

Competition Tribunal File No. CT-2007-002

**COMPETITION TRIBUNAL**

BETWEEN:

LONDON DRUGS LIMITED

APPLICANT

AND:

PARFUMS GIVENCHY CANADA LTD.

RESPONDENT

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**WRITTEN REPRESENTATIONS OF THE APPLICANT**  
(Application for Section 103.1 Leave)

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March 8, 2007

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GCA/1505817

<b>COMPETITION TRIBUNAL</b> <b>TRIBUNAL DE LA CONCURRENCE</b>	
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**PART I - OVERVIEW**

1. This application is brought by London Drugs Limited ("London Drugs") for leave to apply under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") for an order requiring Parfums Givenchy Canada Ltd. ("Givenchy") to continue to supply products to London Drugs as they have for the past eleven years. If leave is granted, London Drugs will also seek an interim order requiring Givenchy to continue supplying products pending the return of the section 75 application.
2. Givenchy supplies "prestige" fragrances. Prestige fragrances are not freely available in the marketplace. Givenchy only distributes its fragrances in Canada through a select number of department stores and drug stores. Until December 2006, there were three drug stores and that number has been reduced to one. At the same time, prestige fragrances are not interchangeable; if customers cannot purchase the fragrance they want from any particular store, they simply look elsewhere.
3. In November and December 2006, Givenchy stopped supplying its products to London Drugs. In January 2007, Givenchy confirmed that its decision.
4. The effect of Givenchy's refusal to deal is effectively to confer a monopoly in the drug store channel for its products. This rationalization strategy will effectively eliminate competition in the Canadian marketplace for Givenchy fragrances. It will also have a substantial effect in competition in the marketplace between retailers in this market.
5. The requirements of section 103.1 are met in this case. London Drugs has adduced credible evidence giving rise to a *bona fide* belief that there has been a reviewable practice that could be the subject of a section 75 order. In particular, there is good reason to believe that:
  - (a) London Drugs will be substantially affected in its business by Givenchy's refusal to deal, through the loss of the revenue generated from the sales of Givenchy products and the permanent loss of customers and market share;
  - (b) it is impossible for London Drugs to acquire adequate supplies of Givenchy fragrances from parallel imports or elsewhere, and other suppliers do not supply substitutable products;

- (c) London Drugs is willing and able to meet the usual, lawful trade terms of Givenchy;
- (d) Givenchy fragrances are in ample supply; and
- (e) the refusal to deal will have an adverse effect on competition in the market.

## **PART II - THE FACTS**

### **A. LONDON DRUGS**

6. London Drugs is a privately-held company which was founded in 1945, and is part of a group of companies founded 103 years ago. It has sixty-four stores in four provinces (British Columbia, Alberta, Saskatchewan and Manitoba) and employs approximately 7,000 people. In addition, since 2003, London Drugs has sold its products on its web-site [www.londondrugs.com](http://www.londondrugs.com).

*Affidavit of Jeanie Lee sworn on March 8, 2007 ("Lee Affidavit"), paras. 4 and 5*

7. London Drugs was established as a traditional pharmacy. However, its stores carry a wide variety of products, including cosmetic and beauty products, pharmaceutical products, photographic products and development services, housewares and hardwares, automotive products, food, hi-tech and electronic equipment, audio visual equipment, computers, stationery, books and health and beauty aids.

*Lee Affidavit, para. 6*

8. London Drugs is the leading retailer of cosmetics and beauty products in the provinces in which it operates. In the western region, London Drugs is the leading retailer of cosmetics and fragrances as a whole, with 58.5% of consumers shopping at London Drugs. In Vancouver, 70.5% of consumers shop at London drugs, with 49.3% in Edmonton and 42% in Calgary.

*Lee Affidavit, para. 7 and Exhibit "A"*

**B. GIVENCHY**

9. Givenchy is a supplier of women's and men's fragrance, and is the only authorized supplier of Givenchy products in Canada. Until December 2006, Givenchy distributed its products in Canada to London Drugs, Shoppers Drug Mart and Jean Coutu, in the drug store channel, and Sears, The Bay and Holt Renfrew, in the department store channel.

*Lee Affidavit, paras. 8, 9 and Exhibit "B"*

**C. THE BEAUTY MARKET IN CANADA**

10. The cosmetics and beauty products industry in Canada is a US\$1.1 billion per year industry. Retail sales have increased by approximately one percent per year, and are expected to increase by 3.9% per year.

*Lee Affidavit, paras 10, 11 and Exhibits "C" and "D"*

**D. THE PRESTIGE FRAGRANCE MARKET IN CANADA**

11. Certain fragrances are known as "prestige" fragrances. Such fragrances include Armani, Givenchy, Christian Dior, Calvin Klein, Chanel, Estee Lauder and Clinique. Eighteen suppliers, including Givenchy, occupy 73% of the market in women's prestige fragrances. Of those eighteen, there is no clear market leader. Givenchy holds between three and four percent of the total market share.

*Lee Affidavit, paras 12, 13 and Exhibit "E"*

12. The prestige fragrance market is an unusual market, with each fragrance constituting its own market. Competition in the prestige fragrance market is unusual, and limited, for the following reasons:

- (a) The market is not interchangeable. Customers tend to have a personal, emotional attachment to a particular fragrance. A customer will come to a store to purchase a particular fragrance and if the store does not stock that particular fragrance, the customer will leave and go elsewhere. Even gifts may not be enough to entice a customer to a store. The customer will choose the fragrance, and then choose the store from which to purchase the fragrance.

(b) Purchasers of prestige fragrances tend to be product-driven. The fragrance represents a status symbol and purchasers will buy a particular fragrance because of its status. Many prestige fragrance suppliers tend to rely on advertising campaigns and celebrities to promote their fragrances, which generates a huge demand for that market. For instance, Liv Tyler promotes Givenchy's Very Irresistible fragrance, which has greatly improved the profile of that fragrance. At London Drugs, that endorsement made the fragrance one of the most successful promotional introduction of a fragrance.

(c) In Canada, prestige fragrances tend to be distributed on a selective basis, through a limited number of department stores and drug stores. This practice also occurs outside Canada.

(d) In terms of distribution, it is also important for suppliers and authorized distributors that a store also carry prestige fragrances from other suppliers and authorized distributors. The suppliers and authorized distributors tend not to supply product to a store if there are few or no other prestige fragrances sold at that store. Consequently, if a retailer wants to build its prestige fragrance markets, it must attract and maintain a range of prestige fragrances. One of the first questions a potential supplier or authorized distributor will ask is which other fragrances are in the stores.

(e) Customers also expect a store to carry other prestige fragrances. Customers prefer to purchase from a retailer which stocks a wide selection of prestige fragrances. Customers will not purchase from stores with a limited selection.

(f) Suppliers and authorized distributors play a large role in determining the end price of the product and they usually do not permit variations in pricing. Discounting is discouraged. This practice also carries on outside Canada.

*Lee Affidavit, para 14 and Exhibits "F" and "G"*

13. As a result of the foregoing factors, each supplier and authorized distributor of prestige fragrances represents its own market and it is extremely difficult to replace that market.

*Lee Affidavit, para 15*

14. Traditionally, prestige fragrances have been sold in department stores. In 1992, London Drugs became the first drug store to enter into a direct relationship with a prestige fragrance

supplier, which was Calvin Klein. The retail landscape for prestige fragrances changed again in the 1990s, with the demise of Eaton's. London Drugs was approached by other suppliers and authorized distributors, and increased its representation of prestige fragrances.

*Lee Affidavit, para 16*

15. At the same time, suppliers and authorized distributors realized the benefits of dealing directly with drug stores, as opposed to the department stores. Drug stores offer better customer service than department stores. In addition, in department stores, suppliers and authorized distributors often subsidize the salaries of staff employed at the beauty counters. By contrast, drug stores do not receive staff subsidies.

*Lee Affidavit, para 17*

#### **E. SALE OF PRESTIGE FRAGRANCES BY LONDON DRUGS**

16. In its stores, London Drugs showcases its cosmetics and prestige fragrances. In each of London Drugs' store, the brand logos of each prestige fragrance are prominently displayed, both inside and outside the store. Inside the store, London Drugs will display the brand logo on London Drugs' installations in its beauty department. For instance, brand logos appear on the high quality, custom made cabinet in which the product is placed. Outside the store, London Drugs will use the manufacturer's imagery, often in large, billboard-style displays. London Drugs also advertises its prestige fragrances regularly in its flyers and catalogues.

*Lee Affidavit, para 18*

17. London Drugs' strategy is to make London Drugs a destination for consumers of cosmetics and beauty products. London Drugs wants to attract a customer who likes prestige products, not just fragrance and beauty products but also other types of products, such as electronics. As an example, London Drugs sells high end, home theatre systems at prices of up to \$30,000.

*Lee Affidavit, para 19*

18. Consequently, it is important for London Drugs to build and maintain its prestige brands. Starting in 1999, London Drugs made a major investment to remodel its stores to create destination areas for cosmetic and beauty products. In 2006, London Drugs refreshed its

concept, at further cost. London Drugs is currently launching this latest improvement in all of its stores. The process of introducing and refreshing the destination concept into London Drugs' stores has required a significant investment on the part of London Drugs.

*Lee Affidavit, para 20 and Exhibit "H"*

19. The key underpinning of London Drugs' strategy to make its stores a destination for cosmetic and beauty products, is to have the right mix of product and, in particular, to have a range of prestige brands.

*Lee Affidavit, para 21*

20. Purchasers of prestige fragrances are important to London Drugs also because of their willingness to buy other products while at London Drugs. Although it is difficult to quantify exactly, London Drugs' research and experience is that the purchaser of a prestige fragrance is also likely to buy other products, such as iPods and lipstick. For instance, a man buying a plasma television may also purchase his wife a gift of fragrance at the same time.

*Lee Affidavit, para 22*

#### **F. LONDON DRUGS' RELATIONSHIP WITH GIVENCHY**

21. London Drugs has had a direct distribution agreement with Givenchy since August 1996. Prior to that time, London Drugs purchased its Givenchy fragrances through parallel imports.

*Lee Affidavit, para 23 and Exhibit "I"*

22. London Drugs carries seventeen stock-keeping units ("SKUs") of Givenchy fragrances, which represents most of Givenchy's line. London Drugs sells Givenchy products in all of its sixty-four stores and showcases Givenchy products on London Drugs' website. At all times, London Drugs has made full efforts to support Givenchy products in London Drugs' stores.

*Lee Affidavit, para 25 and Exhibit "J"*

23. Included in the range of Givenchy products were fragrances of varying strengths, body lotions, shower gels, soaps, deodorants, gift sets and limited editions. Limited editions are important because they create a "newness" which attracts customers. Customers will buy their

regular fragrance, but will also purchase a limited edition of that fragrance along with their regular purchase.

*Lee Affidavit, para 26*

24. London Drugs is required to adhere and has adhered to Givenchy's usual trade terms, which includes not only the price paid by London Drugs to Givenchy for the product, but also the price which London Drugs may set for the sale of the Givenchy products in its stores. Givenchy typically sets the price London Drugs may charge, and sets any increases in that price. London Drugs also negotiated co-operative advertising amounts and negotiated support by means of in-store displays, samples for customers and customer education. London Drugs received a three percent commission on sales of Givenchy products and received advertising support.

*Lee Affidavit, para 27*

25. In each of London Drugs' stores, the Givenchy brand logo is prominently displayed. Givenchy has prime showcases in London Drugs' stores, in the highest traffic areas. London Drugs takes pride in its marketing of Givenchy products: the products are well displayed and always in pristine condition. London Drugs ensures that the area is well staffed, to offer optimal customer service.

*Lee Affidavit, para 28*

26. London Drugs has also advertised Givenchy products on the outside of its stores. For instance, in the Fall of 2006, Givenchy launched a new fragrance, Ange ou Demon. The fragrance was heavily advertised by London Drugs. The advertising included in-store demonstrations, large, billboard-type advertising outside the stores and a prominent position in London Drugs' catalogue, issued at the beginning of December.

*Lee Affidavit, para 29 and Exhibit "K"*

27. London Drugs ordered Givenchy fragrances by submitting purchase orders. Since July 5, 2004, those orders are transmitted electronically. Before 2004, each store would submit its own purchase orders; however, since then, London Drugs has moved to a centralized system of ordering. Through the order sheets, Givenchy would give notice of any price increases.

*Lee Affidavit, para 30*



28. On occasion, London Drugs has questioned the pricing policy of Givenchy, when London Drugs became aware that Shoppers Drug Mart was selling Givenchy products at a discount. Givenchy's then responded Shoppers Drug Mart were selling grey market products, which were probably old or even counterfeit. The representative stated that it would not be appropriate for London Drugs to offer a discount because it was selling the real product.

*Lee Affidavit, para 31*

29. Givenchy is a very important part of London Drugs' retail strategy. For the 2006 calendar year, Givenchy represented sales of \$852,975, and that amount would have been higher but for the fact that Givenchy cut its supply to London Drugs in late November. If Givenchy had met the supply requested by London Drugs, the sales would have been approximately \$1.2 million to \$1.3 million. Sales in November and December account for forty percent of fragrance sales in any given year.

*Lee Affidavit, para 32 and Exhibit "L"*

30. As with the general prestige fragrance market, London Drugs' sales of Givenchy products encourages other suppliers and authorized distributors of prestige fragrances to continue with London Drugs. In addition, London Drugs benefits from the cross-shopping done at London Drugs by its Givenchy customers.

*Lee Affidavit, para 33*

#### **G. GIVENCHY'S REFUSAL TO DEAL**

31. Prior to December 2006, London Drugs had a very good relationship with Givenchy's representative, Steven Lynch. In particular, London Drugs had worked very closely with Givenchy to promote its new fragrance, Ange ou Demon. London Drugs has worked together with Givenchy on co-operative advertising and in-store visual displays.

*Lee Affidavit, para 34*

32. In late November 2006, London Drugs began experiencing difficulty receiving product from Givenchy. Givenchy stopped filling the purchase orders submitted by London Drugs. Givenchy's representative explained that there was a general shortage of the Ange ou Demon

product, because Givenchy had underestimated how well that fragrance would sell, but he did not explain the shortages of other products.

*Lee Affidavit, para 35*

33. In December 2006, Givenchy stopped supplying its products to London Drugs altogether. Two purchase orders issued were not filled and no explanation was given.

*Lee Affidavit, para 36 and Exhibits "M" and "N"*

34. On January 10, 2006, Givenchy set up a meeting with London Drugs "to review the business and the future direction for Givenchy in Canada".

*Lee Affidavit, para 38 and Exhibit "O"*

35. On January 18, 2007, Givenchy confirmed at a meeting that Givenchy was going to stop supplying product to London Drugs and Givenchy would work to assist London Drugs with the "transition of the business". Givenchy confirmed it would continue to supply product to Shoppers Drug Mart, which would mean that Shoppers Drug Mart would be the only drug store to carry Givenchy products.

*Lee Affidavit, para 39*

36. On or about January 24, 2007, Givenchy confirmed its decision in a letter from Robert Kwinter of Blakes, Cassels & Graydon LLP, counsel to Givenchy. That letter is marked "without prejudice" and contained a warning to London Drugs that Givenchy would take legal action against London Drugs if London Drugs attempted to purchase Givenchy products on the "grey market", to replace the lost supply.

*Lee Affidavit, para 41*

37. Other than the meeting with Ms. Donohue and the letter received from Mr. Kwinter, London Drugs has received no verbal or written communication regarding Givenchy's decision, its explanation for the decision or even to discuss any ongoing or future issues.

*Lee Affidavit, para 42*

38. Givenchy has terminated its supply relationship with Sears and has either terminated or threatened to terminate Jean Coutu's supply. As a result, Givenchy will be distributing its fragrances to only one drug store, Shoppers Drug Mart.

*Lee Affidavit, para 43*

#### **H. HARM TO LONDON DRUGS**

39. Givenchy's refusal to supply product to London Drugs has caused and will in the future cause a great deal of harm to London Drugs. London Drugs could not and cannot meet the demand for Givenchy products. First, with respect to the Ange ou Demon fragrance, London Drugs could not meet the demand which had been generated by the intensive promotion London Drugs had done for that product.

*Lee Affidavit, para 44*

40. Second, the last two months of the year account for approximately forty percent of London Drugs' sales of fragrance. Being without Givenchy fragrances at that time resulted in a loss of sales of around \$500,000 for the two month period.

*Lee Affidavit, para 45*

41. Currently, London Drugs has minimal inventory of Givenchy products. The value left is around \$150,000, and given current sales trends at London Drugs, Givenchy products will be sold out within two weeks. London Drugs' sales for Givenchy products for 2007 are sixty-four percent lower compared with the same period last year. London Drugs has already lost approximately \$100,000 in sales for the year to date calendar 2007. In addition, London Drugs has no stock for its next major push for sales, Mother's Day. If London Drugs does not have the Givenchy fragrances, it will lose those customers. Those customers will not switch to another fragrance. The loss of customers will also affect sales of other products which are tied in with Mother's Day, such as cards, chocolates and other beauty products. In January 2007, London Drugs set its advertising programme for Mother's Day, which focussed on Givenchy products.

*Lee Affidavit, para 46, 47 and 48 and Exhibit "Q"*

42. The loss of product means that London Drugs showcases are empty of Givenchy products. Having empty showcases in a high traffic area sends an extremely negative message to London Drugs customers.

*Lee Affidavit, para 49*

43. London Drugs plans to open two new stores on March 20, 2007 and May 15, 2007. Those stores are destination stores for beauty products and London Drugs has allocated space and fixtures for Givenchy fragrances. London Drugs has no Givenchy product for those stores.

*Lee Affidavit, para 50*

44. With no Givenchy fragrances, London Drugs' Givenchy customers will go elsewhere, likely to Shoppers Drug Mart. Shoppers Drug Mart will be the only drug store to carry Givenchy fragrances and will, therefore, have a monopoly in London Drugs' market (the drug store channel).

*Lee Affidavit, para 51*

45. Other prestige fragrances will be affected. A key to being a retailer of prestige fragrances is being accepted by other prestige fragrance suppliers and authorized distributors. Suppliers and authorized distributors are very fickle and will only distribute to a retailer if the other suppliers and authorized distributors in that product category are doing so.

*Lee Affidavit, para 52*

46. Givenchy's refusal to deal with London Drugs will cause irreparable harm to London Drugs in the following ways:

(a) London Drugs will lose its entire Givenchy market, which is worth a minimum of \$1.2 million or \$1.3 million in direct sales and much more in cross-shopping sales. Customers will not purchase an alternate fragrance, but will look for the products elsewhere. Givenchy customers will go elsewhere and London Drugs will lose that business irretrievably. London Drugs will suffer through the permanent loss of its Givenchy customers.

(b) London Drugs' market share will be involuntarily shifted to Shoppers Drug Mart, given that the London Drugs' supply of Givenchy products is cut-off. This, in turn, will

create a monopoly situation in the drug store channel for Givenchy products. London Drugs is concerned that other suppliers and authorized distributors will follow suit. Ultimately customers will not have choices in retail selection in the drug store channel other than Shoppers Drug Mart.

*Lee Affidavit, para 53*

47. In addition, London Drugs will suffer additional irreparable harm as follows:
- (a) London Drugs will lose sales from the cross-segment shopping that originates with Givenchy products.
  - (b) London Drugs will suffer harm with other suppliers of cosmetics and fragrances. For example, such suppliers may view London Drugs as being at a disadvantage and try to extract more concessions from London Drugs. Also, other suppliers and authorized distributors may not supply to London Drugs because London Drugs may be seen as being unable to attract customers of prestige fragrances.
  - (c) London Drugs will have diminished negotiating capabilities in terms of attracting new products, because of the negative stigma associated with losing the Givenchy market. London Drugs will face difficulty keeping existing products and attracting new brands.
  - (d) London Drugs will also suffer a stigma among its customers, who will have a lower impression of London Drugs because it does not carry Givenchy products. London Drugs' reputation and market image will suffer. It is essential to London Drugs' strategy of being a destination for cosmetic and beauty products that it carry a full range of prestige fragrances. It will lack credibility with customers if well-known prestige fragrances, such as Givenchy, are missing.

*Lee Affidavit, para 54*

48. The losses that will be suffered by London Drugs cannot be quantified in damages.

*Lee Affidavit, para 55*

49. While it is possible to turn to parallel imports to restock Givenchy fragrances, Givenchy has threatened to pursue legal action against London Drugs if it purchases Givenchy fragrances

through parallel imports. Givenchy wants to prevent London Drugs from selling Givenchy fragrances altogether, with the consequent loss of those customers. Givenchy has created a monopoly in the drug store channel.

*Lee Affidavit, para 56*

50. It is also unrealistic to suggest that London Drugs could replace the Givenchy fragrances with another, similar line. Given customer loyalty and lack of substitution within the prestige fragrance market generally, even obtaining a new brand would not replace the Givenchy market.

*Lee Affidavit, para 57*

51. London Drugs has met the trade terms set by Givenchy for the past eleven years. London Drugs is willing to meet the usual, lawful trade terms set by Givenchy. Givenchy products are not in short supply in the retailers who continue to sell the products.

*Lee Affidavit, para 58*

### **PART III - LAW AND ARGUMENT**

#### **London Drugs Should be Granted Leave to Bring an Application under Section 75(1) of the Act**

52. Section 103.1 (7) establishes the requirements for granting leave:

(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.

*Competition Act, R.S.C. 1985, c. C-34, s. 103.1(1) and 7.*

53. Section 75 of the *Competition Act* states:

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.

**When article is a separate product**

(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.

*Competition Act*, R.S.C. 1985, c. C-34, s. 75.

54. The purpose of section 75 is to “maintain and encourage competition in Canada in order to ... provide consumers with competitive prices and product choices”.

*Competition Act*, R.S.C. 1985, c. C-34, s. 1.1

*Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] F.C.J. No. 1657 (C.A.) at para. 14

55. The threshold for an applicant obtaining leave is “not a difficult one to meet”. *National Capital News Canada v. Canada (Speaker House of Commons)* establishes the applicable standard for leave under section 103.1(7):

...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. [emphasis added]

*National Capital News Canada v. Canada (Speaker House of Commons)* (2002), 23 C.P.R. (4<sup>th</sup>) 77 (Comp. Trib.) at para. 14.

*Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] F.C.J. No. 1657 (C.A.) at para. 16-17.

56. The applicant “need only provide sufficient credible evidence of what is alleged to give rise to a bona fide belief by the Tribunal”, which is a lower standard than proof on a balance of probabilities.

*Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] F.C.J. No. 1657 (C.A.) at para. 17.

57. Consequently, the Tribunal must consider whether there is credible evidence to find that each of the elements in section 75(1) could be met. The Tribunal may address “each element summarily in keeping with the expeditious nature of the leave proceeding under section 103.1”.

*Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] F.C.J. No. 1657 (C.A.) at para. 19.

*(a) There is Reason to Believe that London Drugs is Substantially Affected by the Failure to Deal*

58. The first prong of section 75(1)(a) requires the Tribunal to consider whether there is reason to believe that the Applicant’s business “is substantially affected” from its inability to obtain the product anywhere in the market. The ultimate test concerns the effect on the business of the person refused supplies. What constitutes the “market” will depend on the context of each case.

*B-Filer Inc. v. Bank of Nova Scotia*, 2006 Comp. Trib. 42 at paras. 75-76, 79



*Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Comp. Trib.) at 10.

59. London Drugs submits that its market is the sale of Givenchy prestige fragrances in the Drug store channel.

60. "Product" is defined with reference to the consumer – what do the customers demand and are substitutes acceptable to them. The availability of and acceptance of substitutes is "of paramount importance in arriving at the appropriate definition of product". The determination of the relevant product "carries with it an identification of the relevant product market."

*Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Comp. Trib.) at 9 (QL).

*Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Comp. Trib.) at para. 52.

61. A product can be defined in terms of a particular brand, such as "Chrysler auto parts", in *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.*; "Harley-Davidson motorcycles related products and services" in *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*; and La-Z-Boy furniture in *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*

*Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Comp. Trib.) at 9 (QL).

*Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, [2004] C.C.T.D. No. 15.

*Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, (2004), 29 C.P.R. (4<sup>th</sup>) 559 (Comp. Trib.).

62. When looking at the effect of the refusal to deal, the Tribunal will consider factors such as whether the product is easily replaced by other products and whether the product is sold in conjunction with other products such that the effect on the business goes beyond the loss of sales of the product. The effect must be "substantial" or something "just beyond de minimis".

*Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Comp. Trib.) at 14 (QL).

*Paradise Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, [2004] C.C.T.D. No. 22 (Comp. Trib.) at para. 21.

63. There is reason to believe that London Drugs will be substantially affected by its inability to obtain adequate supply of Givenchy products from Givenchy (who is the only supplier of Givenchy products). Customers buy Givenchy products because of their unique attributes and the status associated with using these products. There are no acceptable substitutes in the minds of customers. Consequently, London Drugs submits that the product is Givenchy fragrances and related products.

64. As a result of Givenchy's refusal to deal, London Drugs will lose its entire Givenchy market, which is worth a minimum of \$1.2 million or \$1.3 million in direct sales and much more in cross-shopping sales. Customers will not purchase an alternate, available fragrance, but will look for the products elsewhere. London Drugs will suffer through the permanent loss of its Givenchy customers. In particular, London Drugs will lose its Givenchy market to a competitor, Shoppers Drug Mart, which will have a monopoly. London Drugs will have to modify its marketing strategy and change over its cosmetics and accessories destination in each store. London Drugs' reputation in the market will suffer and it will be in a vulnerable negotiating position with respect to other fragrance suppliers.

*(b) There is Reason to Believe that London Drugs is Unable to Obtain Adequate Supply*

65. There are two elements to the requirement to demonstrate that there is reason to believe that the applicant "is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market": first, there is insufficient competition among suppliers of the product; and, second, the inability of the applicant to obtain adequate supplies of the product results from that insufficient competition.

*Competition Act*, R.S.C. 1985, c. C-34, s. 75(1)(b).

*B-Filer Inc. v. Bank of Nova Scotia*, 2006 Comp. Trib. 42 at para. 145

66. There is reason to believe that London Drugs cannot obtain adequate supply of products because of insufficient competition in the market:

- (a) In Canada, there is only one authorised supplier of Givenchy fragrance, Givenchy, which has refused to supply to London Drugs.

(b) The wider market for prestige fragrances is not interchangeable. Customers who cannot purchase Givenchy fragrances will not switch to another fragrance. They will simply go elsewhere.

(c) Givenchy has threatened to pursue legal action against Givenchy if London Drugs obtains Givenchy products through the grey market.

(d) Market conditions are such that London Drugs cannot obtain a “similar” array of fragrances and cosmetics from another supplier.

Therefore, without Givenchy being willing to supply London Drugs, London Drugs cannot obtain adequate supply of Givenchy products.

*(c) There is Reason to Believe that London Drugs is Willing and Able to Meet the Usual Trade Terms*

67. London Drugs is willing and able to meet the usual, lawful trade terms.

*(d) There is Reason to Believe that The Product is in Ample Supply*

68. Section 75(1)(d) requires the applicant to establish that the “product is in ample supply”. This means that the product is “readily available and unencumbered in the sense that it has not been sold or promised to another purchaser”.

*Quinlan’s of Huntsville Inc. v. Fred Deeley Imports Ltd.,*  
(2004), 35 C.P.R. (4<sup>th</sup>) 517 (Comp. Trib.) paras. 91, 22.

69. Givenchy products are in ample supply. London Drugs’ competitors are continuing to receive inventory and there has been no indication by Givenchy that they are having supply issues.

*(e) There is Reason to Believe that the Refusal to Deal is Likely to have an Adverse Effect on Competition*

70. At the leave stage, the threshold for section 75(1)(e) is low. There only needs to be some evidence adduced by the applicant and some consideration (summarily) by the Tribunal of the effect of the refusal to deal on competition in a market. The evidence need not be strong and the benefit of the doubt should be given to the applicant:

If there are facts in [the applicant's] affidavit that might meet the requirements of paragraph 75(1)(e), the benefit of doubt should work in favour of granting leave in order not to finally preclude [the applicant] from its day before the Tribunal.

[...]

The evidence may not be strong but I think it is sufficient to constitute reasonable grounds to believe that Symbol's refusal to deal could be the subject of an order under subsection 75(1).

*Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] F.C.J. No. 1657 (C.A.) at para. 23, 27, 29.

71. London Drugs submits that at this stage it does not need to *satisfy* section 75(1)(e), but rather, it must adduce evidence that the section could be engaged. In that regard, London Drugs submits that there is sufficient evidence of the adverse effect on a market. In particular, there will be no competition among retailers in the drug store channel selling Givenchy products. London Drugs will not be able to effectively compete with Shoppers Drug Mart in this market if it does not maintain Givenchy as a supplier. Further adverse effects on competition in the market will be adduced at the section 75 hearing if leave is granted.

72. Further, in considering section 75(1)(e) in this application for leave, three factors should be considered. First, in passing section 75(1)(e), Parliament did *not* use the familiar terms "substantial lessening or prevention of competition" or "to lessen competition unduly", found elsewhere in the *Act*. Instead, Parliament adopted new language: "adversely affected". Also, Parliament did *not* use the phrase "the market" (as in section 45) or "the relevant market for the product" (as in section 55(2)), or the "relevant geographic market" (as in section 74.01(3) and subparagraph 74.1(5)(a)), or "the market in which the person carries on business" (as in section 74.04(2)). Therefore, concepts of market definition and anti-competitive effects drawn from other areas of the *Act* may not be applicable to what Parliament has clearly intended to be a different, and London Drugs would submit, lower threshold than "substantial" or "unduly" lessening of competition in the market. It is entirely open to the Tribunal, for example, to find that "a market" could mean a "geographic market" (like subsections 74.01(3) and 74.1(5)(a)) for Givenchy products, without reference to competitors of Givenchy at all.

*Competition Act*, R.S.C. 1985, c. C-34, ss. 31, 45, 50, 55, 74.01, 74.1, 77, 79, 86, 92, 93, 95, 96, 99, 116.

*B-Filer Inc. v. Bank of Nova Scotia*, 2006 Comp. Trib. 42 at para. 211.

73. Second, the phrase “adverse effect on competition in a market” should be considered in light of the context of section 75 itself: in statutes, “words, like people, take their colour from their surroundings”. Section 75 is concerned with the refusal to supply a particular product to a particular party. It is unlikely that an entire industry would act in concert to refuse to supply products to an individual. Therefore, in almost every case, it will be a single manufacturer refusing to supply products to a single retailer, and it is reasonable (certainly at the leave stage) for the Tribunal to consider what the adverse effect will be for the “market” for those individual products, without going further to a macro-economic analysis of the effect on the economy or the industry as a whole.

*Bell Express Vu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 27.

*B-Filer Inc. v. Bank of Nova Scotia*, 2006 Comp. Trib. 42 at para. 213.

74. Third, when considering the adverse effect on “competition in a market”, it should also be noted that the *Act* is not solely concerned with macro-economic market effects. Many parts of the *Act*, and London Drugs submits that section 75 should be included, can look at the market effects of an *individual* supplier and the products distributed by that individual supplier. For example, section 61 prohibits price maintenance with respect to a product, whether or not that price maintenance has a macro-economic effect. The price discrimination provisions in section 50 can be engaged without macro-economic effects. Similarly, London Drugs submits that section 75(1)(e) can and should be engaged where the “market” that is adversely affected is the market for Givenchy products.

*Competition Act*, R.S.C. 1985, c. C-34, ss. 50, 61, 75(1)(e).

75. Moreover, London Drugs submits that subsection 75(2) expressly contemplates a market for an individual product “differentiated from other articles in its class”. Where a product has a separate trademark or proprietary name, and that article occupies a dominant position in the market, the Tribunal may consider the anti-competitive effect of the refusal to supply on the market for that product. Here, London Drugs has adduced credible evidence to show that

Givenchy products are differentiated not just by their name, but by their intrinsic and non-substitutable qualities.

*Competition Act*, R.S.C. 1985, c. C-34, s. 75(2).

76. London Drugs submits that this is a proper case for the Tribunal to engage the novel questions of “adverse effect” and the market definition provisions of section 75. London Drugs has provided sufficient credible evidence to give rise to a *bona fide* belief that is directly and substantially affected in its business by a reviewable practice and that the practice in question could be subject to an order under section 75. Accordingly, London Drugs should be granted leave to bring an application under section 75 of the *Act*.

#### **PART IV - ORDER SOUGHT**

77. London Drugs requests that the Tribunal grant leave pursuant to section 103.1 of the *Competition Act* to make an application for an order under section 75 that Givenchy accept London Drugs as a customer on the usual, lawful trade terms.

DATED at Vancouver, British Columbia, this 8<sup>th</sup> day of March, 2007.



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**Schedule "A" List of Authorities**

1. *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.* (2004), 29 C.P.R. (4<sup>th</sup>) 559 (Comp. Trib.).
2. *B-Filer Inc. v. Bank of Nova Scotia*, 2006 Comp. Trib. 42.
3. *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] F.C.J. No. 1657 (C.A.).
4. *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559.
5. *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Comp. Trib.).
6. *Canada (Director of Investigation and Research) v. Hillstown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.).
7. *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Comp. Trib.).
8. *National Capital News Canada v. Canada (Speaker House of Commons)* (2002), 23 C.P.R. (4<sup>th</sup>) 77 (Comp. Trib.).
9. *Paradise Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, [2004] C.C.T.D. No. 22 (Comp. Trib.).
10. *Quinlan's of Huntsville Inc. v. Fed Deeley Imports Ltd.*, [2004] C.C.T.D. No. 15.
11. *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, (2004), 35 C.P.R. (4<sup>th</sup>) 517 (Comp. Trib.).



**Schedule "B" Relevant Statutory Provisions*****Competition Act, R.S.C. 1985, c. C-34*****Purpose of Act**

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

**Recovery of Damages**

36. (1) Any person who has suffered loss or damage as a result of

- (a) conduct that is contrary to any provision of Part VI, or
- (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

**Evidence of Prior Proceedings**

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.

**Jurisdiction of Federal Court**

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

**Limitation**

(4) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI after two years from

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later; and

(b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

(i) a day on which the order of the Tribunal or court was contravened, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later.

**Conspiracy**

45. (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance or person or property, or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

**Idem**

(2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it

was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

[...]

#### **Definition of “Multi-Level Marketing Plan”**

55. (2) No person who operates or participates in a multi-level marketing plan shall make any representations relating to compensation under the plan to a prospective participant in the plan unless the representations constitute or include fair, reasonable and timely disclosure of the information within the knowledge of the person making the representations relating to

- (a) compensation actually received by typical participants in the plan; or
- (b) compensation likely to be received by typical participants in the plan, having regard to any relevant considerations, including
  - (i) the nature of the product, including its price and availability,
  - (ii) the nature of the relevant market of the product,
  - (iii) the nature of the plan and similar plans, and
  - (iv) whether the person who operates the plan is a corporation, partnership, sole proprietorship or other form of business organization.

#### **Misrepresentations to the Public**

74.01 (3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product for the purpose of promoting directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

- (a) has not sold substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
- (b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

#### **Bait and Switch Selling**

74.04 (2) A person engages in reviewable conduct who advertises at a bargain price a product that the person does not supply in reasonable quantities having regard to the nature of the market in which the person carries on business, the nature and size of the person’s business and the nature of the advertisement.

### **Determination of Reviewable Conduct and Judicial Order**

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

- (a) not to engage in the conduct or substantially similar reviewable conduct;
- (b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
  - (i) a description of the reviewable conduct,
  - (ii) the time period and geographical area to which the conduct relates, and
  - (iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and
- (c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding
  - (i) in the case of an individual, \$50,000 and, for each subsequent order, \$100,000, or
  - (ii) in the case of a corporation, \$100,000 and, for each subsequent order, \$200,000.

[...]

### **Aggravating or Mitigating Factors**

(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

- (a) the reach of the conduct within the relevant geographic market;
- (b) the frequency and duration of the conduct;
- (c) the vulnerability of the class of persons likely to be adversely affected by the conduct;
- (d) the materiality of any representation;
- (e) the likelihood of self-correction in the relevant geographic market;

- (f) injury to competition in the relevant geographic market;
- (g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and
- (h) any other relevant factor.

#### **Jurisdiction of Tribunal Where Refusal to Deal**

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 the 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.

#### **When Article is a Separate Product**

(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 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.

#### **Definition of "Trade Terms"**

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

**Inferences**

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

**Leave to Make Application Under Section 75 or 77**

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.

**Notice**

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75 or 77 is sought.

**Certification by Commissioner**

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought was the subject of an inquiry that has been discontinued because of settlement between the Commissioner and the person whom the order under section 75 or 77 is sought.

**Application Discontinued**

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a) or (b) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75 or 77.

**Notice by Tribunal**

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

**Representations**

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

**Granting Leave to Make Application Under Section 75 or 77**

(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.

**Time and Conditions for Making Application**

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75 or 77 must be made. The application must be made no more than one year after the practice that is the subject of the application has ceased.

**Decision**

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any person referred to in subsection (2).

**Limitation**

(10) The Commissioner may not make an application for an order under section 75, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7), if the person granted leave has already applied to the Tribunal under section 75 or 77.

**Inferences**

(11) In considering an application for leave, the Tribunal may not draw on any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

**Inquiry by Commissioner**

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

Competition Tribunal File No. \_\_\_\_\_

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**COMPETITION TRIBUNAL**

BETWEEN:

LONDON DRUGS LIMITED

APPLICANT

AND:

PARFUMS GIVENCHY CANADA LTD.

RESPONDENT

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**WRITTEN REPRESENTATIONS OF THE APPLICANT**

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