

THE COMPETITION TRIBUNAL

IN THE MATTER OF the Order Granting Leave to Barcode Systems Inc. pursuant to Section 103.1 of the *Competition Act*, RSC 1985 c. C-35, as amended, to commence an Application pursuant to Section 75 of the *Competition Act*.

BETWEEN:

SYMBOL TECHNOLOGIES CANADA ULC

Applicant ,

- and -

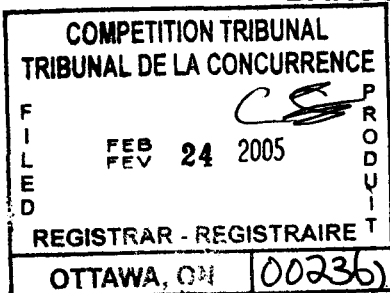
**BARCODE SYSTEMS INC. and PRICEWATERHOUSECOOPERS INC. as
INTERIM RECEIVER of BARCODE SYSTEMS INC.**

Respondents.

STATEMENT OF GROUNDS AND MATERIAL FACTS

1. On November 4, 2003, Barcode Systems Inc. ("BSI") applied to the Competition Tribunal ("the Tribunal") [Tribunal file No. 2003 008] pursuant to subsection 103.1(1) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "*Act*") for leave to make an application under section 75 of the *Act* and seek an Order requiring the Applicant, Symbol Technologies Canada ULC ("Symbol") to accept BSI as a customer on the "usual trade terms".

2. On December 19, 2003, Mr. Justice Schulman of the Manitoba Court of Queen's Bench, in File No. BK 03-01-36054, appointed PricewaterhouseCoopers Inc. ("PWC") as Interim Receiver "of all property, assets and undertakings" of BSI (the "PWC appointment Order"). Paragraph 11 of the PWC appointment Order granted PWC the authority to initiate and continue all legal and administrative proceedings on behalf of BSI.



3. PWC then commenced marketing BSI for sale as a going concern.
4. On January 15, 2004, the Tribunal issued its Order in Tribunal File No. 2003 008 granting leave to BSI to make an application under Section 75 of the *Act*.
5. On the very same day that the Tribunal was issuing the Order granting leave to commence the s. 75 application, PWC, in their capacity as Interim Receiver of BSI, was in Court obtaining an Order in the Manitoba Court of Queen's Bench from Justice Schulman compelling Symbol to:
 - (a) supply the PWC, as Interim Receiver of BSI, with product for the purpose of resale by the Interim Receiver to end-users on such terms and conditions as Symbol would ordinarily provide to one of its authorized distributors;
 - (b) direct its authorized dealers to supply the Interim Receiver with product for the purpose of resale by the Interim Receiver to BSI's customers upon such terms and conditions as such distributor would ordinarily provide to one of its authorized dealers; and
 - (c) compelling Symbol to provide such customers of BSI with such support and to honour such warranties as Symbol does in the ordinary course to end-users who have purchased Symbol products from authorized Symbol dealers.
6. Subsequent to obtaining the Order in Manitoba Court of Queen's Bench compelling Symbol to sell and deal with the Interim Receiver in respect of BSI's customers, the Interim Receiver continued its efforts to market BSI for sale as a going concern and subsequently sold its assets, including its intangible assets such as customer lists, supplier lists, and copies of accounting records, quotes, proposals and such files relating to the operation of BSI as may be reasonably

necessary to enable the purchaser to carry on its business. Court approval of this sale was given by the Manitoba Court of Queen's Bench on February 26, 2004. The sale concluded and the business of BSI which had been continued by the Interim Receiver was then continued by the purchaser of BSI's business, **q.data inc.**

7. The Tribunal issued an Order on May 19, 2004, that the style of cause be amended to show Price Waterhouse Coopers (*sic*) as Receiver and Manager for Barcode Systems Inc. as the applicant in CT 2003 008 and on June 15, 2004, the Tribunal issued an Order staying that proceeding before the Tribunal until further Order of the Tribunal.

8. In a judgment rendered on October 7, 2004, involving an appeal from the decision granting leave to BSI in CT 2003 008, the Federal Court of Appeal decided that the Tribunal is to take into account each of the elements in Section 75(1) (a) – (e) of the *Act* when considering an Application for Leave pursuant to Section 103.1.

9. BSI first started legal action against Symbol in the Manitoba Court of Queen's Bench on March 19, 2003, Queens' Bench File No. CI 03-01-32071. The original Statement of Claim filed by BSI against Symbol was assigned to David Sokolow by BSI prior to the appointment of PWC as Interim Receiver for BSI. On or about November 5, 2004 Mr. Sokolow amended his claim to now include a claim for damages for loss of BSI as a going concern.

Basis for Application for Recession pursuant to section 106

10. Section 106(1) of the *Act* provides, in part:

106. (1) The Tribunal may rescind or vary ... an order made under this Part other than ... on application by the ... person against whom the order was made, if the Tribunal finds that

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the ... order would not have been made or would have been ineffective in achieving its intended purpose; or
...

11. In order to bring itself within the ambit of paragraph 106(a) the Applicant must establish:

- (a) that there has been a change in circumstances;
- (b) in the circumstances that exist now, the order:
 - (i) would not have been made; or
 - (ii) would have been ineffective in achieving its intended purpose.

Changed Circumstances

12. As outlined above, the circumstances that led to the making of the Tribunal's Order dated January 15, 2004 have changed. The circumstances which now exist, include the following:

- (a) PWC, as Interim Receiver of BSI, the very party granted the authority to commence and continue all legal proceedings on behalf of BSI at the material time, (save the cause of action originally brought against Symbol in Manitoba Queen's Bench File No. CI 03-01-32071), made a successful application for an Order in the Manitoba Court of Queen's Bench in File No. BK 03-01-36054 for essentially the same relief being sought in the Tribunal proceedings CT 2003 008;
- (b) PWC, as Interim Receiver of BSI, sold the business of BSI to **qdata. inc.** which has continued to operate BSI's business being supplied by Symbol among other suppliers;
- (c) In November, 2004, David Sokolow, as the assignee of the rights of the Manitoba civil action Queen's Bench File No. CI 03-01-32071,

amended that claim so that it now includes a claim for damages for the loss of BSI as a going concern.

Order would not be have been made - it would have been ineffective in achieving its intended purpose

12. An applicant under s. 106(1)(a) needs to show that under the circumstances that now exist, either the order sought to be rescinded would not have been made or the order would have been ineffective in achieving its intended purpose. It is submitted that in this case both criteria are met.

13. The granting of leave to an Applicant such as BSI pursuant to s. 103.1 of the Act, is a discretionary remedy. Subsection 103.1(7) provides as follows:

(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. [emphasis added]

14. It is submitted that the current proceedings, which are being continued by the Interim Receiver of BSI, are simply an abuse of process being brought for the purpose of enhancing the position in the ongoing civil dispute in the Manitoba Court of Queen's Bench, now being prosecuted by David Sokolow, the former principal of BSI against Symbol.

15. Under CT File 2003 008 BSI, and now the Interim Receiver of BSI, seek an order pursuant to Section 75 whereby the Tribunal could order Symbol to accept BSI as a customer within a specified time on usual trade terms. This is the very relief which was effectively granted to the Interim Receiver of BSI by Justice Schulman in the Manitoba Court of Queen's Bench proceeding brought by the Interim Receiver.

16. Further, Sokolow, as assignee of the rights of BSI to the original Manitoba civil action against BSI is now claiming damages for loss of BSI as a going concern.

17. It is submitted that BSI and its assignees ought not to be allowed to use Competition Tribunal proceedings where, on the one hand relief has already been given in a different forum (ordering Symbol to supply the Interim Receiver) and where, in the original action being continued by Sokolow seeking damages, there is a claim for the loss of BSI as a going concern indicating there is no longer an entity which would be in a position to receive any benefit from a Competition Tribunal Order pursuant to Section 75.

18. Accordingly, it is submitted that in the current circumstances:

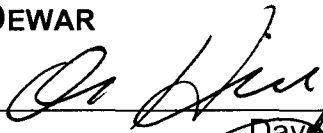
- (a) there is simply no need for the Competition Tribunal proceedings;
- (b) the order would have been ineffective in achieving its intended purpose;
- (c) there would be no proper basis for the Tribunal exercising its discretion in favour of granting leave to BSI to now commence an Application under Section 75;
- (d) and therefore the order granting leave would not have been made.

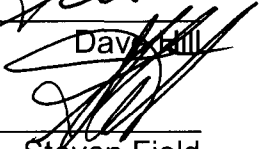
19. Accordingly, it is submitted that the Tribunal ought to rescind the order issued on January 15, 2004 in CT 2003 008 granting leave to BSI to commence a Section 75 application against Symbol.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

this 23rd day of February, 2005

HILL ABRA DEWAR





David Hill
Steven Field

Counsel for the Applicant Symbol
Technologies Canada ULC