Competition Tribunal File No. CT-2008/002

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 under Section 103.1 of the *Competition Act* by John G. Annable for leave to make an application for an Order under subsection 77(1) of the *Competition Act*

BETWEEN

JOHN GUY ANNABLE

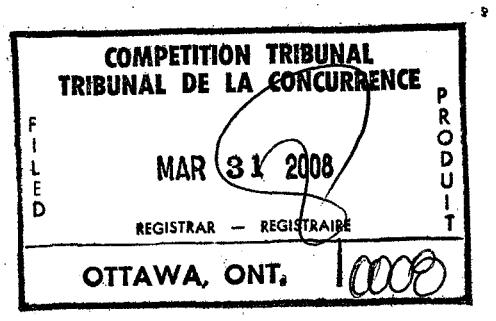
Applicant

- and -

CAPITAL SPORTS AND ENTERTAINMENT INC.

Respondent

REPRESENTATIONS OF THE RESPONDENT IN RESPONSE TO THE APPLICATION FOR LEAVE PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*



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I. OVERVIEW

1. Capital Sports & Entertainment Inc. (incorrectly named as Capital Sports And Entertainment Inc.) ("Capital Sports") opposes Mr. Annable's leave application on the grounds that he has failed to satisfy the requirements for obtaining leave, as set out in subsection 103.1(7) of the *Competition Act* (the "Act").

2. Mr. Annable has failed to file any, let alone sufficient, evidence to establish that he has been directly and substantially affected in his business (or otherwise) by any practice referred to in section 77 of the Act or that the conduct complained of could be subject to an order of the Competition Tribunal (the "Tribunal").

3. Mr. Annable decided to initiate his application despite being aware that the Commissioner of Competition (the "Commissioner") was of the view that the conduct complained of did not contravene section 77 of the Act. The Tribunal should carefully consider Mr. Annable's motivation for bringing this application in the context of his history of precipitating confrontations with Capital Sports.

4. The manner in which Capital Sports chooses to market tickets to games played by the Ottawa Senators is neither contrary to section 77 of the Act, nor has any impact on competition in any relevant market in Canada.

5. For these and the reasons raised below, Mr. Annable's application for leave should be dismissed with costs.

II. THE PARTIES

6. Capital Sports, an Ontario corporation, is the owner of the National Hockey League franchise known as the Ottawa Senators (the "Senators"). The Senators play their home games at Scotiabank Place, Ottawa, Ontario, which is owned and operated by Capital Sports Properties Inc., an affiliate of Capital Sports.

7. Mr. Annable is a private individual residing in Ottawa, Ontario.

III. THE FACTS

8. As the owner of the Senators franchise, Capital Sports determines the ticket prices, as well as the method of marketing the Senators tickets to consumers, including whether to offer multi-game ticket packages.

9. Capital Sports decided to offer multi-game ticket packages not only to help sales, but also to thwart unauthorized resellers (commonly referred to as "scalpers") from purchasing the available single tickets to high-demand games and reselling them to consumers at inflated prices, which in many cases exceed the price of the multi-game packages.

Affidavit of Cyril M. Leeder, sworn March 28, 2008 (the "Leeder Affidavit") at para. 9.

10. The sales of multi-game ticket packages for the three Senators games referred to in the February 7, 2008 Ottawa Citizen article (the "Article") attached to Mr. Annable's Notice of Application as Schedule "A" have only accounted for between approximately 3% and 4.9% of the total number of tickets sold for these games. These figures do not include either box tickets or complimentary tickets given out by Capital Sports.

Leeder Affidavit at para. 12.

11. Consumers can purchase single-game tickets to Senators games (including the three games in question) in various ways other than by buying multi-ticket packages, including through capitaltickets.ca, an affiliate of Capital Sports. Capitaltickets.ca also provides a service called the "SenatorsTicket Marketplace", which allows Senators season ticket holders to sell unwanted tickets to the public for the face-value of the ticket.

Leeder Affidavit at para. 13.

IV. THE LEAVE TEST AND WHY MR. ANNABLE'S APPLICATION MUST FAIL

12. To grant leave to commence a private application, the Tribunal must be satisfied that it has reason to believe that:

a) The application for leave 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 practice referred to in section 75 or 77 of the Act; and

b) the practice at issue could be subject to an order under either section 75 or 77 of the Act.

***National Capital News Canada v. Milliken,* 2002 Comp. Trib. 41 at para 14.**

***Barcode Systems Inc. v. Symbol Technologies Canada ULC* 2004 FCA 339 at para. 16, attached as Schedule "A".**

13. The Tribunal has defined "substantial" as having its ordinary meaning, which is more than something just beyond *de minimis*, and has also indicated that it reflects a degree of significance.

***Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 at 23 (Comp. Trib.).**

14. The Tribunal has clearly stated that speculative claims of harm are not sufficient for it to conclude that the applicant has been "substantially affected" by the conduct in question and that the lack of clear, documented evidence of impact is fatal to an application for leave.

***Broadview Pharmacy v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22 at para. 21.**

***Paradise Pharmacy Inc. and Rymal Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21 at paras. 23-24.**

***Mrs. O's Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 24 at paras. 24-25.**

15. Mr. Annable has failed to even allege, let alone provide credible evidence, that he has been "directly and substantially affected" in his business by Capital Sports' decision to sell a portion of the tickets to any particular game as part of a multi-game ticket package. Moreover, there is no evidence that Mr. Annable has a business capable of being affected by the conduct at issue.

16. As there is no evidentiary basis upon which the Tribunal could conclude that this aspect of the subsection 103.1(7) test for leave has been satisfied, Mr. Annable's application must fail.

V. THE CONDUCT AT ISSUE DOES NOT CONTRAVENE SECTION 77

17. While Capital Sports believes that the Tribunal need not consider whether the conduct at issue contravenes section 77 of the Act, to be complete, we will briefly address this issue.

18. Tied selling occurs when a supplier of a product, as a matter of practice, requires or induces a customer to buy a product as a condition of buying another.

19. Even if the Tribunal were to conclude that the conduct at issue is tied selling, the Tribunal may only make an order where it finds that the conduct will or is likely to result in a substantial lessening of competition in a market.

20. In this case, Mr. Annable has neither pled, nor provided any evidence that the conduct alleged has had, or is capable of having, any impact on competition, let alone a substantial lessening of competition. Furthermore, in the Article, Mr. Annable is quoted as saying "We're not questioning (the competition aspect)". This suggests that Mr. Annable's motivation for bringing his application is to force Capital Sports to sell him tickets to Senators games on terms that he desires, and not because he believes that the conduct at issue has had any negative impact on competition.

21. As Mr. Annable's application does not attempt to define the relevant market, it is not necessary for Capital Sports to take any position on this issue. However, it is Capital Sports' position that, regardless of how the relevant market is defined, the conduct at issue is simply incapable of resulting in any negative impact on competition, let alone a substantial lessening of competition.

22. Mr. Annable has not adduced any evidence whatsoever as to whether the conduct at issue has resulted in a substantial lessening of competition in any relevant market. As the conduct at issue could not be subject to an order under subsection 77(1), Mr. Annable's application must fail.

23. Capital Sports does not admit any of the grounds and material facts contained in Mr. Annable's application for leave.

24. Capital Sports requests that the proceedings be conducted in English.

25. Capital Sports does not oppose Mr. Annable's request that documents be filed in electronic form.

VI. MR. ANNABLE'S APPLICATION IS FRIVOLOUS AND VEXATIOUS

26. Mr. Annable has precipitated several confrontations with Capital Sports over the past year or so, the particulars of which are described in the Leeder Affidavit.

Leeder Affidavit, at paras. 14 to 17.

27. It appears that Mr. Annable's application is motivated by his desire to obtain some sort of retribution against Capital Sports by forcing it to devote the management time and financial resources required to respond to his application.

28. This assumption is consistent with the fact that Mr. Annable appears to have contacted the media in February 2008 to publicly disclose that he had made a complaint to the Commissioner regarding the conduct at issue in these proceedings. It also appears from the Article that Mr. Annable provided a copy of his complaint to the paper.

29. It is clear from the Article that, before commencing the leave application, Mr. Annable was aware of the statements made by Mr. Chris Busuttil, an Acting Assistant Deputy Commissioner of Competition with the Civil Matters Branch, explaining why the Commissioner did not intend to pursue his complaint, as well as why the conduct at issue did not contravene the Act.

30. In light of the explanation provided by Mr. Busuttil, Mr. Annable's decision to initiate these proceedings can only be interpreted as an attempt to "get even" with Capital Sports.

31. For these reasons, Capital Sports is of the view that Mr. Annable's application is frivolous and vexatious.

VII. COSTS

32. Pursuant to section 8.1 of the *Competition Tribunal Act*, R.S.C 1985, c.19, as amended, the Tribunal is empowered to order costs of proceedings before it in respect of reviewable matters in accordance with the provisions governing costs in the *Federal Court Rules* (SOR/98-106) ("Federal Court Rules").

33. Federal Court Rules specifically state that one of the factors that may be considered in determining an award of costs is whether any step in the proceeding was "improper, vexatious or unnecessary".

Federal Court Rules, Rule 400(3)(k), attached as Schedule "B".

34. Capital Sports submits that an order of costs against Mr. Annable is appropriate to sanction and deter private applicants from bringing frivolous and vexatious litigation.

VIII. ORDER SOUGHT

35. Capital Sports requests that the Tribunal dismiss Mr. Annable's leave application with costs.

DATED at Toronto, Ontario, this 28th day of March 2008.

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Counsel for the Respondent

Schedule "A"

Case Name:

Barcode Systems Inc. v. Symbol Technologies Canada ULC

Between
Symbol Technologies Canada ULC, appellant (respondent),
and
Barcode Systems Inc., respondent (applicant)

[2004] F.C.J. No. 1657
2004 FCA 339
Docket A-39-04

Federal Court of Appeal
Winnipeg, Manitoba
Richard C.J., Létourneau and Rothstein JJ.A.

Heard: September 28, 2004.
Judgment: October 7, 2004.
(30 paras.)

Appeal from a decision of the Competition Tribunal dated January 15, 2004, [2004] C.C.T.D. No. 1.

Counsel:

Steven Field and Dave Hill, for the appellant (respondent).

Lindy Choy, for the respondent (applicant).

The judgment of the Court was delivered by

ROTHSTEIN J.A.:—

INTRODUCTION

¶ 1 This is an appeal by Symbol Technologies Canada ULC (Symbol) from a decision of the Competition Tribunal under subsection 103.1(7) of the Competition Act, R.S.C. 1985, c. C-34 granting leave to the respondent Barcode Systems Inc. (Barcode) to make an application to the Tribunal against Symbol. In its leave application to the Tribunal, Barcode alleged that Symbol was engaging in the reviewable restrictive trade practice of "refusal to deal" within the meaning of section 75 of the Act.

¶ 2 Barcode's application before the Tribunal is for an order under subsection 75(1) of the Competition Act requiring Symbol to accept Barcode as a customer.

¶ 3 In this appeal, Symbol says that the Tribunal member who granted leave erred in law by refusing to take into account statutory requirements and that the decision to grant leave should be quashed by this Court.

FACTS

¶ 4 The facts are taken from the affidavit of David Sokolow, the President of Barcode. There has been no cross-examination on that affidavit. Symbol is the Canadian subsidiary of Symbol Technologies Inc. (Symbol US).

Symbol US is the largest single manufacturer of bar code equipment in the world. Symbol sells and distributes Symbol US products in Canada. In or about 1994, Barcode took over Symbol's distribution in Western Canada.

¶ 5 In or about January 2003, Symbol informed Barcode that it could no longer buy parts for Symbol products. In April 2003, Symbol informed Barcode that it would not accept purchase orders from Barcode. Barcode says that since May 1, 2003, Symbol has refused to deal with Barcode.

RELEVANT STATUTORY PROVISIONS

¶ 6 Until 2002, only the Commissioner of Competition could bring an application before the Competition Tribunal in respect of reviewable restrictive trade practices described in Part VIII of the Competition Act, e.g. refusal to deal (section 75) and tied selling (section 77). By amendments to the Competition Act, 2002, c. 16, ss. 11.1-11.3, private applicants were given the opportunity to bring applications to the Tribunal, subject to the Tribunal granting them leave to do so. Subsection 103.1(1) of the Competition Act provides:

> 103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.
>
> * * *
>
> 103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75 ou 77. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

¶ 7 The considerations the Tribunal is to take into account in determining a leave application are set out in subsection 103.1(7). To grant leave, the Tribunal must have reason to believe that the applicant is directly and substantially affected in its business by a reviewable restrictive trade practice that could be the subject of a Tribunal order under sections 75 or 77 of the Competition Act. Subsection 103.1(7) provides:

> (7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant 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.
>
> * * *
>
> (7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

¶ 8 The reviewable restrictive trade practice relied on by Barcode is refusal to deal. Subsection 75(1) provides:

> 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.

* * *

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

b) que la personne mentionnée à l'alinéa a) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

c) que la personne mentionnée à l'alinéa a) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

> le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

THE ALLEGED ERROR OF LAW

¶ 9 Symbol submits that the Competition Tribunal member who granted leave refused to take account of all the elements of the reviewable practice of refusal to deal set out in subsection 75(1) and therefore erred in law by not taking account of statutory requirements. Symbol's main argument is that the member refused to consider whether Symbol's alleged refusal to deal was likely to have an adverse effect on competition in a market as required by paragraph 75(1)(c).

¶ 10 Indeed, in his reasons, the member specifically finds that on an application for leave, the Tribunal is not to have regard to whether the refusal to deal is likely to have an adverse effect on competition in a market. At paragraphs 8 and 10, the member states:

> 8. What the Tribunal must have reason to believe is that Barcode is directly and substantially affected in its business by Symbol's refusal to sell. The Tribunal is not required to have reason to believe that Symbol's refusal to deal has or is likely to have an adverse effect on competition in a market at this stage.
>
> 10. As I read the Act, adverse effect on competition in a market is a necessary element to the Tribunal finding a breach of section 75 and a necessary condition in order that the Tribunal make a remedial order under that section. It is not, however, part of the test for the Tribunal's granting leave or not.

STANDARD OF REVIEW

¶ 11 Subsection 13(1) of the Competition Tribunal Act, R.S.C., 1985, c. 19 (2nd Supp.), s. 13; 2002, c. 8, s. 130, provides for a statutory right of appeal to the Federal Court of Appeal from any decision or order whether final, interlocutory or interim of the Competition Tribunal as if it were a judgment of the Federal Court. The unrestricted right of appeal (except in the case of appeals on questions of fact under subsection 13(2)) is an indication of a correctness standard of review.

¶ 12 Whether to grant leave under subsection 103.1(7) is a discretionary decision of the Tribunal. However, the question at issue here is whether, in exercising its discretion, the Tribunal is required to consider all the elements of the restrictive trade practice of refusal to deal set out in subsection 75(1). That is a question of law, a straight question of statutory interpretation. It is the task of the Court to determine whether the Tribunal has exercised its discretionary power within the constraints imposed by Parliament. See Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 at paragraph 38.

¶ 13 This question of statutory interpretation does not engage any particular expertise of the Tribunal. Economic and commercial considerations are not part of the analysis of whether, on a leave application, all the elements listed in subsection 75(1) must be considered. That expertise is not engaged on the question of statutory interpretation at issue here therefore points to the correctness standard.

¶ 14 The basic purpose of the Competition Act as described in subsection 1.1 is "to maintain and encourage competition in Canada" and the purpose of section 75 is in furtherance of that objective. When economic and commercial considerations are being considered, deference may be called for. But these considerations are not at issue in the present appeal.

¶ 15 Weighing these pragmatic and functional considerations, I conclude that the standard of review in this appeal is correctness. ANALYSIS

The legal test in an application under subsection 103.1(7)

¶ 16 In National Capital News Canada v. Canada (Speaker House of Commons) (2002), 23 C.P.R. (4th) 77, Dawson J., in her capacity as a member of the Competition Tribunal, reviewed the test for the granting of leave under subsection 103.1(7). After citing authorities on the term "reasonable grounds to believe" she stated at paragraph 14 of her reasons:

> Accordingly on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that 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.

I agree with Dawson J. and adopt her analysis and conclusion as to the test for granting leave under subsection 103.1(7).

¶ 17 The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a bona fide belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.

¶ 18 However, it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under subsection 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1). These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in subsection 75(1) on the leave application, it could not conclude, as required by paragraph 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under subsection 75(1).

¶ 19 The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding under section 103.1. As long as it is apparent that each element is considered, the Tribunal's discretionary decision to grant or refuse leave will be treated with deference by this Court. But the Tribunal's discretion to grant leave is not unfettered. The Tribunal must consider all the elements in subsection 75(1).

¶ 20 The words of subsection 103.1(1) support this interpretation of the requirements of subsection 103.1(7). Subsection 103.1(1) requires that the application for leave be accompanied by an affidavit setting out the facts in support of the application under subsection 75(1). That affidavit must therefore contain the facts relevant to the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1). It is that affidavit which the

Tribunal will consider in determining a leave application under subsection 103.1(7). While the standard of proof on the leave application is lower than when the case is considered on its merits, nonetheless, the same considerations are relevant to both and must be taken into account at both stages.

¶ 21 The respondent says that the words in subsection 103.1(7) "that the applicant is directly and substantially affected in the applicant's business" are essentially the words in paragraph 75(1)(a) and because there are no words similar to those in paragraphs 75(1)(b) to (e) in subsection 103.1(7), Parliament did not intend that each element in paragraphs (b) to (e) need be taken into account on a leave application.

¶ 22 I do not think that is correct. Because subsection 103.1(1) says that "any person may apply", it is theoretically possible for someone other than a person substantially and directly affected to bring a private application. However, Parliament clearly intended to limit private applications to persons who themselves are directly and substantially affected in their businesses by the alleged reviewable practice. I think that is the reason for the use of words in subsection 103.1(7) that are substantially similar to those in paragraph 75(1)(a). However, the use of these words does not imply that the statutory elements in paragraphs 75(1)(b) to (e) need not be considered on a leave application. That is because, on a leave application, the Tribunal must consider whether the practice that is alleged could be subject to an order under subsection 75(1); and it cannot reach that conclusion without considering all the elements of refusal to deal set out in that subsection.

¶ 23 Counsel for Symbol argued that on a purposive interpretation, it should be clear that on a leave application, the Tribunal must have regard to all the statutory elements in subsection 75(1). I agree. The purpose of the Competition Act is to maintain and encourage competition in Canada. It is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition. That is the obvious reason for paragraph 75(1)(e). The threshold at the leave stage is low, but there must be some evidence by the applicant and some consideration by the Tribunal of the effect of the refusal to deal on competition in a market.

Application of the test for leave to the facts

¶ 24 Having determined the correct legal test on an application seeking leave to apply for an order under subsection 75(1), the question is whether this matter should be remitted to the Tribunal for redetermination or whether this Court should dispose of it. Barcode has pointed out that a leave application is intended to be a summary screening process. There is no right of cross examination on the affidavit filed in support of the application for leave, there is no provision for the respondent to file affidavit evidence and the time limits in section 103.1 are short, consistent with leave applications being dealt with summarily. For these reasons, I think the appropriate course of action in this case would be for this Court to resolve the matter without further delay.

¶ 25 Is there credible evidence to support a finding that there are reasonable grounds to believe that Symbol's refusal to supply Barcode could be subject to an order under subsection 75(1)? There is evidence that Barcode is substantially affected in its business due to its inability to obtain Symbol's products. Barcode's evidence is that it cannot obtain these products either directly from Symbol or from other Symbol distributors. Barcode says it is willing and able to meet Symbol's usual trade terms and that Symbol's products are in ample supply.

¶ 26 The only real controversy is whether there is evidence that Symbol's refusal to deal is likely to have an adverse effect on competition in a market.

¶ 27 On this point, paragraph 75(1)(e) has not been interpreted by the Tribunal or this Court and a leave application is not the appropriate occasion to do so. Therefore, if there are any facts in its affidavit that might meet the requirements of paragraph 75(1)(e), the benefit of any doubt should work in favour of granting leave in order not to finally preclude Barcode from its day before the Tribunal.

¶ 28 The evidence of Barcode is that in or about 1994, it took over Symbol's distribution in Western Canada and that by 2002 its annual revenues were in excess of $20 million. Symbol US is the largest single manufacturer of bar code equipment in the world. Barcode's evidence is that if Symbol continues to refuse to supply, Barcode will be forced into receivership, and indeed, the Tribunal member found that on December 19, 2003, Barcode was petitioned into receivership.

¶ 29 From Barcode's evidence, I think it may be inferred, for leave to appeal purposes, that there are reasonable grounds to believe that Barcode had somewhat of a presence in the Western Canadian market for the supply and servicing of Symbol's products. Its difficult financial situation reflected by its receivership could be likely to impede its ability to be an effective competitor in that market, thereby having an adverse effect on competition in that market. The evidence may not be strong but I think it is sufficient to constitute reasonable grounds to believe that Symbol's alleged refusal to deal could be the subject of an order under subsection 75(1).

CONCLUSION

¶ 30 For these reasons I would dismiss the appeal with costs.

ROTHSTEIN J.A.
RICHARD C.J.:— I agree.
LÉTOURNEAU J.A.:— I agree.

QL UPDATE: 20041019
cp/e/qw/qlaim

Schedule "B"

Department of Justice Canada | Ministère de la Justice Canada

Canada

Enabling Statute: Federal Courts Act
Federal Courts Rules (SOR/98-106)

Regulation current to February 26th, 2008

Table Of Contents

PART 11

COSTS

AWARDING OF COSTS BETWEEN PARTIES

Discretionary powers of Court

400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

Crown

(2) Costs may be awarded to or against the Crown.

Factors in awarding costs

(3) In exercising its discretion under subsection (1), the Court may consider

(*a*) the result of the proceeding;

(*b*) the amounts claimed and the amounts recovered;

(*c*) the importance and complexity of the issues;

(*d*) the apportionment of liability;

(*e*) any written offer to settle;

(*f*) any offer to contribute made under rule 421;

(*g*) the amount of work;

(*h*) whether the public interest in having the proceeding litigated justifies a particular award of costs;

(*i*) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;

(*j*) the failure by a party to admit anything that should have been admitted or to serve a request to admit;

(*k*) whether any step in the proceeding was

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

Competition Tribunal File No. CT-2008/002

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BETWEEN

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CAPITAL SPORTS AND ENTERTAINMENT INC.

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REPRESENTATIONS OF THE RESPONDENT IN RESPONSE TO THE APPLICATION FOR LEAVE PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*

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