

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c.C-34, as amended; and the *Competition Tribunal Rules*, Can. Reg. SOR/94/290;

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* relating to a refusal to deal by Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.

B E T W E E N:

SEARS CANADA INC.

Applicant

- and -

**PARFUMS CHRISTIAN DIOR CANADA INC. and
PARFUMS GIVENCHY CANADA LTD.**

Respondents

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

February 26, 2007

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TRIBUNAL DE LA CONCURRENCE

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Jos LaRose for // pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

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PART I – OVERVIEW

1. This application is brought by Sears Canada Inc. ("Sears") for leave to apply under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "*Competition Act*") for an order requiring Parfums Christian Dior Canada Inc. ("Dior") and Parfums Givenchy Canada Ltd. ("Givenchy") to continue to supply products to Sears as they have for at least the last 14 years. If leave is granted, Sears will also seek an interim order requiring Dior and Givenchy to continue supplying products pending the return of the section 75 application.

2. Dior and Givenchy manufacturer "prestige" cosmetics and fragrances. Prestige cosmetics and fragrances manufacturers typically do not compete on price. They employ a practice called "selective distribution" wherein they limit the number of retailers that can sell their products. The very few retailers, in turn, rarely compete on price: rarely does a consumer see a prestige fragrance like Chanel No. 5 "on sale". At the same time, these prestige cosmetics and fragrances are not interchangeable products: a Dior customer does not simply switch to Chanel if the Dior product is unavailable; they simply look elsewhere. As a result of these and other combined factors, price competition in the marketplace is almost non-existent.

3. Sears is one of three retailers that, combined, supply approximately 75% of the Canadian market in Dior and Givenchy products. In December 2006, Sears broke ranks with the historical pricing practices of prestige cosmetics and fragrances retailers, by offering price discounts to consumers leading up to Christmas. In January 2007, after receiving complaints from the other two major retailers, Dior and Givenchy advised Sears that they would cut off all supply to Sears.

4. Whether Dior and Givenchy are intentionally retaliating against Sears for discounting their products is not the subject matter of the underlying applications. This is not a section 61

price maintenance case. However, whether intentional or not, the economic reality of Dior and Givenchy's refusal to deal is effectively to confer monopolies on two retailers to supply the entire Canadian market: Shoppers Drug Mart for the drug store channel; and The Bay for the department store channel. This rationalization strategy will effectively eliminate competition – whether price competition or service competition – in the Canadian marketplace for Dior and Givenchy products. It also will 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. Sears 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) Sears will be substantially affected in its business by the Respondents' refusal to deal through the loss of the majority of the revenue generated from the sales of Dior and Givenchy products and the permanent loss of customers and market share; (b) it is impossible for Sears to acquire adequate supplies of Dior and Givenchy product from the grey market or elsewhere and other suppliers do not supply substitutable products; (c) Sears is willing and able to meet the usual trade terms of Dior and Givenchy; (d) Dior and Givenchy products are in ample supply; and (e) the refusal to deal will have an adverse effect on competition in the market.

PART II - THE FACTS

The Parties

6. Sears is a company that was incorporated pursuant to the laws of Canada under the name Simpsons-Sears Limited by letters patent dated September 17, 1952, and was continued under the *Canada Business Corporations Act* by articles of continuance effective May 15, 1980. By

articles of amendment effective May 31, 1984, Sears changed its name to Sears Canada Inc. Sears is a multi-channel retailer with a network of 196 corporate stores, 178 dealer stores, and more than 1,850 catalogue merchandise pick-up locations.

Affidavit of Carol Wheatley, sworn February 22, 2007 ("Wheatley Affidavit") at paras. 5-6, Application Record of Sears, dated February 22, 2007 ("Sears Application Record"), Tab 5, p. 148

Sears' Corporation Profile Report, Wheatley Affidavit, Ex. "A", Sears Application Record, Tab 5A, p. 172.

7. The Respondent Dior is a company incorporated pursuant to the laws of Quebec with a head office located in Montreal, Quebec. It is a wholly-owned subsidiary of LVMH Moët Hennessy Louis Vuitton ("LVMH"), a *société anonyme* organized under the laws of the Republic of France. Dior is a manufacturer of women's "prestige" fragrances and cosmetics (which includes make up and skin care products).

Wheatley Affidavit at para. 7, Sears Application Record, Tab 5, p. 148

Dior's Corporation Profile Report, Wheatley Affidavit, Ex. "B", Sears Application Record, Tab 5A, p. 175.

8. The Respondent Givenchy is a company incorporated pursuant to the laws of Ontario with a head office located in Toronto, Ontario. It is also a wholly-owned subsidiary of LVMH. Givenchy is a manufacturer of women's and men's "prestige" fragrances.

Wheatley Affidavit at para. 7, Sears Application Record, Tab 5, p. 149

Givenchy's Corporation Profile Report, Wheatley Affidavit, Ex. "C", Sears Application Record, Tab 5C, p.186.

The Cosmetic and Fragrance Market in Canada

9. The cosmetics and toiletries market in Canada is a US\$1.1 billion per year industry. The industry can be meaningfully segmented into the "cosmetics" segment (consisting of skincare and make up) and the "fragrances" segment. There is also a segmentation in "class" of cosmetics and fragrances, with certain market participants such as the Respondents offering "prestige" cosmetics and fragrances.

Wheatley Affidavit at paras. 9-10, Sears Application Record, Tab 5, p. 149

10. A number of factors limit competition in the prestige fragrances and cosmetics market. First, consumers of prestige cosmetics and fragrances are intensely brand loyal. Fragrances, in particular, are considered to be "one of a kind" and not interchangeable with one another, in the same way that generic products are. Retailers of prestige cosmetics invest heavily in research and development in order to develop the most innovative and advanced products. Such products are marketed based on their specific attributes. Additionally, many consumers consider using Dior to be a status symbol and will not switch to an alternative brand.

Wheatley Affidavit at paras. 15-17, Sears Application Record, Tab 5, pp. 150-151

Dior's Annual Report 2005, Wheatley Affidavit, Ex. "G", Sears Application Record, Tab 5G, pp. 229-230, 237.

11. Second, prestige cosmetics and fragrances are distributed only through a very select number of retailers. Sears, The Bay, and Shoppers Drug Mart make up approximately 75% of sales of all women's prestige fragrances, prestige make up, and prestige skin care products.

Wheatley Affidavit at para. 18, Sears Application Record, Tab 5, p. 151.

12. Third, because prestige fragrances and cosmetics are often not interchangeable, prestige manufacturers typically do not compete on price. Rather, they focus on advertising and celebrity endorsements.

Wheatley Affidavit at para. 19, Sears Application Record, Tab 5, p. 152

Retailing Prestige Cosmetics and Fragrances in Canada

13. In 2006, the retail market of prestige cosmetics and fragrances was divided as follows:

Retailer	Fragrances - Women	Fragrances – Men	Make Up	Skin Care
Sears	25.4%	25.2%	18.5%	21.7%
The Bay	34.5%	31.6%	49.0%	42.3%
Holt Renfrew	2.3%	1.9%	5.0%	2.1%
Les Ailes	0.1%	0.2%	0.2%	0.2%
Jean Coutu	2.8%	9.1%	4.8%	5.8%
London Drugs	2.2%	1.3%	1.5%	1.0%
Shoppers Drug Mart	12.7%	11.1%	6.1%	12.8%

Wheatley Affidavit at para. 21, Sears Application Record, Tab 5, p. 153.

Tendex North America, "Prestige Cosmetics Management Summary Report", Wheatley Affidavit, Ex. "F", Sears Application Record, Tab 5F, pp. 212, 214, 216, 218.

14. In December 2006, for the first time, Sears broke ranks with existing retailing strategy by offering price discounts (between 10 and 20%) on all cosmetic products, including Dior and

Givenchy. These discounts, which were entirely absorbed by Sears, directly increased Dior and Givenchy sales by 10.2% and 2.1%, respectively, compared to December 2005.

Wheatley Affidavit at paras. 25-26, Sears Application Record, Tab 5, pp. 154-155.

15. Sears is the only department store that discounts price. Holt Renfrew does not discount and The Bay has not done so since 2002. In the drug store channel, both London Drugs and Jean Coutu offered regular price discounts, and Shoppers Drug Mart offered occasional price discounts.

Wheatley Affidavit at paras. 7-8, Sears Application Record, Tab 5, p. 155

Dior and Givenchy Products at Sears

16. Dior and Givenchy provide retail selling prices for their products on their order sheets. Retailers purchase these products at a standard industry discount on the retail prices. The usual trade terms require Sears to accept Dior and Givenchy's price increases, to have employees devoted to selling Dior and Givenchy product (a portion of their salaries are charged back to Dior and Givenchy), and to negotiate cooperative advertising and demonstrator support.

Wheatley Affidavit at paras. 30, 32, Sears Application Record, Tab 5, pp. 156, 157

17. Historically, Sears has had a good relationship with Dior and Givenchy. The companies have worked together on co-operative advertising and product displays. For example, in several key stores, Sears and Dior jointly invested in fixtured installations featuring Dior products.

Wheatley Affidavit at paras. 36-37, 42, Sears Application Record, Tab 5, pp. 158, 160

Photographs of the Toronto Eaton Centre Sears Store, Wheatley Affidavit, Ex. "Q", Sears Application Record, Tab 5Q, p. 431.

18. Sears has also cooperated with Dior and Givenchy in improving their profitability. For example, Sears agreed with Dior and Givenchy to discontinue supply to stores with low cosmetic sales. This led to the discontinuance of supply to two stores.

Wheatley Affidavit at para. 43, Sears Application Record, Tab 5, p. 160

Dior and Givenchy's Refusal to Deal

19. In December 2006, Givenchy advised Sears that it was unable to supply product to its stores because of "shipping" issues. Then, on January 18, 2007, Dior and Givenchy advised Sears that once existing orders were filled, they would no longer supply Sears.

Wheatley Affidavit at paras. 44-45, Sears Application Record, Tab 5, p. 160.

20. Sears believes that this decision was partly, if not entirely, a response to Sears' December 2006 price discounting. On November 1 and 9, 2006 respectively, Dior and Givenchy presented their spring 2007 marketing plan to Sears' buying team. There was no suggestion at these meetings that Sears was not meeting Dior or Givenchy's usual trade terms, that there were profitability issues, or indeed, that Dior or Givenchy would cease supplying product.

Wheatley Affidavit at para. 47, Sears Application Record, Tab 5, p. 161.

21. There is no legitimate basis for Dior and Givenchy's refusal to deal. Sears pays the same price to Dior and Givenchy for their products as any other retailer and Sears has always satisfied Dior and Givenchy's usual trade terms.

Wheatley Affidavit at para. 49, Sears Application Record, Tab 5, p. 162

22. As well, to the extent that a certain level of sales is necessary to cover the salary expenses of Sears employees working Dior and Givenchy counters, Sears has demonstrated its willingness to work with Dior and Givenchy to address profitability concerns.

Wheatley Affidavit at para. 50, Sears Application Record, Tab 5, p. 162

23. In any event, it is not credible for Dior and Givenchy to claim that their salary expenses are too high to maintain supply to Sears. The commission that Dior and Givenchy pay to Sears employees is the same commission paid to any commissioned employee, whether at The Bay, Holt Renfrew, or Sears. As it expressly tied to sales, there is no basis to argue that a certain level of sales is necessary to maintain this cost.

Wheatley Affidavit at para. 51, Sears Application Record, Tab 5, p. 162

24. In 2006, the cost to Dior of the salary subsidy paid to Sears employees selling Dior cosmetics was \$668,205, or 7.39% of sales. It is unlikely that this percentage would be significantly different at The Bay or elsewhere.

Wheatley Affidavit at para. 52, Sears Application Record, Tab 5, p. 162

25. Dior and Givenchy's profits are unaffected by Sears' discounting practices. The reduced margin is borne solely by Sears. In fact, given that Sears' sales increased during this period, Dior

and Givenchy's retail sales increased correspondingly. As well, there is no historical or contractual basis that has limited Sears' promotional activities, as they occur from time to time.

Wheatley Affidavit at para. 54, Sears Application Record, Tab 5, p. 163

26. Since January 18, 2007, Sears has been trying to come to a consensual resolution to what was stated to be a concern by Dior and Givenchy - that they were not as profitable in Sears stores. In this regard, Sears has offered to work with Dior and Givenchy to resolve any profitability concerns. Dior and Givenchy representatives have refused to meet with Sears.

Wheatley Affidavit at para. 60, Sears Application Record, Tab 5, p. 165

Email from D. Bell to D. Affleck dated February 20, 2007, Wheatley Affidavit, Ex. "Z", Sears Application Record, Tab 5Z, p. 469.

Effects of the Refusal to Deal

27. Dior and Givenchy products are critical to Sears' operations. As such, Dior and Givenchy's refusal to supply product to Sears will substantially affect Sears' business.

28. First, Dior and Givenchy form a key part of Sears' merchandising strategy. For its retail stores, Sears' merchandising strategy is focused on "destination categories", where it can leverage its reputation for trust and service. Cosmetics and accessories (including fragrances) is one of six destination categories.

Wheatley Affidavit at para. 34, Sears Application Record, Tab 5, p. 157

29. Because Dior and Givenchy are considered "better / best" brands in the cosmetic and fragrance industry, Sears has placed considerable emphasis on these brands. Without Dior and Givenchy products, Sears will have to rethink its entire marketing strategy. It cannot market

itself as offering a full compliment of products in its cosmetics and accessories destination without these brands. Sears will also incur the costs of changing over this destination category in each of its stores after having lost two major brands.

Wheatley Affidavit at paras. 35, 61, Sears Application Record, Tab 5, pp. 157, 166

30. Second, Sears will lose a significant portion of the revenues generated from the sale of Dior and Givenchy products. In 2006, Dior and Givenchy generated \$16 million in revenue. There are very few brands that can deliver this volume and the loss of these brands will significantly impact Sears' business.

Wheatley Affidavit at paras. 38, 61, Sears Application Record, Tab 5, pp. 158, 166

Report of Sears' Cosmetic and Fragrance Sales, Wheatley Affidavit, Ex. "R", Sears Application Record, Tab 5R, p. 434.

31. Sears will also lose the "cross-segment" sales from Dior and Givenchy shoppers. In 2006, Dior and Givenchy shoppers (who purchased on their Sears Card or Sears Mastercard, approximately 40% of all cosmetic sales) purchased an additional \$14 million in other merchandise at Sears.

Wheatley Affidavit at paras. 41, 61, Sears Application Record, Tab 5, pp. 159, 166

Sears Cross-Shop Sales Report, Wheatley Affidavit, Ex. "T", Sears Application Record, Tab 5T, p. 450.

32. Third, Dior and Givenchy are important to Sears to preserve its market share. Over the past three years, Sears' market share in cosmetics and fragrances has been eroding to The Bay, the only other major department store in competition with Sears. As a result of the refusal to

deal, The Bay will gain the strategic advantage of being the only middle level department store selling Dior and Givenchy products.

Wheatley Affidavit at paras. 41, 61, Sears Application Record, Tab 5, pp. 159, 166

33. Fourth, Sears will have diminished negotiating capabilities with respect to other fragrance and cosmetic suppliers. Sears will also be in a difficult position in terms of attracting new brands on favourable terms, because of the stigma associated with losing Dior and Givenchy.

Wheatley Affidavit at para. 61, Sears Application Record, Tab 5, p. 167

34. Sears is unable to obtain adequate supplies of Dior and Givenchy products elsewhere in the market. Given the volume of Sears' business, it is not feasible for Sears to purchase from the grey market. Moreover, products on the grey market are often in poor condition, counterfeit or simply unavailable. As well, there is inconsistent gross profit with grey market product, and important marketing tools, such as testers or blotters, are not available.

Wheatley Affidavit at paras. 64-65, Sears Application Record, Tab 5, p. 168

Excerpt of a report of the U.K. Competition Commission, "Fine Fragrances: A Report for the Supply in the UK for Retail Sales of Fine Fragrances, dated August 18, 1993, Wheatley Affidavit, Ex. "K", Sears Application Record, Tab 5K, p. 346

35. Further, given the brand loyalty and lack of substitutability in Dior and Givenchy products with those of their competitors, it cannot be said that Sears could obtain a "similar" array of fragrance and cosmetics products from another supplier.

Wheatley Affidavit at para. 66, Sears Application Record, Tab 5, p. 169

36. Sears is willing and able to meet the usual trade terms of the Dior and Givenchy, as it always has. Dior and Givenchy have never indicated to Sears that it has not satisfied their trade terms.

Wheatley Affidavit at para. 67, Sears Application Record, Tab 5, p. 169

37. Dior and Givenchy's products are in ample supply. Until this dispute arose, Dior and Givenchy have satisfied Sears' inventory requirements. Moreover, Sears' competitors are continuing to receive a full complement of Dior and Givenchy product, and none of Dior, Givenchy or LVMH have publicly stated that they are having supply issues.

Wheatley Affidavit at para. 68, Sears Application Record, Tab 5, p. 169

38. Dior and Givenchy's refusal to deal to Sears will likely have an adverse effect on competition in the marketplace. The Bay will capture most of Sears' market share and will effectively be in a monopoly position. Without Sears, consumers will be deprived of any meaningful *price* or *service* competition within the department store channel.

Wheatley Affidavit at paras. 69, 72, Sears Application Record, Tab 5, pp. 169, 170

39. In terms of the drug store channel, Sears has learned that Dior and Givenchy similarly terminated the supply relationship with London Drugs, and Jean Coutu's supply relationship is uncertain. Like Sears, these companies offered price discounts on Dior and Givenchy products in 2006.

Wheatley Affidavit at para. 55, Sears Application Record, Tab 5, p. 163

40. As a result of Dior and Givenchy's conduct, consumers are left with one choice of retailer per segment: Holt Renfrew for high-end department stores, The Bay for mid-range department stores, and Shoppers Drug Mart for drug stores. None of those retailers meaningfully compete with one another.

Wheatley Affidavit at para. 71, Sears Application Record, Tab 5, p. 170

PART III - LAW AND ARGUMENT

Sears Should be Granted Leave to Bring an Application under Section 75(1) of the *Competition Act*

41. 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).

42. 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.

43. Section 75 is informed by the purpose of the *Competition Act*, which is to "maintain and encourage competition in Canada in order to ... provide consumers with competitive prices and product choices" and "the purpose of section 75 is in furtherance of that objective."

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.

44. 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. (4th) 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.

45. In order to conclude that an alleged practice could be subject to an order under section 75(1), 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. 17, 19.

(a) There is Reason to Believe that Sears is Substantially Affected by the Failure to Deal

46. The first prong of section 75(1) 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.

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

47. The reference to "products" and "markets" in section 75(1)(a) can only be "meaningfully defined in a particular context and for a particular purpose. ... In the case of paragraph 75(1)(a), the ultimate test concerns the effect on the business of the person refused supplies." *B-Filer Inc. v. Bank of Nova Scotia* restated the test as follows:

For the purposes of 75(1)(a), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.

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.

48. "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 & Research) v. Xerox Canada Inc. (1990), 33 C.P.R. (3d) 83 (Comp. Trib.) at para. 52.

49. A product can be defined in terms of a particular brand. For example, in *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.*, the product was defined as "Chrysler auto parts" because customers would not accept a substitute. As well, in *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, the Tribunal held that "Harley-Davidson motorcycles related products and services constitute one or more product markets." Finally, in *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, the relevant product was La-Z-Boy furniture.

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. (4th) 559 (Comp. Trib).

50. 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 minimus".

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.

51. There is reason to believe that Sears will be substantially affected by its inability to obtain adequate supply of Dior and Givenchy product from the Respondents (who are the only suppliers of Dior and Givenchy products). Consumers buy Dior and Givenchy because of their unique attributes and the status associated with using these products. There are no acceptable substitutes in the minds of consumers. If Dior and Givenchy are not available, consumers will not buy Chanel or Clinique; they will shop elsewhere.

52. As a result of the Respondents' refusal to deal, Sears will lose a significant amount of direct and indirect sales generated from the supply of Dior and Givenchy products. Sears will have to modify its marketing strategy and change over its cosmetics and accessories destination in each store. Sears' reputation in the market will suffer and it will be in a vulnerable negotiating position with respect to other cosmetic suppliers. Finally, Sears will lose market share and customers to The Bay.

53. Notwithstanding that section 75(1) requires the applicant to show that its business "is substantially affected", leave can be granted in situations where the respondent has indicated its intention to cut off supply at a future date. For example, in *Quinlan*, leave was granted where the respondent refused to provide product for the upcoming season. Therefore, the fact that Dior

has stated its intention to discontinue supply is sufficient basis for granting leave. Givenchy, on the other hand, already has discontinued supply.

Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd., (2004), 35 C.P.R. (4th) 517 (Comp. Trib.).

(b) There is Reason to Believe that Sears is Unable to Obtain Adequate Supply

54. The second requirement for leave is 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". This requirement has two elements: (1) there is insufficient competition among suppliers of the product; and (2) 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

55. What constitutes "insufficient competition among suppliers" will depend on the particular facts in every case. A market with numerous suppliers acting independently would not qualify. At the same time, the fact that there is only one supplier of a particular product does not preclude a finding that there is insufficient competition among suppliers.

Canada (Director of Investigation & Research) v. Xerox Canada Inc. (1990), 33 C.P.R. (3d) 83 (Comp. Trib.) at paras. 82, 84-88.

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

- a. First, to the extent that the "product" is Dior and Givenchy cosmetics and fragrances, it is obvious that this product cannot be obtained from sources other

than Dior and Givenchy themselves. There is good reason why the "product" should be considered as Dior and Givenchy products, rather than "prestige cosmetics and fragrances" as a whole. Competition in the marketplace has not resulted in interchangeability or substitutability of products in the prestige cosmetics and fragrance industry. Sears cannot simply purchase more Chanel product and hope that customers will switch from Dior and Givenchy to Chanel. For the consumer, only Dior and Givenchy sell Dior and Givenchy products, and there are no substitutes. Manufacturers of prestige fragrances and cosmetics have spent millions building their brand image and creating a market that views their products as unique and not substitutable.

- b. Second, the alternative "grey" market for Dior and Givenchy products cannot provide the volume, variety or quality of products that Sears needs.
- c. Third, market conditions are such that Sears cannot obtain a "similar" array of fragrances and cosmetics from another supplier.

Therefore, without Dior and Givenchy being willing to supply Sears, Sears cannot obtain adequate supply of Dior and Givenchy products.

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

57. The applicant must show reason to believe that it is "is willing and able to meet the usual trade terms of the supplier or suppliers of the product". For the purpose of this section, "trade terms" "means terms in respect of payment, units of purchase and reasonable technical and servicing requirements."

Competition Act, R.S.C. 1985, c. C-34, ss. 75(1)(c) and 75(3).

58. Sears is willing and able to meet the usual trade terms, as it always has. Neither Dior nor Givenchy has indicated to Sears that it is not meeting the usual trade terms. Further, Sears has demonstrated a willingness to cooperate with Dior and Givenchy to remedy any concerns that may arise in their supply relationship by, for example, discontinuing supply to low-sales stores.

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

59. 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".

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

Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd., (2004), 35 C.P.R. (4th) 517 (Comp. Trib.) at paras. 19, 22.

60. Dior and Givenchy products are in ample supply. Sears' competitors are continuing to receive inventory and there has been no indication by Dior, Givenchy or LMVH 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

61. The final requirement for obtaining leave is to show reason to believe that "the refusal to deal is having or is likely to have an adverse effect on competition in a market". This is a relatively new provision of section 75 that has not yet been definitively interpreted by the Tribunal. What constitutes "a market" and what "adverse effect" is needed, are open questions for the Tribunal.

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

B-Filer Inc. v. Bank of Nova Scotia, 2006 Comp. Trib. 42 at para. 226.

62. At this stage, Sears does not need to *satisfy* section 75(1)(e), but rather, it must adduce evidence that the section could be engaged. Here, there is sufficient evidence of the adverse effect on a market. First, competition among retailers selling Dior and Givenchy products will be adversely affected by Dior and Givenchy's refusal to deal. Absent competition among retailers, Dior and Givenchy (and the few remaining retailers) will be able to maintain higher prices. Second, competition among retailers in the prestige cosmetics and fragrances market will be adversely affected by the refusal to deal. The Bay and Sears are the two largest suppliers of prestige cosmetics and fragrances in Canada. Sears will not be able to effectively compete with The Bay in this market if it does not maintain Dior and Givenchy as a supplier. Further adverse effects on competition in the market will be adduced at the section 75 hearing if leave is granted.

63. 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 *Competition 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 *Competition Act* may not be applicable to what Parliament has clearly intended to be a different, and Sears 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 Dior and Givenchy products, without reference to competitors of Dior and 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.

64. Second, it is necessary to consider the phrase "adverse effect on competition in a market" 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 ExpressVu 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.

65. Third, when considering the adverse effect on "competition in a market", it must also be noted that the *Competition Act* is not solely concerned with macro-economic market effects. Many parts of the *Competition Act*, and Sears would submit 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, Sears submits, section 75(1)(e) can and should be engaged where the "market" that is adversely affected is the market for the respondents' goods.

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

66. Moreover, it is notable 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, Sears has adduced credible evidence to show that Dior and Givenchy products are differentiated not just by their trade name, but by their intrinsic and non-substitutable qualities.

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

67. And, it must be recognized that, 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).

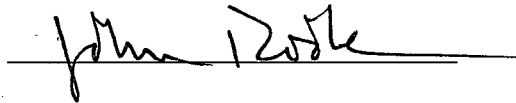
Barcode Systems Inc. v. Symbol Technologies Canada ULC, [2004]
F.C.J. No. 1657 (C.A.) at para. 23, 27, 29.

68. This is a proper case for the Tribunal to engage the novel questions of "adverse effect" and the market definition provisions of section 75. Sears 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, Sears should be granted leave to bring an application under section 75 of the *Competition Act*.

PART V – ORDER SOUGHT

69. Sears respectfully 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 Dior and Givenchy accept Sears as a customer on the usual trade terms.

DATED at Toronto, Ontario, this 26th day of February, 2007.

A handwritten signature in black ink, appearing to read "John F. Rook", is written over a horizontal line.

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Schedule "A" List of Authorities

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

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 on persons 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 for 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 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 or 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 a 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 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.

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 a settlement between the Commissioner and the person against 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 other 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 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. CT-2007-001

COMPETITION TRIBUNAL

BETWEEN:

SEARS CANADA INC.

Appellants

- and -

**PARFUMS CHRISTIAN DIOR CANADA INC.
and PARFUMS GIVENCHY CANADA LTD.**

Respondents

**WRITTEN REPRESENTATIONS
OF THE APPLICANTS**

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Our File No.: 003089-103

February 26, 2007

By Courier

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Competition Tribunal
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Ottawa, ON K1P 5B4

The Commissioner of Competition
Competition Bureau
50 Victoria Street
Gatineau, QC K1A 0C9

Mr. Don Affleck
Affleck Greene Orr LLP
365 Bay Street, Suite 200
Toronto, ON M5H 2V1

Registry of the Federal Courts
180 Queen Street West
Suite 200
Toronto, ON M5V 3L6

Dear Sir or Mesdame:

Re: Sears Canada Inc. v. Christian Dior et al.

Please find enclosed a copy of our client's Written Representations in respect of the leave application to be heard on March 1, 2007. A hard copy of the Written Representations and Book of Authorities will follow.

Yours truly,

BENNETT JONES LLP



Derek J. Bell

DJB/dc
Enclosure