Competition Tribunal | Tribunal de la Concurrence

PUBLIC VERSION

Reference: *Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, 2007 Comp. Trib. 6
File No.: CT-2007-001
Registry Document No.: 0030

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 Sears Canada Inc. for leave to make an application under section 75 of the *Competition Act*

B E T W E E N :

Sears Canada Inc.
(applicant)

and

Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.
(respondents)

Date of hearing: 20070314
Presiding Judicial Member: Simpson J. (Chair)
Date of Reasons and Order: March 23, 2007
Reasons and Order signed by: Madam Justice S. Simpson

REASONS FOR ORDER AND ORDER DISMISSING AN APPLICATION FOR LEAVE UNDER SECTION 103.1 OF THE ACT

INTRODUCTION

[1] Sears Canada Inc. has applied under subsection 103.1(7) of the *Competition Act*, R.S.C. 1985, c. C-34 (the Act) for leave to commence an application for a supply order based on the Respondents' refusal to supply the Prestige Fragrances and Cosmetics described in paragraph 5 below.

THE PARTIES

[2] Sears Canada Inc. (Sears) is incorporated pursuant to the laws of Canada and is a multi-channel, multi-product retailer with a network that includes 196 company-owned stores, 178 dealer stores, more than 1850 catalogue merchandise pick-up locations and internet shopping.

[3] Parfums Christian Dior Canada Inc. (Dior) is a Quebec corporation and Parfums Givenchy Canada Ltd. (Givenchy) is incorporated pursuant to the laws of Ontario. Both Dior and Givenchy are wholly-owned subsidiaries of LVMH Louis Vuitton Möet Hennessy.

THE EVIDENCE

[4] Sears' evidence is provided in an affidavit sworn by Carol Wheatley on February 22, 2007 (the Wheatley Affidavit). She describes her present position and experience as follows:

> I am the General Merchandise Manager, Cosmetics and Accessories, of the Applicant, Sears Canada Inc. ("Sears"). I have held this position since August 1, 2004. In my position, I am responsible for developing and managing Sears' Cosmetics and Accessories categories. Prior to this, I held the position of Shop Co-ordinator, Cosmetics at Sears from June 1999 to August 2004. Prior to this, I was a Buyer, Fragrances, at T. Eaton & Co. Ltd. from May 1998 to June 1999, and for the thirteen years prior to that, I held various positions at Quadrant Cosmetics, Sanofi Beaute / Parfums Stern, and Germaine Monteil / Revlon, all of which are cosmetics manufacturers or distributors.

THE SUPPLY

[5] For at least fourteen years, Dior has supplied Sears with Dior fragrances, make-up and skin care products (collectively the Dior Products). They are currently sold in 104 of Sears' 196 company-owed department stores. In the same period, Givenchy supplied Sears with Givenchy fragrances (the Givenchy Products) which are sold in 121 of Sears' 196 company stores.

[6] The Dior and Givenchy Products are included in an industry product category known as Prestige Fragrances and Cosmetics. Counsel for Sears indicated that Dior make-up and skin care products are one of the fifteen to twenty brands of Prestige Cosmetics sold in Sears stores. He derived this information from an analysis of the exhibits to the Wheatley Affidavit.

[7] The sale of the Dior and Givenchy Products generates revenues for Sears of approximately sixteen million dollars per annum. Sears' annual revenue from the sale of all its products exceeds six billion dollars.

THE REFUSAL TO SUPPLY

[8] In December 2006, Givenchy advised Sears that it could not supply the Givenchy Products because of "shipping" issues. Then on January 18, 2007, both Dior and Givenchy indicated that they would no longer be doing business with Sears. In a letter of January 24, 2007, counsel for the Respondents terminated the supply of the Dior and Givenchy Products to Sears effective March 24, 2007. However, by agreement during this proceeding, that date was extended to May 4, 2007.

[9] Sears speculates that the refusal to supply was prompted by the discounts it offered in December 2006 on all cosmetics products. The Dior and Givenchy Products were included.

FACTS NOT IN DISPUTE

[10] Revenues from the sale of the Dior and Givenchy Products represent an insignificant percentage **[CONFIDENTIAL]** % of Sears' overall sales and a modest percentage **[CONFIDENTIAL]** % of Sears total cosmetics business. The Dior and Givenchy Products with sales of $ **[CONFIDENTIAL]** and $ **[CONFIDENTIAL]** in 2006 ranked **[CONFIDENTIAL]** and **[CONFIDENTIAL]** respectively among cosmetic lines sold in Sears stores. The five top selling cosmetic lines had sales of **[CONFIDENTIAL]** in 2006.

[11] Sears has been losing market share to The Bay in Prestige Fragrances and Cosmetics over the past three years.

[12] In addition to Sears, London Drugs has also been refused supply of the Dior and Givenchy Products. This means that only The Bay, Holt Renfrew and Shoppers Drug Mart will continue to distribute the Dior and Givenchy Products in Canada. The status of Jean Coutu as a distributor is uncertain but it is probable that it has also been refused supply.

[13] The Dior and Givenchy Products have not traditionally competed on the basis of price with other brands of Prestige Fragrances and Cosmetics.

THE ISSUES

[14] The following are the issues:

1. What is Sears' business for the purpose of this application?
2. Is there reason to believe that Sears is directly and substantially affected in its business?
3. Is there reason to believe that an order could be made under subsection 75(1) of the Act?

Issue 1 – Sears' Business

[15] The relevant language in subsection 103.1(7) and paragraph 75(1)(*a*) and subsection 75(2) of the Act is highlighted below:

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 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.
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,	**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;
…	**…**
75. (2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated. [my emphasis]	**75.** (2) Pour l'application du présent article, n'est pas un produit distinct sur un marché donné l'article qui se distingue des autres articles de sa catégorie en raison uniquement de sa marque de commerce, de son nom de propriétaire ou d'une semblable particularité à moins que la position de cet article sur ce marché ne soit à ce point dominante qu'elle nuise sensiblement à la faculté d'une personne à exploiter une entreprise se rapportant à cette catégorie d'articles si elle n'a pas accès à l'article en question. [je souligne]

The cases

[16] Sears says that this application for leave is significant because it raises for the first time the question of how the Tribunal will approach the issue of a substantial effect on a multi-product business when the refused items impact only one sector or segment of the overall business. However, this issue is not new. It has already been considered in five cases: Chrysler, three Pharmacy cases and Construx Engineering.

[17] In *Director of Investigation & Research v. Chrysler Canada Ltd*., 27 C.P.R. (3d) 1, aff'd 38 C.P.R. (3d) 25 (F.C.A.), the Director of Investigation and Research applied for an order under section 75 of the Act. The Tribunal was required to consider the language of paragraph 75(1)(*a*) of the Act and determine whether Mr. Brunet had been substantially affected in his business by Chrysler's (the Respondent's) refusal to supply Chrysler auto parts. The Director argued that the business at issue was the sale of Chrysler auto parts. Chrysler said that Mr. Brunet's overall auto parts export business was the business at issue and not just the segment involving Chrysler parts and that this broader interpretation was mandated by the definition of "business" in subsection 2(1) of the Act.

[18] The Tribunal found that Chrysler's refusal to supply had caused losses of approximately $200,000 in sales and $30,000 in gross profits and that those losses were substantial for Mr. Brunet's small business. The Tribunal concluded as follows "A majority of the Tribunal agrees with the submission of the respondent that the effect on the entire activity of which the refused supplies are a part should be used." The Tribunal then said that the question of whether the refused product accounted for a large percentage of the overall business was the first issue to be addressed. The Tribunal concluded that Mr. Brunet's overall business had been substantially affected by Chrysler's refusal to supply its auto parts.

[19] The three Pharmacy cases are *1177057 Ontario Inc. (c.o.b. as Broadview Pharmacy) v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22, *Paradise Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21 and *Broadview Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 23. These cases involved applications for leave under subsection 103.1(7) of the Act. In each case, the Tribunal considered whether the withdrawal of certain brands of prescription drugs had had a direct and substantial effect on the applicants' businesses. In each case, the pharmacy sold products other than prescription drugs and, in each case, Blais J. considered the loss of the prescription drug sales in the context of the pharmacy's overall business.

[20] Finally, in *Construx Engineering Corporation v. General Motors of Canada*, 2005 Comp. Trib. 21, the applicant for leave was a wholesale dealer and broker of transportation products including automobiles. GM had refused supply. The only evidence before the Tribunal was that in 2003, the sale of GM vehicles represented 67% of Construx' sales of new motor vehicles. Leave under subsection 103.1(7) of the Act was refused because there was no evidence to show the impact of GM's refusal to supply cars on the whole enterprise.

[21] Based on this review, I have concluded that the Tribunal has consistently taken the position that a substantial effect on a business is measured in the context of the entire business.

The parties' submissions

[22] Sears' written representations do not include a description of Sears' business for the purpose of this application for leave. However, in his oral submissions, counsel for Sears said that, for the purpose of this application, Sears' business is the sale of the Dior and Givenchy Products.

[23] The Respondents say that Sears' business is the operation of department stores.

[24] The Wheatley Affidavit provides the evidence which was referred to in support of Sears' position. Carol Wheatley says that:

- Consumers of Prestige Fragrances and Cosmetics are intensely brand loyal and, if their preferred product is not available at Sears, they will seek it elsewhere.
- The Dior and Givenchy Products are unique and are "not" or "often not" interchangeable with other brands of Prestige Fragrances and Cosmetics.
- The Dior and Givenchy Products are the subject of heavy investment in research and development which results in innovative and unique products.
- Dior Givenchy Products are advertised as status symbols in association with their brand names.
- Along with other brands of Prestige Fragrances and Cosmetics, the Dior and Givenchy Products are distributed on a selective basis.
- The Dior and Givenchy Products compete with other brands of Prestige Fragrances and Cosmetics on the basis of service and advertising with celebrity endorsements rather than on price.

[25] In my view, this evidence is not helpful. It might be apt if used to argue that the Dior and Givenchy Products are "products" as that term is used in paragraph 75(1)(*a*) of the Act but it does not assist in reaching a conclusion about the breadth of Sears' business for the purpose of subsection 103.1(7) of the Act.

The Language of the Act

[26] As shown in paragraph 15 above, subsection 75(2) of the Act refers to a person carrying on business in a class of articles. It is therefore my view that, if Parliament had intended the substantial effect in subsection 103.1(7) and paragraph 75(1)(*a*) of the Act to be on a business in a class of articles such as the Dior and Givenchy Products, it would have said so.

Conclusion - Issue 1

[27] In my view, both the Tribunal's earlier decisions and the plain language used in the subsection lead to the conclusion that Sears' entire business as a department store retailer is the business under consideration for the purposes of subsection 103.1(7) of the Act.

Issue 2 – Substantial Effect

[28] Sears suggested that the French version of paragraph 75(1)(*a*) which uses the phrase "sensiblement gênée dans son entreprise" indicates that a substantial effect need not be a very significant or important effect.

[29] In this regard, Sears relied on a Larousse French English Dictionary at page 834 to show that "sensiblement" means "appreciably", "noticeably" and "markedly" (*Grand Dictionnaire Larousse Chambers, Anglais-Français Français-Anglais*, s.v. "sensiblement"). Further, it noted that according to Collins Robert French-English Dictionary at page 328, "gêner" as a verb means to "bother", "disturb" or "be in the way" (*Collins Robert French-English English French Dictionary*, 2nd ed., s.v. "gêner").

[30] It is a principle of statutory interpretation that bilingual legislation may be construed by determining the meaning shared by the two versions of the provision. The Harrap French-English Dictionary defines "sensiblement" as "appreciable; perceptible; obviously; to a considerable extent" and the word is defined in Le Petit Robert as "d'une manière appreciable" (see *Grand Harrap Dictionnaire français-anglais et anglais-français*, s.v. "sensiblement" and *Le Petit Robert*, s.v. "sensiblement").

[31] In my view, there is nothing in the French language version of paragraph 75(1)(*a*) that detracts from the notion that substantial in the English carries meanings such as important and significant. This is the meaning shared by the two versions and is the one which has already been confirmed by this Tribunal in *Chrysler* where it said that "important" was an acceptable synonym for substantial.

[32] Sears says that the substantial effect on its business is the combined impact of the following:

(i) $16,000,000 in lost sales
(ii) Loss of cross-segment sales
(iii) A negative impact on Sears' ability to negotiate with and attract other brands of Prestige Fragrances and Cosmetics
(iv) A negative impact on Sears' ability to compete with The Bay
(v) A negative impact on Sears' marketing strategy and reputation in the marketplace

I will deal with each in turn.

(i) Lost Sales

[33] As described above, the Dior and Givenchy Products generate revenues of $16 million. However, some of the lost sales will be recouped when customers switch to other brands of Prestige Fragrances and Cosmetics at Sears, so the $16 million figure is slightly high. The Wheatley Affidavit acknowledges this in paragraph 61(a) which says:

> First, Sears will lose a significant portion of the $16 million in annual sales revenue from these products, because only a fraction of the customers will select an alternate brand. The remaining sales revenue will simply be lost as customers look for that product elsewhere.

In my view, whether the figure is $16 million or something less, it is insignificant when considered in the context of Sears' $6 billion overall business.

(ii) Cross-Segment Sales

[34] Sears says that the Dior and Givenchy Products generate $14 million in sales of other products at Sears. However, this figure is difficult to assess because it is not clear what portion of the sales were made to customers who were motivated to go to Sears to purchase a Dior or Givenchy Product and then purchased something else. Sales of that kind would be relevant as the Wheatley Affidavit acknowledges. However, sales to customers who went to Sears for other products and happened to purchase a Dior or Givenchy Product would not count as relevant cross-segment sales. Since the value of such sales is not in the evidence, the cross-segment sales figure of $14 million must be discounted by an unknown amount. Whatever that amount may be it will not, even when combined with lost sales, be substantial in the context of Sears' entire business.

(iii) Dealings with other Brands

[35] Sears says that it will suffer harm because the bargaining position and negotiating power of other brands of Prestige Fragrances and Cosmetics will be improved if Sears no longer carries the Dior and Givenchy Products. The Wheatley Affidavit states this as a fact but in my view it is mere speculation because there is no discussion that shows that it is based on the deponent's experience or on comments made by personnel who work for other brands. For this reason, I have given this assertion of alleged harm little weight.

(iv) Competition with The Bay

[36] The Wheatley Affidavit shows that Sears has lost market share in Prestige Fragrances and Cosmetics in the last three years. It decreased from 26.3% in 2004 to 23.5% in 2005 and to 23.0% in 2006. The concern is that the loss of the Dior and Givenchy Products will contribute to a continuation of the trend. As the loyal Dior and Givenchy customers are lost, Sears says they will be lost principally to The Bay and, while there is no evidence quantifying this effect, I accept Sears' submission.

(v) Sears Marketing

[37] Sears treats Prestige Fragrances and Cosmetics and Accessories as one of six destination categories in its department stores. The Wheatley Affidavit indicates that Sears must have the Dior and Givenchy Products to convey the message to the market that this destination is credible. Sears says that its reputation and market image will suffer if it does not carry a full range of Prestige Fragrances and Cosmetics. I accept that this could be true to some degree.

[38] Sears also uses Dior as the "central magnet" in its Toronto Eaton Centre and Vancouver Pacific Centre flagship stores. The evidence shows that Dior's display is one of the first things customers see when they use one of the ground floor entrances to the stores. As well, in the Calgary store and Rideau Centre store in Ottawa, Dior has branded displays in key locations. Sears estimates that it will cost $600,000 to remove and replace the Dior displays. However, the Respondents have said in paragraph 11 of their written representations that they are willing to cover reasonable costs associated with the removal or renovation of any related displays or shelving units.

Conclusion – Issue 2

[39] I have concluded that, when taken together, these submissions show that Sears will be directly affected by the Respondents' refusal to supply the Dior and Givenchy Products, but that the effect on Sears' department store business will not be substantial.

[40] Accordingly, applying the test for leave approved by the Federal Court of Appeal in *Symbol Technologies ULC v. Barcode Systems Inc.*, [2004] F.C.A. 339 at paragraph 16, I am not satisfied that Sears has provided sufficient credible evidence to give rise to a *bona fide* belief that it may have been directly and substantially affected in its business by the Respondents' refusal to supply the Dior and Givenchy Products.

Issue 3 – A section 75 order

[41] In view of the previous conclusion, it is not necessary to consider whether the Tribunal could make an order under paragraphs 75(1)(*a*-*e*) of the Act.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[42] The application for leave is hereby dismissed with costs.

DATED at Ottawa, this 23th day of March, 2007

SIGNED on behalf of the Tribunal by the Chairperson of the Tribunal.

(s) Sandra J. Simpson

APPEARANCES:

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