't handle the brand at the time. We didn't sell new current year units at that time.

Q: Okay. So you were certainly selling Polaris snowmobiles as of fiscal year 2003?

A: It depends if you say if we sold them as an authorized dealer, new, current model years, no. If you are asking me if there was some left in stock that would have come in, been purchased in previous years? There may have been some left over. As a matter of fact, there's always some left over. We have Harleys in stock right now and we're still selling Harleys. But they're not current year model year Harleys and we may have them three years from now.

So in answer to that question, no, we were not selling new units as an authorized dealer, we were selling leftover inventory that would come up on an income statement.

Q: They weren't used Polaris snowmobiles, they were new

–

A: New leftovers from previous years.

Q: And that was as late as fiscal 2003?

A: That's correct.

Quinlan Supplementary Cross-Examination at 24-26.

D. Quinlan's Harley-Davidson Sales – A Wide Geographic Market

14. In addition to the income statements attached as Exhibit "A" to Quinlan's Supplementary Affidavit, Quinlan's also provided Deeley, at Deeley's request, with the general ledger entries for Quinlan's accounts. In reviewing the ledger entries with Mr. Quinlan on cross-examination, it was revealed that a large number of Quinlan's sales of new Harley-Davidson motorcycles are to car dealerships and leasing companies in Toronto, Montreal, Peterborough, Barrie, Chatham, Hamilton, Sudbury, Waterloo, and Michigan for eventual resale or leasing to customers "around the country" and in the United States.

Quinlan Supplementary Cross-Examination at 42, 45, 48, 50, 55, 59, 60, 61, 62

15. For example, Mr. Quinlan described his dealings with Blackstone Enterprises of Montreal as follows:

Q: Okay. Then on the next page, sir, there is a company called Blackstone Enterprises that is in the first set, three down from the very top. And then there's also a bunch of vehicles that end up with them in the last set of entries and again over on the next page. My count is 11 during this year. You sold 11 bikes to Blackstone Enterprises in fiscal 2001?

A: Yes.

Q: Who is Blackstone Enterprises?

A: They're another leasing type company.

Q: Okay. And where – so again –

A: Out of Montreal.

Q: They're out of Montreal?

A: They have an office in Montreal as well.

Q: So again you're selling essentially a set of bikes to them over the course of the year and then they lease them to ultimate customers?

A: Yeah, along with other dealers. Yes.

Q: Don't worry about what we're doing with the other dealers. What I'm concerned about is what you're doing.

A: Okay, all right.

Q: So again, these people, they're going into Blackstone's offices in Montreal and arranging to lease a Harley-Davidson, fair?

A: Yes.

Q: They're not coming into your shop?

A: Not in most cases, no.

Q: In all cases?

A: In some cases, sure, yeah.

Q: So some of these Blackstone customers come into your store, you say I want to lease them something and they – they what, they fill out the paperwork and you just send it in to Blackstone?

A: No, we just contact them and they do the paperwork.

[...]

Q: Okay. Where did those bikes end up, sir? Are they in the Muskoka area?

A: No, they end up in various spots around the country.

Q: And the ones that Mr. Strong [sic] leases, where do they end up?

A: Various parts of the country as well.

Quinlan Supplementary Cross-Examination at 44-46, 60-61.

E. Quinlan's Supplementary, Supplementary Documents

16. At the outset of Mr. Quinlan's cross-examination on his Supplementary Affidavit, Mr. Quinlan and his counsel told Deeley's counsel that they had new "corrections" to paragraph 9 of Mr. Quinlan's affidavit of June 26, 2004. Counsel for Deeley objected to Mr. Quinlan's attempt to change his evidence for a third time.

Quinlan Supplementary Cross-Examination at 5-8

17. In re-examination, counsel for Quinlan's attempted to have two additional documents, which had not been provided to Deeley or Deeley's counsel prior to the cross-examination, entered as exhibits. Counsel for Deeley objected to the inclusion of such exhibits, which, over his objection, were marked as Exhibits 12 and 13.

Quinlan Supplementary Cross-Examination at 67

PART III - ISSUES

18. Deeley submits that the Quinlan Supplementary Affidavit and the Quinlan Supplementary Cross-Examination raise facts that are relevant to the issues of serious issue and irreparable harm, which were addressed in more detail in its written representations of September 3, 2004.

19. In addition, Deeley submits that Exhibits 12 and 13 from the examination of James Quinlan should not be part of the Tribunal's record in these proceedings, as they were not contained in any affidavit, and were only provided to Deeley's counsel at the very late stage of cross-examination on the Supplementary Affidavit.

PART IV - ARGUMENT

A. Irreparable Harm

20. The income statements contained in Mr. Quinlan's Supplementary Affidavit provide little evidence to support Quinlan's claim that it will suffer irreparable harm if it is unable to obtain Harley-Davidson products from Deeley.

Quinlan Supplementary Cross-Examination at 27-29

21. The income statements provided in the Supplementary Affidavit (Tab 1A of the Supplemental Record) indicate several significant accounts that do not indicate the proportion of sales attributable to Harley-Davidson products. For instance, in fiscal years 2003, 2002, 2001, 2000 and 1999, Quinlan's had sales of \$119,132.56, \$100,378.62, \$90,770.35, \$109,192.60 and \$79,722.70, respectively, under the "Sales-Labour-Retail" account, which does not break out the Harley-Davidson related sales from other sales. Similarly, the "Sales-Acc-Other" account shows revenues of \$153,052.41, \$186,938.21 and

\$127,853.18 in fiscal years 2001, 2000 and 1999, respectively, with no indication of Harley-Davidson related sales.

Quinlan's Supplemental Application Record at Tab 1A.

22. This conglomeration of sales of Honda, Polaris and Harley-Davidson products and labour provided to the Tribunal cannot be broken down into their constituent parts. Accordingly, the Income Statements do not permit this Tribunal to calculate the exact proportion of Quinlan's sales attributable to Harley-Davidson products. This was acknowledged by Mr. Quinlan on his cross-examination.

23. As such, the Income Statements do not establish with certainty and accuracy the irreparable harm required before the Tribunal can issue the extraordinary relief of a mandatory injunction that is sought by Quinlan's.

24. As Deeley noted in its written representations of September 3, 2004, evidence of irreparable harm must be clear and not speculative. Deeley submits that this Tribunal should not endeavour to speculate with regard to these financial questions. It is Quinlan's responsibility alone to provide evidence of irreparable harm, and it had the obligation to provide such information, if it exists, to the Tribunal. It has failed to do so, and has therefore failed to establish its irreparable harm.

Syntex Inc. v. Novopharm (1991), 36 C.P.R. (3d) 129 at 135 (F.C.A.)

25. What the Income Statements do establish is that Mr. Quinlan provided inaccurate numbers at paragraphs 7 and 9 of his affidavit of June 26, 2003, in which he claimed that 65% of Quinlan's revenues were from sales of Harley-Davidson products, year in, and year out. Quinlan's relied upon this fact in both its application to this Tribunal for leave under section 103.1 (paragraph 18 of its Statement of Grounds and Material Facts), and in its application under section 75 (paragraph 6 of its Statement of Grounds and Material Facts). The Income Statements establish that this claim was not true.

26. In addition, the Income Statements demonstrate that Mr. Quinlan was wrong when, in re-examination by his counsel on August 31, 2004 he stated:

MR. RUETER:

Q: [...] What is Polaris?

A. That's a supplier we formerly had. We don't have them anymore.

Q. What kind of product was that?

A. Snowmobile.

Q. And when did you stop selling Polaris snowmobiles?

A. It's been three seasons now.

Cross-examination of James Quinlan, dated August 31, 2004 at 195.

27. In fact, the Income Statements demonstrate that Quinlan has, in fact, sold Polaris snowmobiles as recently as fiscal year ending May 31, 2003. Mr. Quinlan admitted to this in his supplementary cross-examination. Whether Quinlan's has sold Polaris snowmobiles more recently is impossible to establish from the Income Statements, since none have been provided for fiscal year 2004.

28. Finally, the fact Quinlan's has not provided data from its most recent fiscal year, and thus relies on information that is at least 16 months old should also weigh against a finding that sufficient clear evidence has been provided in order to issue this extraordinary order. Quinlan's had ample opportunity to provide such evidence but failed to adduce it. The Tribunal should not speculate what such evidence might or might not have been had it been provided.

29. In order to effectively prove irreparable harm, if the potential for such harm had existed in this case, the Tribunal could have expected Quinlan's to provide a wide variety of information and documents indicating the scope of such harm. Quinlan's could have provided: (1) updated financial and accounting statements for fiscal year 2004, and partial statements up to August 2004; (2) bank statements; and (3) payroll information. It has not done so, and this Tribunal should not be left to fill in the blanks.

B. Serious Issue

30. As is set out in more detail in Deeley's written representations of September 3, 2004, the type of mandatory injunction sought by Quinlan's can only be issued where the

applicant is able to raise a *prima facie* case with a strong, almost certain, chance of success at trial. Quinlan's has argued that the serious question threshold is a low one. Here, however, the additional evidence provided by Mr. Quinlan on his supplementary cross-examination indicates that Quinlan's has no chance of success on the merits of its section 75 application. Quinlan's has thus failed to meet the "serious question" threshold, on any standard.

Redland Bricks v. Morris, [1970] A.C. 652 (H.L.)

Islington Village Inc. v. Citibank Canada, [1992] O.J. No. 1970 (Gen. Div.) at 5-6 (Q.L.)

31. Section 75(1)(e) of the *Competition Act* requires that Quinlan's establish that Deeley's decision not to enter into a new Retailer Agreement with Quinlan's "is having or is likely to have an adverse effect on competition in a market." In its original application materials, Quinlan's described its "market area" as "stretching south to Orillia and north to North Bay; east to Algonquin Park and west to Georgian Bay."

32. In fact, however, in his latest cross-examination, Mr. Quinlan acknowledged that Quinlan's sells a significant number of Harley-Davidson motorcycles to car dealerships and leasing companies in Montreal, Michigan, and throughout Ontario. Mr. Quinlan acknowledged that at least 34 of the 105 Harley-Davidson motorcycles sold by Quinlan's in 2001 were to such companies. At least 32 of 125 Harley-Davidson motorcycles were similarly sold by Quinlan's in 2002. Mr. Quinlan further acknowledged that these entities eventually lease or sell such motorcycles to end users, "throughout the country" and the United States.

Quinlan Supplementary Cross-Examination at 41-49, 49-58 60.

33. Accordingly, the market served by Quinlan's, and the market that it must demonstrate will be adversely affected by its inability to obtain Harley-Davidson products from Deeley, comprises at least the entire province of Ontario, Montreal and Michigan, if not the entire country.

34. Quinlan's has not provided any evidence that its failing to supply Harley-Davidson products will have any effect, let alone an adverse effect, on the Canadian

Motorcycle Market. Its section 75 application therefore fails to raise a serious issue, and its application for interim relief should be refused.

C. The Supplementary Supplementary Documents

35. Deeley submits that justice would not be served if this Tribunal accepts Exhibits 12 and 13 as evidence in these proceedings.

36. Deeley informed Quinlan's that it would not be entering into a new Retailer Agreement in December of 2003. Quinlan's commenced its application before this Tribunal almost seven months later, in July of this year. Two months later, its application for interim relief was scheduled to be heard. At that time, Quinlan's sought special leave of this Tribunal to provide additional evidence in relation to its interim order application, two months after it made its original application. This extraordinary relief was granted by the Tribunal in the interests of justice.

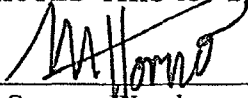
37. Now, Quinlan's seeks to put still more evidence before the Tribunal in order to attempt to improve upon the Supplementary Affidavit that the Tribunal had granted it special permission to submit. These documents were provided to Deeley's counsel the day of the cross-examination on Mr. Quinlan's affidavit. Counsel for Deeley were, accordingly, not adequately prepared to cross-examine Mr. Quinlan on the content of such materials.

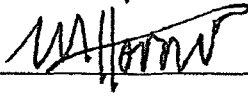
38. Deeley submits that Quinlan's actions in this regard are highly irregular and inappropriate. Quinlan's has been provided with more than enough opportunity to put its best case before the Tribunal. The interests of justice require that its application for an interim order be heard on the record as it now stands.

PART V - ORDER REQUESTED

39. For the reasons provided herein and in its previous written representations of September 3, 2004, Deeley reiterates its request that Quinlan's motion for interim relief be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF OCTOBER 2004.


for _____
R. Seumas Woods


for _____
Christopher Hersh



Matthew Horner

BLAKE CASSELS & GRAYDON LLP
Solicitors for Fred Deeley Imports Ltd.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Syntex Inc. v. Novopharm* (1991), 36 C.P.R. (3d) 129 at 135 (F.C.A.)

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File No: CT-2004-0090

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