File No.: CT-2007-001
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COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an application by Sears Canada Inc. for an order pursuant to section 103.1 granting leave to make application under section 75 of the *Competition Act*;

BETWEEN:

SEARS CANADA INC.

Applicant

PARFUMS CHRISTIAN DIOR CANADA INC. & PARFUMS GIVENCHY CANADA LTD.

Respondents

REPRESENTATIONS OF THE RESPONDENT IN RESPONSE TO APPLICATION FOR LEAVE PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*

AFFLECK GREENE ORR LLP
Barristers & Solicitors
365 Bay Street, 2nd Floor
Toronto, ON M5X 1E5
Fax: (416) 360-5960

Donald S. Affleck, QC
Tel: (416) 360-1488
Jennifer L. Cantwell
Tel: (416) 360-2800

Counsel for the Respondents, Parfums Christian Dior Canada Inc. & Parfums Givenchy Canada Ltd.

TO: **The Registrar**
Competition Tribunal
The Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario K1P 5B4

Tel: 613-957-7851
Fax: 613-952-1123

AND TO: **Sheridan Scott**
Commissioner of Competition
50 Victoria Street
Gatineau, Quebec K1A 0C9

Tel: 819-997-3301
Fax: 819-997-0324

AND TO: **John Rook, Q.C./Derek Bell/Linda Viser**
Bennett Jones LLP
Suite 2300, POBox 130
One First Canadian Place
Toronto, Ontario M5X 1A4

Tel: (416) 863-1200
Fax: (416) 863-1716

I. OVERVIEW – DIOR & GIVENCY OPPOSE THIS APPLICATION FOR LEAVE

1. Parfums Christian Dior Canada Inc. ("Dior") and Parfums Givenchy Canada Ltd. ("Givenchy") oppose Sears Canada Inc. ("Sears") application for leave to apply for an order under s.75 of the *Competition Act* (the "*Act*"). Sears has failed to satisfy the grounds upon which leave might be granted under ss.103.1(7) of the *Act*.

2. Sears has failed to file sufficient, if any, credible evidence to establish that its business is directly and substantially affected by a practice referred to in s.75 of the *Act* or that such conduct could be subject to an order of the Competition Tribunal ("Tribunal"). The Tribunal has made it clear that evidence of a "substantial affect" must go beyond mere speculation.

3. The Tribunal should exercise its discretion to refuse leave as Dior and Givenchy's valid business decision to rationalize within Canada and cease supply to Sears is one that has no bearing on the maintenance or encouragement of competition within Canada.

4. For these and other reasons as articulated below, Sears' application for leave should be dismissed with costs.

II. THE PARTIES

5. Sears is incorporated pursuant to the laws of Canada under the name Simpsons-Sears Limited by letters patent and 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.

6. Dior is incorporated pursuant to the laws of Quebec and is a wholly owned subsidiary of LVMH Moet Hennessy Louis Vuitton ("LVMH").

7. Givenchy is incorporated pursuant to the laws of Ontario and is a wholly owned subsidiary of LVMH.

III. THE FACTS

8. Dior and Givenchy are luxury brands that produce high-end products such as clothing, leather goods, and beauty products.

9. As of 2006, Dior supplied cosmetics and fragrances to 104 of Sears' 196 stores and Givenchy supplied fragrances to 121 of the Sears' 196 stores.

Affidavit of Carol Wheatley, sworn February 22, 2007 ("Wheatley Affidavit"), Application Record of Sears, dated February 22, 2007 (Sears Application Record"), Tab 5, Ex. R, pp. 440-448

10. In January of 2007, Dior and Givenchy announced they would be ceasing the supply of product to Sears in order to rationalize the distribution of their cosmetics and fragrance businesses within Canada. The continued supply of product to Sears was not a financially viable option for Dior and Givenchy and the decision to cease supply was based on valid business reasoning.

11. Regardless, Dior and Givenchy have agreed to work with Sears to make the transition as smooth as possible and allow Sears a reasonable period of time to bring in replacement product. Further, Dior and Givenchy are willing to cover reasonable costs of the removal or renovation of any related displays or shelving units.

12. Sears has demonstrated no attempts to replace Dior and Givenchy product with other prestige brands such as MAC cosmetics, another prestige brand that it does not currently offer.

IV. THE LAW

13. The test for leave to commence a private application was stated by the Tribunal in *National Capital News Canada v. Canada (Speaker of the House of Commons)*, and affirmed by the Federal Court of Appeal in *Symbol Technologies ULC v. Barcode Systems Inc*. In order for leave to be granted, the Tribunal must be satisfied that it has reason to believe that the leave application is:

a) supported by sufficient credible evidence to give rise to a bona fide belief that applicant may have been directly and substantially affected in the applicant's business by a reviewable practice; and

b) that the practice could be subject to an order.

> ***National Capital News Canada v. Canada (Speaker of the House of Commons*** **[2002] CCTD No. 38 at para. 15.**
>
> ***Symbol Technologies ULC v. Barcode Systems Inc.*****, 2004 FCA 339 (*"Symbol"*)**

i. The Tribunal's Interpretation of "Substantially Affected"

14. Though the Competition Tribunal has not specifically defined what is "substantial", it has confirmed that it should be given its ordinary meaning in the context for leave under 103.1(7) of the *Act*:

> The Tribunal agrees that "substantial" should be given its ordinary meaning, which means more than something just beyond de minimis. While terms such as "important" are acceptable synonyms, further clarification can only be provided through evaluations of actual situations.
>
> ***Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.*** **(1989), 27 CPR (3d) 1 at 23 (CACT) (*"Chrysler"*).**

15. The Shorter Oxford English Dictionary definition of "substantially" was accepted by the Federal Court of Appeal in a non-competition related matter as "essential; that is, constitutes or involves an essential part"; and "of ample or considerable amount, quantity or dimension."

> ***General Enterprises Construction Ltd. v. Canada (Minister of Public Works)*** **(1987) 78 NR 230 at 233, 25 CLR 157 (Fed. CA).**

16. A consideration of the Tribunal's decisions under section 103.1(7) of the *Act* reflects the high threshold at which a substantial affect will be found, as well as the

necessity for "sufficient credible evidence" and not mere assertions. Further, evidence of loss cannot be speculative or undocumented.

> ***1177057 Ontario Inc. (cob Broadview Pharmacy) v. Wyeth Canada Inc.*** **[2004] CCTD No. 24 at para. 21.**

17. Blais J. recently affirmed this high threshold in *Paradise Pharmacy v. Novartis Pharmaceuticals Canada Inc.*:

> The applicants must show sufficient credible evidence of a direct and substantial effect. In Barcode, for example, the company was in receivership and 50% of the employees *had* been laid off. In La-Z-Boy, the applicant had figures showing a 46% decrease in its sales. There was thus a credible basis as to substantial affect.
>
> ***Paradise Pharmacy v. Novartis Pharmaceuticals Canada Inc.*** **[2004] CCTD No. 22 at para. 20**

18. In the *Chrysler* decision, the Tribunal found that a loss of 72.6% of the applicant's sales constituted a substantial affect.

19. In a recent Tribunal decision, a substantial affect was established when 50% of the applicants' revenue was dependent on the terminated services.

> ***B-Filer Inc. v. Bank of Nova Scotia*** **[2005] CCTD No. 37.**

20. However, in *1177057 Ontario Inc. (cob Broadview Pharmacy) v. Wyeth Canada Inc.*, the Tribunal found that given the small percentage of revenue that the refused pharmaceutical products represented for the applicant (only 5% of the its pharmaceutical sales, not total sales), that the "substantial affect" test was not satisfied. This conclusion was reached despite the applicant's argument that if it could not offer a full line of prescription drugs that its customers would move all of their business elsewhere.

> ***1177057 Ontario Inc. (cob Broadview Pharmacy) v. Wyeth Canada Inc.*** **[2004] CCTD No. 24**

21. In Broadview *Pharmacy v. Pfizer Canada Inc*, the Tribunal determined that a loss of 11% of total revenue did not constitute a "substantial affect" on the applicant's business.

***Broadview Pharmacy v. Pfizer Canada Inc*. [2004] CCTD No. 23 at para.8 ("*Broadview Pharmacy*")**

22. Finally, the Tribunal in *Broadview Pharmacy* clarified that the substantial affect must be on the *entirety* of the applicant's business, and not just a portion of it.

***Broadview Pharmacy* at para.8.**

ii. Sears Has Not Been "Directly and Substantially" Affected

23. Sears has failed to provide any credible evidence that it will be "directly and substantially" affected by the removal of Dior or Givenchy products from its beauty line. In fact, the evidence presented by Sears establishes quite the contrary.

Revenue

24. The Tribunal's standard for the percentage of lost revenue constituting a substantial affect ranges from approximately 50% - 100% of the revenue from an applicant's *entire* business. In the case at hand, even if we apply the absolute "worst case scenario", and anticipate a loss of *all* revenue generated from customers who purchase Dior and Givenchy products (using Sears' 2005 Dior & Givenchy sales of [ ] and Sears 2005 revenue of C$6,238,000,000, Sears can only establish a [**]%** loss of revenue.

Wheatley Affidavit, Sears Application Record, Tab 5, Ex. R, pp. 434 and Ex. L, p.372

25. If this lost revenue is considered solely in relation to Sears' cosmetic and fragrance sales [ ], in the same "worst case scenario" this would constitute a loss of only [**]%**. Again, Sears does not even come close to meeting the Tribunal's established standard of lost revenue constituting a "substantial affect."

Wheatley Affidavit, Sears Application Record, Tab 5, Ex. R, pp. 434-435

Substitutability and Cross-Segment Sales

26. Sears makes bald and unsubstantiated statements that the prestige cosmetics and fragrance market is driven by loyalty, and customers will simply not switch from one brand to another. Further, it asserts that customers will not return to Sears for the purchase of any other products, cosmetic or otherwise, if these lines are terminated. However, Sears provides no evidence of this loyalty, and its information with regard to "cross-segment" sales is meaningless without knowledge of what purchases or departments initially drew customers into the store.

27. Sears provides no persuasive evidence to establish why Dior & Givenchy products should be considered a separate market from that of other prestige brands of cosmetics and fragrances. There is no evidence to establish that customers will not substitute other products for that of Dior or Givenchy. In fact, Sears' own evidence establishes that approximately 70% of Sears' customers are *not* loyal Dior and Givenchy purchasers, thus would switch to other prestige cosmetics and fragrance brands if Dior and Givenchy were not available.

Wheatley Affidavit, Sears Application Record, Tab 5, Ex.S, p.449

28. Sears' evidence also establishes that it is not brand loyalty, but "newness" which is the key driver that attracts customers to the cosmetics and fragrance counters.

Wheatley Affidavit, Sears Application Record, Tab 5, Ex. D, p. 196

Market Share

29. Sears states that Dior and Givenchy are *critical* to Sears' very operation and that Sears will lose actual market share if it is refused these two lines. Again, Sears does not provide any evidence for these assertions. However, Sears' evidence does reveal that Dior and Givenchy products were not even carried in a large percentage of Sears' stores, as outlined in paragraph 9 above.

Wheatley Affidavit, Sears Application Record, Tab 5, Ex. R, p.440-448

30. Further, in Sears' 2005 Annual Report, Dior and Givenchy are not mentioned in Sears' list of "Canada's most popular brands" of cosmetics.

Wheatley Affidavit, Sears Application Record, Tab 5, Ex.L, p. 379

31. In a series of charts referenced by Sears that list percentages of retail sales dollars by brand and store, Givenchy fragrance accounts for just 4.4% of retail dollar sales of women's prestige fragrances, and Givenchy is not even listed in the chart outlining the top 14 prestige fragrances for men.

Wheatley Affidavit, Sears Application Record, Tab 5, Ex. F, 222-223

32. Dior skincare accounts for just 3.6% of retail dollar sales, in comparison to top sellers such as Clinique (19.9%), Lancome (14.9%), Biotherm (14.1%), and Estee Lauder (9%).

Wheatley Affidavit, Sears Application Record, Tab 5, Ex. F, p.221

33. Dior make up accounts for a minor 3.2% of retail dollar sales, while Clinique accounts for 19.3%, MAC accounts for 16.3%, Lancome accounts for 15.4%, Estee Lauder accounts for 14.3% and Lise Watier accounts for 9.3% of retail dollar sales.

Wheatley Affidavit, Sears Application Record, Tab 5, Ex.F, p.220

34. Dior and Givenchy clearly do not occupy a dominant position in the prestige cosmetics and fragrance market. Thus, it is difficult to fathom how the loss of these two lines would "critically" impact Sears as a whole, or its fragrance and cosmetics department in particular.

Other Alleged Substantial Affects

35. Sears contends that is will be substantially affected in its business if supply of Dior and Givenchy product is terminated, as it will have to alter its marketing plan and renovate the cosmetics counters and disassemble displays in the Sears stores that carry Dior and Givenchy product.

36. In previous Tribunal decisions, in addition to significant loss of revenue, substantial effects have been found in such situations where an applicant's company was put in receivership and 50% of its employees were laid off. The replacement of displays or revision of marketing plans simply cannot qualify as substantial impacts on a business in light of past Tribunal decisions.

> ***Barcode Systems Inc v. Symbol Technologies ULC*, 2004 CACT 1 at paras. 14-16**

37. There are solid public policy reasons for ensuring that the impact on an applicant's business is in fact substantial. If everyday commercial realities such as store renovations, the revision of marketing plans, or the loss of [ ]% in revenue were to be considered substantial affects for the purpose of either section 103.1(7) or section 75 of the *Act*, the implications for contracting parties would be immense. Applying this logic, parties would be trapped in supply relationships for life if the refused party could show it was merely inconvenienced in any way by a termination. Essentially, once a party agreed to supply a company such as Sears with product, it would have to be prepared to participate in a lifetime supply relationship.

38. The absurdity of this proposition was affirmed by JJ.A. Rothstein, as he was then, when stating that the purpose of the *Competition Act* in general, and s.75 in particular is:

> …to maintain and encourage competition in Canada. **It is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition.**
>
> *Symbol* at para. 23, (emphasis added)

39. Here, the supply dispute between Dior/Givenchy and Sears is one that does not impact the Canadian competition landscape in any way. It is a private dispute regarding Dior and Givenchy's valid decision to rationalize its business and improve profitability, and it does not warrant exercise of the Tribunal's discretion to grant leave.

40. Finally, as a publicly traded company, Sears is obligated to complete a Form 51-102F3 "Material Change Report" if it experiences any significant events or changes to its business. It is important to note that a review of Sears' affidavit evidence does not demonstrate that it has filed a Material Change Report in connection with the termination of Dior and Givenchy product.

41. In light of the above, it is clear that Sears has failed to satisfy the first branch of the section 103.1(7) test, or that it has been "directly and substantially affected in its business." Consequently, this application for leave cannot succeed.

iii. Sears Cannot Meet the Test Under Section 75

42. Though it is unnecessary to consider the second branch of the test for leave, we will address it briefly. Subsection 75(1) requires that:

> 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.

43. The Tribunal must be satisfied that there is sufficient credible evidence with respect to every one of the conjunctive elements under s.75 of the Act. If even one of the five elements is not met, the application must fail.

> ***Symbol Technologies ULC v. Barcode Systems Inc.*, 2004 FCA 339 at para.18-19**

44. Here it is clear that a section 75 order could not issue for, as described above, Sears has failed to meet the first element of section 75, or provide credible evidence that it will be substantially affected in its business or is precluded from carrying on business.

45. Sears has also failed to establish the second element of s.75, or that it is unable to obtain adequate supply of product due to insufficient competition among suppliers of the product in the market.

46. Sears has presented no evidence to overcome the presumption of s.75(2) that 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. Dior and Givenchy products are not so differentiated as to occupy a dominant position in that market. As noted above, they do not occupy a dominant position in the prestige cosmetics and fragrance market.

47. Further, Sears has presented no evidence to show that these products are not substitutable. As established in Sears' evidence, it is not brand loyalty that brings customers to the retail counters, but newness. In the autumn of 2003 nearly 50 new fragrances were introduced in the Canadian market alone. The market is not driven by loyalty, but newness and product launches. As well, and as previously noted, 70% of

Sears' purchasers of Dior and Givenchy are not loyal customers and would switch to other prestige products if Dior or Givenchy were unavailable.

Wheatley Affidavit, Sears Application Record, Tab 5, Ex. D, p.196 & Ex. 5, p.449

48. There is no shortage of prestige cosmetics and fragrances in the Canadian market, or any limit on Sears' ability to obtain such products due to insufficient competition. The prestige cosmetics and fragrance market is a buoyant one, and expected to grow over the next few years. It is comprised of many competing brands, as demonstrated by the wide variety of brands already offered by Sears and its many other competitors.

Wheatley Affidavit, Sears Application Record, Tab 5, Ex. D, p.192

49. Even if the product market is determined to be Dior and Givenchy product, Sears' inability to obtain adequate supply of product is not due to insufficient competition in the market, but the valid business decisions of Dior and Givenchy.

50. Finally, Sears cannot establish the fifth element of s. 75, or that the refusal to deal is having or is likely to have an adverse affect on competition in a market. Though Sears baldly states that competition among retailers selling Dior and Givenchy product will be adversely affected, as will competition between retailers of prestige cosmetics and fragrances in general, it does not provide one shred of evidence to support these claims. In fact, Sears' evidence establishes the opposite. Though prestige brands such as Dior, Lancome and Chanel were historically sold almost exclusively in department stores and specialty boutiques, recent years have seen a shift from department stores to mass-market channels such as drugstores, grocery stores and online stores that allow for availability of product anywhere in Canada. Thus, competition and availability of prestige products are stronger than ever before.

Wheatley Affidavit, Sears Application Record, Tab 5, Ex. D, p.193-194

51. Finally, there is no evidence to establish that Sears does not compete with Shoppers Drug Mart or any other drug stores, Holt Renfrew or cosmetics stores such as Sephora. As noted by Sears, all past and current suppliers of Dior and Givenchy product have discounted at some point, with the exception of Holt Renfrew. Further, Sears' evidence establishes that there is little variation in pricing for these prestige products due to the low retail margins on these products, and not a lack of competition in the market.

Wheatley Affidavit, Sears Application Record, Tab 5, Ex. K, p. 340

52. Sears has failed to satisfy the requirements for obtaining leave to commence an application under s.75 of the *Act*. In light of the lack of credible evidence relating to a substantial affect on Sears' business or an adverse affect on competition in the market, we request that this Tribunal exercise its discretion to refuse leave.

53. Dior and Givenchy admit the grounds and material facts in paragraphs 7, 9 and 10 of Sears' application for leave.

54. Dior and Givenchy deny or have no knowledge of the grounds or material facts contained in all other paragraphs of Sears' application for leave.

55. Dior and Givenchy request that the proceedings be conducted in English.

56. Dior and Givenchy do not oppose Sears' request that documents be filed in electronic form.

V. ORDER SOUGHT

57. Dior and Givenchy request that the Tribunal dismiss this leave application with costs.

DATED at Toronto, Ontario, this 8th day of March 2007.

AFFLECK GREENE ORR LLP
Barristers & Solicitors
365 Bay Street, 2nd Floor
Toronto, ON M5X 1E5

Donald S. Affleck, QC
Tel: (416) 360-1488
dsaffleck@agolaw.com

Jennifer L. Cantwell
Tel: (416) 360-1485
jcantwell@agolaw.com
Fax: (416) 360-5960

Counsel for the Respondents