

COMPETITION TRIBUNAL

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT October 22, 2008 CT- 2008-008 Chantal Fortin for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 0016

STEVEN OLAH

Applicant

and

HER MAJESTY THE QUEEN

**AS REPRESENTED BY THE CORRECTIONAL SERVICE OF CANADA
AND GRAVENHURST HOME HARDWARE**

Respondent

**THE RESPONDENT'S WRITTEN REPRESENTATIONS
(APPLICATION FOR LEAVE UNDER S. 103.1 OF THE *COMPETITION ACT*)**

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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. Mr. Olah has brought an application for leave to argue that Fenbrook Institution's policies with respect to the Inmate Purchasing Service violate the *Competition Act*. Her Majesty the Queen opposes Mr. Olah's application on two grounds. First, the Competition Tribunal lacks jurisdiction over the Crown's management of Fenbrook Institution. Second, even if the Competition Tribunal has jurisdiction, Mr. Olah's application record is fatally deficient. There is insufficient credible evidence to give rise to a *bona fide* belief that Mr. Olah was directly and substantially affected in his business by the Crown's activities.

2. Mr. Olah is not a competitive business alleging improper market practices; he is an incarcerated individual who is dissatisfied with the Crown's management of a prison. The Competition Tribunal is an inappropriate forum for his grievance.

B. THE PHILOSOPHY OF FENBROOK INSTITUTION

3. Some understanding of the background of Fenbrook Institution supplies a useful context for understanding this case. In 1992, the Federal Government decided to open Canada's newest correctional institution in Gravenhurst, Ontario. At that time, the Correctional Service of Canada ("CSC") made a commitment that it would actively consult with municipal officials and members of the local community in order to ensure that they had a say in how Fenbrook Institution ("Fenbrook") could be to their maximum benefit.¹
4. Before Fenbrook opened, CSC officials and members of the Gravenhurst community formed a Public Advisory Committee that looked at the new institution's impact. The work of this Committee segued into the Prison Economic Task Force, a group established by the Mayor of Gravenhurst with the mandate of developing concrete ways to deliver on CSC's commitment to benefit the community.²

¹ Affidavit of Corinne Hagerman, para. 5.

² Affidavit of Corinne Hagerman, para. 6.

5. CSC officials and the Prison Economic Task Force established the philosophy that animated Fenbrook: *the integration of institutional operations with the private sector of the local community*. This is a partnership.³
6. This partnership was founded in order to maximize the economic benefit to the local community. In addition to the economic benefit, there are correctional benefits to be gained from this integration. Integration improves the employment prospects for offenders after their release, it gives the community a stake in the success of the institution, it promotes transparency and it improves CSC's efficiency.⁴
7. This philosophy of integration had significant effects on the way CSC conceived and organized Fenbrook. The Government of Canada gave Fenbrook a smaller operating budget than a similar institution, with the understanding that Fenbrook's cooperation with the private sector would allow it to accomplish more with less.⁵
8. Several contracts were put in place either before Fenbrook opened or very early in its history. These contracts were between CSC and local businesses and institutions such as the Bracebridge Public Library, the local school board, Gravenhurst IGA, Mr. Sub, Home Hardware Small

³ Affidavit of Corinne Hagerman, para. 7; Affidavit of William Gladu, para. 4.

⁴ Affidavit of Corinne Hagerman, para. 7; Affidavit of William Gladu, para. 5.

⁵ Affidavit of William Gladu, para. 7 and Tab 2-J, Exhibit "J".

Engine Repair, the Great Canadian Bagel, the Call Us Centre, and McGrath Antique and Classic Boat Restoration.⁶

9. The contracts brought local organizations into Fenbrook to provide services for inmates that CSC would have traditionally furnished at larger public expense. One of the reasons private businesses entered into contracts with CSC was so they could run a profitable enterprise based on Fenbrook's needs using employees who would work at Fenbrook while providing on-the-job training to the inmates.⁷

C. THE INMATE PURCHASING SERVICE

10. Flowing from this animating philosophy, one of the duties which would normally be executed by a CSC employee but which was instead contracted to a local business is the management of the Inmate Purchasing Service.⁸
11. While incarcerated in Federal Institutions, inmates are permitted to purchase goods such as televisions, stereos, hobbycraft tools or clothing.⁹ The Inmate Purchasing Service is the operation through which these purchases occur.¹⁰

⁶ Affidavit of Corinne Hagerman, para. 8; Affidavit of William Gladu, para. 6.

⁷ Affidavit of William Gladu, paras. 5-6.

⁸ Affidavit of William Gladu, para. 8.

⁹ These purchases are always subject to CSC's operational and security controls.

¹⁰ Affidavit of William Gladu, para. 9.

12. In every other Federal Institution, the Inmate Purchasing Service is carried out by at least one full-time CSC officer. This officer takes inmate orders, processes them, arranges for payment, physically travels from the Institution to various merchants to make the necessary purchases, screens incoming goods, and delivers them to the inmates. The coordination of this service is labour intensive.¹¹
13. CSC contracted with the local IGA grocery store in July 1998 in order to provide an Inmate Purchasing Service that was run by a community business instead of CSC.¹²
14. In 2000, the local Home Hardware took over IGA's role as manager of the Inmate Purchasing Service.¹³
15. Home Hardware pays the salary of an employee to manage the Inmate Purchasing Service. This employee in turn recruits inmates to work in the Service and provides them with a training program based in a real business environment. The inmate employees learn record keeping, inventory control, purchasing and ordering procedures, customer service and computer literacy. The inmates are taught marketable skills and receive work experience with a viable employer.¹⁴

¹¹ Affidavit of Corinne Hagerman, para. 20; Affidavit of William Gladu, para. 17.

¹² Affidavit of Corinne Hagerman, para. 13.

¹³ Affidavit of Corinne Hagerman, paras 22 and 23.

¹⁴ Affidavit of William Gladu, para. 15.

16. From its beginning, Fenbrook received no funding to employ an Inmate Purchasing officer since the Inmate Purchasing Service was provided via a contract with a local merchant. The annual cost for the Home Hardware contract in 2006 was \$24,999.60. In other federal correctional institutions, these services are performed by a CSC officer who receives an annual salary ranging from \$47,204 to \$61,268.¹⁵
17. In other Federal institutions, CSC fully subsidizes the Inmate Purchasing Service by paying the salary of one or more Purchasing Officers. At Fenbrook, Home Hardware runs the Inmate Purchasing Service as a profitable business, thereby fulfilling CSC's commitment to maximize the benefit to the local economy.¹⁶
18. Home Hardware recoups the cost of its operations by selling to inmates goods normally available at Home Hardware stores at retail prices. Goods which inmates request but which Home Hardware does not stock (and does not purchase wholesale) must be bought by Home Hardware at retail prices from other local merchants, such as Sears and Future Shop.¹⁷

¹⁵ Affidavit of William Gladu, para. 16.

¹⁶ Affidavit of William Gladu, para. 17.

¹⁷ Affidavit of William Gladu, para. 18; Affidavit of Corinne Hagerman, para. 16.

D. HOME HARDWARE'S MARK-UP FOR CERTAIN GOODS

19. In order to compensate Home Hardware for the labour involved in taking outside orders, picking up the merchandise and delivering it to the inmates, the inmate purchasing contract allows Home Hardware to charge a mark-up on such orders.¹⁸
20. Ongoing consultations between Fenbrook, Home Hardware and the inmate population have resulted in a general mark-up (or "surcharge") of 20% for goods which Home Hardware does not normally stock and which must be purchased by Home Hardware at retail prices before re-selling to inmates.¹⁹ The mark-up on hobbycraft items is only 10%.²⁰
21. This mark-up has been the most controversial aspect of Fenbrook's approach to the Inmate Purchasing Service and has generated a long history of consultation, discussion, debate, complaints, grievances and now, this Application for leave to the Competition Tribunal.²¹ The management of Fenbrook has considered the inmates' requests to subsidize the Inmate Purchasing Service and do away with mark-ups. CSC has rejected these requests on policy and fiscal grounds.²²

¹⁸ Affidavit of William Gladu, para. 18.

¹⁹ *Ibid.*

²⁰ This reduced mark-up for hobbycraft items is intended to encourage inmates to pursue constructive hobbies and crafts. This reduction in the mark-up for hobbycraft items is the result of the consultations between FMI, Home Hardware and the inmate population.

²¹ Affidavit of William Gladu, paras. 23 and 34.

²² Affidavit of William Gladu, para. 35.

PART II – POINTS IN ISSUE

22. Does the Competition Tribunal have jurisdiction over Her Majesty the Queen in this case?
23. Has Mr. Olah satisfied the test for leave under s. 103.1(7) of the *Competition Act*?

PART III – SUBMISSIONS

A. NO JURISDICTION

24. It is an established principle of statutory interpretation that legislation is presumed not to apply against the Crown if its application would prejudice the Crown in any way.²³
25. This common law rule is codified in the *Interpretation Act*, R.S.C. 1985, c. I-21, at s. 17:

No enactment is binding on Her Majesty or affects Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.
26. Statutes generally contain an explicit provision stating that they are binding on the Crown when Parliament intended to overcome this common law and statutory presumption.

²³ Ruth Sullivan, *Statutory Interpretation*, Concord, Irwin Law; 1997 at p. 194.

27. Parliament gave the *Competition Act* only limited power over the Federal (and Provincial) Crown. Section 2.1 of the *Competition Act* provides:

This Act is binding on and applies to an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons to the extent that it would apply if the agent were not an agent of Her Majesty.

28. In order to fall within the four corners of s. 2.1 of the *Competition Act*, a government body must be (1) a Crown corporation; (2) engaged in commercial activities; (3) that involve competition with other persons.²⁴

29. None of these requirements are present in this case.

30. Mr. Olah has brought his application directly against Her Majesty the Queen, not an agent or a Crown corporation.

31. Mr. Olah also names the Correctional Service of Canada in the style of cause. CSC is not a corporation. It is a "service" created by s. 5 of the *Corrections and Conditional Release Act*, 1992 c-20:

There shall continue to be a correctional service in and for Canada, to be known as the Correctional Service of Canada, which shall be responsible for

(a) the care and custody of inmates;

²⁴ See, for example, *Sebastian v. Saskatchewan* (1987), 61 Sask.R. 71 (Q.B.) at p. 4 of 5 (QL).

(b) the provision of programs that contribute to the rehabilitation of offenders and to their successful reintegration into the community;

(c) the preparation of inmates for release;

(d) parole, statutory release supervision and long-term supervision of offenders; and

(e) maintaining a program of public education about the operations of the Service.

32. Neither her Majesty the Queen nor CSC are engaged in commercial activities in this case. Under s. 5 of the *Corrections and Conditional Release Act*, the Government's legal mandate at Fenbrook is the care and custody of inmates, the provision of correctional programs, and other public services. Profit, commercial success in the market and competition are not motives or goals of the Government's management of Fenbrook.
33. Canadian courts have held that s. 2.1 means the *Competition Act* does not apply when the Crown is engaged in acts of governance and public policy. In *People Recycling v. Vancouver*, [2002] B.C.J. No. 2232 (S.C.) (QL), the plaintiff corporation alleged that the City of Vancouver breached various statutes (including the *Competition Act*) by entering the business of municipal recycling and limiting the plaintiff's profits. Dismissing the action, the Court found that Vancouver's entry into the recycling business was a valid exercise of social policy under its

statutory powers. In consequence, McEwan J. found at para. 29 that s.

2.1 precluded any application of the *Competition Act*:

The city is not engaged in commercial activity in occupying the recycling field on a cost recovery basis, for valid social policy reasons in accordance with authorizing legislation.

34. Similarly, in *Industrial Milk Producers Association v. British Columbia*, [1989] 1 F.C. 463 (T.D.) (QL), Reed J. held that s. 2.1 precludes review of government activities unless they are competitive/commercial.²⁵
35. The Federal Court has already held that Fenbrook's Inmate Purchasing Service was implemented in accordance with the governing legislation, the *Corrections and Conditional Release Act*.²⁶ The Crown's decision to use a public-private partnership at Fenbrook and to allow a reasonable mark-up is a matter of valid social policy.
36. In consequence, the Competition Tribunal cannot apply the *Competition Act* to the decisions that Mr. Olah challenges. The imposition of rules intended to keep market economies free from unfair business practices would be a bizarre and ill-fitting intrusion into the penal system. The management of prisons is a policy matter that remains in the exclusive purview of the CSC. In cases of illegality or unfairness, inmates are free to request judicial review of any of CSC's decisions in Federal Court (as Mr. Olah has already done).

B. MR. OLAH'S EVIDENCE IS INSUFFICIENT

1) The Test for Leave

37. The Federal Court of Appeal has held that in order to grant leave under s. 103.1 of the *Competition Act*, the Tribunal must be satisfied that 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 requires evidence of both direct *and* substantial effect.²⁸
38. The Tribunal must also be satisfied that there is sufficient credible evidence with respect to each of the conjunctive statutory conditions under s. 77 of the *Competition Act*.²⁹ Therefore, the Tribunal must find sufficient credible evidence to give rise to a *bona fide* belief that there is "exclusive dealing" or "tied selling" as defined in s. 77(1). It also requires a finding that the exclusive dealing or tied selling has one of the detrimental effects set out in s. 77(2) with the result "that competition is or is likely to be lessened substantially." This is a complex and multi-part test.

²⁵ See para. 33.

²⁶ *Olah v. Attorney General*, 2006 FC 1245 at para. 19.

²⁷ *Symbol Technologies Canada ULC v. Barcode Systems Inc.* (2004) 34 C.P.R. (4th) 481 at para. 16 (Fed. C.A.) ("*Symbol v. Barcode*").

²⁸ *Construx Engineering Corp. v. General Motors of Canada*, 2005 Comp. Trib. 21 at para. 8.

²⁹ *Barcode*, *supra*, at para. 18.

2) There is No Evidence of a Direct or Substantial Effect on Mr. Olah

39. Mr. Olah's affidavit contains no specifics on which the Tribunal can give rise to a *bona fide* belief that he is directly or substantially affected by Fenbrook's Inmate Purchasing Service.
40. The test articulated in *Symbol v. Barcode* states that the complainant must be affected in his "business". There is no evidence that Mr. Olah is carrying on a business.
41. Even if s. 77 could be invoked by an individual consumer, there is a dearth of evidence supporting Mr. Olah's application. There is no evidence of Mr. Olah's activities as a consumer. There is no evidence with respect to how much money Mr. Olah has paid in mark-ups. There is no evidence with respect to whether the mark-up affected his purchasing decisions. There is no evidence about whether the mark-up prejudiced his financial security. There is no evidence about what goods Home Hardware can and cannot provide from its own stock (i.e. without charging a mark-up in the first place).
42. There is some evidence indicating that Mr. Olah is *not* directly affected by Fenbrook's policy. He states at para. 2 of his affidavit that he is now an inmate at a different prison.

3) There is No Evidence of Exclusive Dealing

43. It is unclear from Mr. Olah's application whether the "exclusive dealing" he complains of arises from (1) the fact that Gravenhurst Home Hardware does not have competition in the running of the Inmate Purchasing Service; (2) the allegation that Gravenhurst Home Hardware's mark-ups on certain goods improperly induces inmates to buy Home Hardware stocked goods; or (3) the fact that Gravenhurst Home Hardware is allowed to charge a mark-up in the first place.
44. The vagueness of the allegations is compounded by the lack of evidence. There is no evidence that the situation at Fenbrook impedes entry of other firms into the market; impedes the introduction of products into the market; or has another exclusionary effect on the market under s. 77(2).
45. Nor is there evidence that the inmates of Fenbrook constitute a "market" as per s. 77(2). There is no evidence about whether the mark-up has substantially lessened competition. There is no evidence about what competition may mean in the context of a medium security prison.
46. Fenbrook's inmates are required to use the Inmate Purchasing Service in order to obtain commercial goods because of security concerns and CSC policy, not because of commercial agreements or market

manipulation on the part of any supplier. Purchased goods are not given to inmates with conditions or with strings attached that induce loyalty to Gravenhurst Home Hardware. There is no evidence indicating how this situation can meet the definition of exclusive dealing set out in s. 77(1) of the *Competition Act*.

47. Finally, to meet the test for leave, Mr. Olah must demonstrate that the practice in question "could be subject to an order."³⁰ As this factum has already canvassed, under s. 2.1 of the *Act*, decisions of the Crown cannot be subject to review under the *Competition Act* when they are based on social policy and governance in the public interest.

PART IV – ORDER REQUESTED

48. The Respondent requests that this matter be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this October 22, 2008.



Matthew Sullivan and Susan Keenan
Of Counsel for the Respondent
Her Majesty the Queen

³⁰ *Symbol Technologies Canada ULC v. Barcode Systems Inc.* (2004) 34 C.P.R. (4th) 481 at para. 16 (Fed. C.A.).

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AND TO: John Hill
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APPENDIX A - LIST OF AUTHORITIES

1. Ruth Sullivan, *Statutory Interpretation*, Concord, Irwin Law; 1997
2. *Sebastian v. Saskatchewan* (1987), 61 Sask.R. 71 (Q.B.)
3. *People Recycling v. Vancouver*, [2002] B.C.J. No. 2232 (S.C.)
4. *Industrial Milk Producers Association v. British Columbia*, [1989] 1 F.C. 463 (T.D.)
5. *Olah v. Attorney General*, 2006 FC 1245 (T.D.)
6. *Symbol Technologies Canada ULC v. Barcode Systems Inc.* (2004) 34 C.P.R. (4th) 481 at para. 16 (Fed. C.A.)
7. *Construx Engineering Corp. v. General Motors of Canada*, 2005 Comp. Trib. 21

APPENDIX B - STATUTES AND REGULATIONS

- A. *Competition Act*, R.S., 1985, c. C-34, sections 45(1), 67(3)
- B. *Corrections and Conditional Release Act*, 1992, c. 20, as amended, sections 3, 74, 90, 91
- C. *Interpretation Act*, R.S.C. 1985, c. I-21, section 17