

COMPETITION TRIBUNAL

BETWEEN:

LONDON DRUGS LIMITED

APPLICANT

AND:

PARFUMS GIVENCHY CANADA LTD.

RESPONDENT

STATEMENT OF GROUNDS AND MATERIAL FACTS

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 Givenchy has done for the past twelve years. If leave is granted, London Drugs also seeks 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.

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3. In November and December 2006, Givenchy stopped supplying its products to London Drugs. In January 2007, Givenchy confirmed its decision. This refusal to deal constitutes a reviewable practice under section 75 of the *Act*, for which leave should be granted under section 103.1 of the *Act*. London Drugs also submits that an interim order under section 104 of the *Act* a permanent order under section 75 of the *Act* should also be granted.

4. Givenchy is in the process of conferring monopolies to individual retailers in particular retail segments. In particular, Givenchy will now supply its product only to one drug store, Shoppers Drug Mart. This rationalization strategy will effectively eliminate competition in the Canadian marketplace for Givenchy fragrances.

5. The issues raised in the application for leave are interrelated with the issues raised in the application for an interim order. There is a serious issue to be tried on the section 75 application and there is a *bona fide* belief that there has been a reviewable practice that could be the subject of a section 75 order. London Drugs will be substantially affected in its business, losing approximately \$1.2 million to \$1.3 million per year in sales. It is impossible for London Drugs to acquire adequate supplies of Givenchy product through parallel imports. London Drugs is willing and able to meet the usual, lawful trade terms of Givenchy, and the products are in ample supply. There is a serious issue to be tried about whether the refusal to deal is likely to have an adverse effect on competition in the market, in that drug store customers of these products will be deprived of any meaningful alternate to the selected retailer, Shoppers Drug Mart.

6. 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 through 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.

7. Similarly, there is sufficient credible evidence to give rise to a *bona fide* belief that London Drugs will be directly and substantially affected in its business, and moreover, that such effect will constitute irreparable harm to London Drugs. As a result of the Respondent's refusal to deal, London Drugs will lose a significant portion of the \$1.2 million to \$1.3 million in revenues generated from the sale of Givenchy products - harm that cannot be compensated in damages, because the Tribunal cannot award damages. London Drugs will lose market share as a result of the refusal to deal, and will permanently lose customers. London Drugs will also lose cross-segment sales from shoppers who purchase other products at London Drugs in addition to their Givenchy purchases. London Drugs will be in a weakened bargaining position vis-à-vis other cosmetics and fragrance suppliers. London Drugs' reputation and market image will suffer as a result of the loss of Givenchy as a supplier.

8. The balance of convenience overwhelmingly favours London Drugs. The harm that London Drugs will suffer is irreparable. By comparison, Givenchy will suffer no harm: they will simply continue a relationship that has spanned more than eleven years, in the same manner as before. They will be paid the same price as other retailers pay for their product. They will continue to profit from those sales, as they would if this market share conferred to the most likely beneficiary, Shoppers Drug Mart.

PART II - THE FACTS

A. LONDON DRUGS

9. London Drugs is a privately-held company which was founded in 1945, and is part of a group of companies founded 103 years ago. London Drugs 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.

10. 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.

11. 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.

B. GIVENCHY

12. Givenchy is a supplier of women's and men's fragrance, and is the only authorised supplier of Givenchy products in Canada.

13. 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.

C. THE BEAUTY MARKET IN CANADA

14. According to an Industry Canada profile report, 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.

D. THE PRESTIGE FRAGRANCE MARKET IN CANADA

15. Certain fragrances are known as "prestige" fragrances. Such fragrances include Armani, Givenchy, Christian Dior, Calvin Klein, Chanel, Estee Lauder and Clinique.

16. 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.

17. 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 market. For instance, Liv Tyler promotes Givenchy's Very Irresistible fragrance, which has greatly improved the profile of that fragrance and made the product launch one of the most successful for London Drugs.

(c) In Canada, prestige fragrances tend to be distributed on a selective basis, through a limited number 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. They 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 wide selection 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) Authorized distributors and suppliers 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.

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

19. 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.

20. 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.

E. SALE OF PRESTIGE FRAGRANCES BY LONDON DRUGS

21. In its stores, London Drugs showcases its cosmetics and prestige fragrances. In each of London Drugs' stores, 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.

22. London Drugs' strategy is to make London Drugs a destination for consumers of cosmetics 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.

23. 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.

24. 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.

25. 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 indicates 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.

F. LONDON DRUGS' RELATIONSHIP WITH GIVENCHY

26. 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.

27. 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.

28. 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.

29. 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 negotiated co-operative advertising amounts and support in the form 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.

30. 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.

31. 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.

32. London Drugs ordered Givenchy fragrances by submitting electronic purchase orders. Since 2004, London Drugs has moved to a centralized system of ordering. Through the order sheets, Givenchy would give notice of any price increases.

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

34. 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.

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

G. GIVENCHY'S REFUSAL TO DEAL

36. Prior to December 2006, London Drugs had a very good relationship with Givenchy. 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.

37. 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 did not explain the shortages of other products.

38. In December 2006, Givenchy stopped supplying its products to London Drugs altogether. Two purchase orders were not filled, with no explanation.

39. On January 10, 2007, London Drugs was advised by e-mail that Erin Donohue, of Givenchy, wanted a meeting with London Drugs "to review the business and the future direction for Givenchy in Canada".

40. On January 18, 2007, Wynne Powell and Jeanie Lee of London Drugs met with Ms. Donohue. Ms. Donohue advised that Givenchy was going to stop supplying product to London Drugs and would work to assist London Drugs with the "transition of the business". At the meeting, Ms. Donohue confirmed that Givenchy 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.

41. 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". The letter 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.

42. 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.

43. London Drugs has since learned that 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.

H. HARM TO LONDON DRUGS

44. 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 it had done for that product.

45. 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 that two month period.

46. Currently, London Drugs has minimal inventory of Givenchy products. Its inventory is probably worth around \$150,000, and 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 calendar year.

47. London Drugs has no Givenchy products 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.

48. London Drugs has already set its advertising programme for Mother's Day, which focussed on Givenchy products. In the past, London Drugs' offerings of Givenchy fragrances has been tailored to increase sales at that time. For instance, in the past Givenchy has offered gift sets, including decorative plates.

49. 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.

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

51. 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).

52. 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.

53. 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 does so. 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.

54. 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.

55. 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.

PART III – BASIS OF THE SECTIONS 75, 103 AND 104 APPLICATIONS

56. 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 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.

57. 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.

(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 stock 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.

58. London Drugs is unable to obtain adequate supplies of Givenchy products elsewhere in the marketplace. Given the volume of London Drugs' business, it is neither practical nor realistic for London Drugs to acquire supply of Givenchy product through parallel imports.

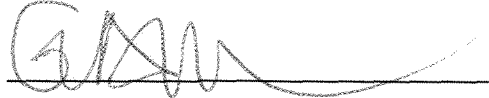
59. London Drugs is willing and able to meet the usual lawful trade terms of Givenchy.

60. Givenchy's products are in ample supply.

61. Givenchy's refusal to deal to London Drugs will likely have an adverse effect on competition in the marketplace. Shoppers Drug Mart will be the *only* drug store in which they can purchase Givenchy.

62. London Drugs therefore requests an order granting London Drugs leave to bring an application pursuant to section 103.1 of the *Act* for an order under section 75 that Givenchy accept London Drugs as a customer on their usual trade terms, for an interim order requiring supply to continue pending the return of the section 75 application, and for a permanent order under section 75 of the *Act*.

DATED at Vancouver, British Columbia, this 8th day of March, 2007.

A handwritten signature in dark ink, appearing to read 'GAM', is written over a horizontal line.

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