

File No.: CT-2007-002
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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 London Drugs Limited for an order pursuant to section 103.1 granting leave to make application under section 75 of the *Competition Act*;

BETWEEN:

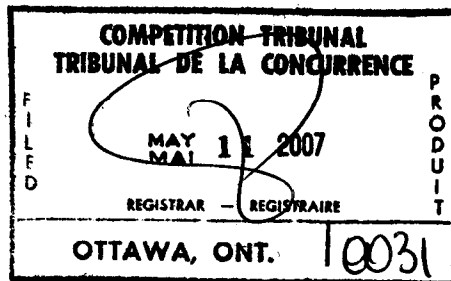
LONDON DRUGS LIMITED

Applicant

PARFUMS GIVENCHY CANADA LTD.

Respondent

**REPRESENTATIONS OF THE RESPONDENT IN RESPONSE TO AN
APPLICATION FOR LEAVE PURSUANT TO SECTION 103.1 OF THE
COMPETITION ACT (PUBLIC VERSION)**



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I. OVERVIEW – GIVENCHY OPPOSES THIS APPLICATION FOR LEAVE

1. Parfums Givenchy Canada Ltd. (“Givenchy”) opposes London Drugs Limited (“London Drugs”) application for leave to apply for an order under section 75 of the *Competition Act* (the “*Act*”). London Drugs has failed to satisfy the grounds upon which leave might be granted under subsection 103.1(7) of the *Act*.
2. London Drugs 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 section 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 Givenchy’s valid business decision to rationalize within Canada and cease supply to London Drugs is one that has no bearing on the maintenance or encouragement of competition within Canada.
4. Most importantly, Givenchy and London Drugs’ Master Vendor Agreement contains a termination clause permitting either party to terminate the supply relationship upon 30 days written notice to the other.
5. For these and other reasons as articulated below, London Drugs’ application for leave should be dismissed with costs.

II. THE PARTIES

6. London Drugs is a privately held company founded in 1945. London Drugs is amalgamated under the laws of British Columbia on February 24, 1980 and is part of the H.Y. Louie Group of companies.
7. London Drugs has 64 stores in 4 provinces and employs approximately 7,000 people. London Drugs sells everything from pharmaceuticals and cosmetics and beauty

products to groceries, automotive products and electronic equipment such as plasma televisions and iPods. It is a department store.

8. Givenchy is incorporated pursuant to the laws of Ontario and is a wholly owned subsidiary of Moët Hennessy Louis Vuitton (“LVMH”).

III. THE FACTS

9. Givenchy is a luxury brand that produces high-end products such as clothing, accessories, and beauty products.

10. As of 2006, Givenchy supplied fragrances and toiletries such as body lotions, soaps, deodorants and shower gels to London Drugs’ 64 stores.

**Affidavit of Jeanie Lee, sworn March 9, 2007 (“Lee Affidavit”),
Application Record of London Drugs, dated March 9, 2007 (“London
Drugs Application Record”), para. 25-26**

11. [REDACTED]

**Written Representations of the Respondent, Tab B, Supplementary
Answers to Questions, Letter of Gwendolyn Allison dated April 5,
2007, Question #3, pp. 1-4**

12. In a meeting held with London Drugs on January 18, 2007, Givenchy announced it would be ceasing the supply of product to London Drugs in order to rationalize the distribution of its fragrance business within Canada. The continued supply of product to London Drugs was not a financially viable option for Givenchy and the decision to cease supply was based on valid business reasoning. The decision to stop supplying London Drugs was confirmed in writing on or about January 24, 2007.

Lee Affidavit, London Drugs Application Record, paras. 39 & 41

13. Givenchy and London Drugs' Master Vendor Agreement contains a termination clause permitting either party to terminate the supply relationship upon 30 days written notice to the other.

Lee Affidavit, London Drugs Application Record, Ex. I, p. 7

14. Givenchy provided London Drugs with additional time to make a transition. London Drugs has not responded to this offer, though it was invited to do so.

Written Representations of the Respondent, Tab B, Supplementary Answers to Questions, Letter of Gwendolyn Allison dated April 5, 2007, Question #12, p. 6

15. London Drugs has demonstrated no attempts to replace Givenchy product with other prestige brands such as Estee Lauder, Clinique, Nina Ricci, Cool Water, Lise Watier or Dolce & Gabanna. These are but a few of the prestige brands that London Drugs currently does not offer.

Written Representations of the Respondent, Tab C, Supplementary Answers to Questions, Letter of Gwendolyn Allison dated April 5, 2007, "Calendar 2006 Prestige Fragrances"

IV. THE LAW

16. 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] C.C.T.D. No. 38 at para. 15.

Symbol Technologies ULC v. Barcode Systems Inc., 2004 F.C.A. 339 (“Symbol”)

i. The Tribunal’s Interpretation of “Substantially Affected”

17. 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 subsection 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 C.P.R. (3d) 1 at 23 (C.A.C.T.) (“Chrysler”).

18. 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 N.R. 230 at 233, 25 C.L.R. 157 (Fed. C.A.).

19. A consideration of the Tribunal’s decisions under subsection 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] C.C.T.D. No. 24 at para. 21.

20. 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] C.C.T.D. No. 22 at para. 20**

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

22. 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] C.C.T.D. No. 37**

23. 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 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] C.C.T.D. No. 24**

24. 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] C.C.T.D. No. 23 at para.8 ("*Broadview Pharmacy*")**

25. The Tribunal has consistently held that a substantial affect on a business is measured in the context of the entire business, and not just a portion of it.

Broadview Pharmacy at para.8.

Sears Canada Inc. v. Parfums Christian Dior Canada Inc. & Parfums Givenchy Canada Ltd., 2007 Comp. Trib. 6 at para. 21

ii. London Drugs Has Not Been “Directly and Substantially” Affected

26. London Drugs has failed to provide any credible evidence that it will be “directly and substantially” affected by the removal of Givenchy products from its “cosmetics and beauty” department. In fact, the evidence presented by London Drugs establishes quite the contrary.

Revenue

27. [REDACTED]

Written Representations of the Respondent, Tab B, Supplementary Answers to Questions, Letter of Gwendolyn Allison dated April 5, 2007, Question #6, p. 4

28. [REDACTED]

Written Representations of the Respondent, Tab B, Supplementary Answers to Questions, Letter of Gwendolyn Allison dated April 5, 2007, Question #7, p. 4

Substitutability and Cross-Segment Sales

29. London Drugs makes bald and unsubstantiated statements that the prestige 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 London Drugs for the

purchase of any other products, cosmetic or otherwise, if the Givenchy line is terminated. However, London Drugs provides no evidence of this loyalty, and its information or “basket analysis” with regard to “cross-segment” sales is meaningless without knowledge of what purchases or departments initially drew customers into the store. Indeed, evidence presented by London Drugs demonstrates that customers apparently purchase other products before considering the purchase of a fragrance.

Written Representations of the Respondent, Tabs B & F, Supplementary Answers to Questions, Letter of Gwendolyn Allison dated April 5, 2007, Question #10, “POS Transactions containing Givenchy Items”

Lee Affidavit, London Drugs Application Record, para. 22

30. London Drugs provides no persuasive evidence to establish why Givenchy products should be considered a separate market from that of other prestige brands of fragrances. There is no evidence to establish that customers will not substitute other products for that of Givenchy. In fact, London Drugs’ “basket analysis” demonstrates that customers do in fact purchase more than one brand of fragrance even within one purchase transaction, thus are not loyal to simply one brand.

Written Representations of the Respondent, Tab F, Supplementary Answers to Questions, Letter of Gwendolyn Allison dated April 5, 2007, “POS Transactions containing Givenchy Items”

31. London Drugs’ evidence also establishes that it is not brand loyalty, but “newness” which is the key driver that attracts customers to the fragrance and toiletries counters.

Lee Affidavit, London Drugs Application Record, Ex. C, p.46

Market Share

32. [REDACTED]

Written Representations of the Respondent, Tab B, Supplementary Answers to Questions, Letter of Gwendolyn Allison dated April 5, 2007, Question #3, pp. 1-4

33. In a series of charts referenced by London Drugs 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.

Lee Affidavit, London Drugs Application Record, Ex. E, pp. 23-24

34. Givenchy clearly does not occupy a dominant position in the prestige fragrance and toiletry market. Thus, it is difficult to fathom how the loss of this line would "critically" impact London Drugs as a whole, or its "cosmetics and beauty" department in particular.

Other Alleged Substantial Affects

35. London Drugs contends that it will be substantially affected in its business if supply of Givenchy product is terminated, as it will have to alter its advertising programme and reassign allocated shelf space for Givenchy product.

Lee Affidavit, London Drugs Application Record, paras. 48-50

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 reallocation of shelf space or revision of advertising programmes simply cannot qualify as substantial impacts on a business in light of past Tribunal decisions.

***Barcode Systems Inc v. Symbol Technologies ULC*, 2004 C.A.C.T. 1 at paras. 14-16**

37. [REDACTED]

38. The absurdity of this proposition was affirmed by Rothstein JJ.A., 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. Most importantly, there is a formal written Master Vendor Agreement with a detailed termination clause permitting either party to terminate the supply relationship upon 30 days written notice to the other. Both London Drugs and Givenchy are sophisticated contracting parties who came to a mutually beneficial agreement that either party could terminate the supply relationship at will and with notice. Givenchy has exercised its contractual right to terminate the supply relationship.

40. The supply dispute between Givenchy and London Drugs is one that does not impact the Canadian competition landscape in any way. It is a private dispute regarding Givenchy's valid decision and contractual right to rationalize its business and improve profitability, and it does not warrant exercise of the Tribunal's discretion to grant leave.

41. In light of the above, it is clear that London Drugs 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. London Drugs 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 section 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 F.C.A. 339 at para.18-19**

44. Here it is clear that a section 75 order could not issue for, as described above, London Drugs 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. London Drugs has also failed to establish the second element of section 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. London Drugs has presented no evidence to overcome the presumption of subsection 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. 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 fragrance and toiletries market.

47. Further, London Drugs has presented no evidence to show that these products are not substitutable. As established in London Drugs' 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, London Drugs' purchasers of Givenchy are not loyal customers and in fact purchase more than one fragrance even within one purchase transaction, thus would likely switch to other prestige products if Givenchy were unavailable.

Lee Affidavit, London Drugs Application Record, Ex. C, p. 46

Written Representations of the Respondent, Tab F, Supplementary Answers to Questions, Letter of Gwendolyn Allison dated April 5, 2007, "POS Transactions containing Givenchy Items"

48. There is no shortage of prestige cosmetics and fragrances in the Canadian market, or any limit on London Drugs' 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 London Drugs and its many other competitors.

Lee Affidavit, London Drugs Application Record, Ex. C, p.42

49. Even if the product market is determined to be Givenchy product, London Drugs' inability to obtain adequate supply of product is not due to insufficient competition in the market, but the valid business decision and contractual right of Givenchy to cease supply.

50. Finally, London Drugs cannot establish the fifth element of section 75, or that the refusal to deal is having or is likely to have an adverse affect on competition in a market. Though London Drugs baldly states that there will be an adverse impact on “competition in the marketplace”, it does not provide one shred of evidence to support this claim. In fact, London Drugs’ evidence establishes the opposite. Though prestige brands such as Givenchy 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 is healthier than ever before.

Lee Affidavit, London Drugs Application Record, Ex. C, pp. 43-44

51. Finally, there is no evidence to establish that London Drugs does not compete with other department stores or cosmetics stores such as Sephora. In fact, its marketing research indicates just the opposite. London Drugs’ evidence also establishes that the reason for little variation in pricing for these prestige products is due to the low retail margins on these products, and not a lack of competition in the market.

Lee Affidavit, London Drugs Application Record, Ex. A, pp. 19, 20-21, 25, 30-31

52. London Drugs has failed to satisfy the requirements for obtaining leave to commence an application under section 75 of the *Act*. In light of the lack of credible evidence relating to a substantial affect on London Drugs’ business or adverse affect on competition in the market, and the supply contract that permits the termination of supply with 30 days written notice, we request that this Tribunal exercise its discretion to refuse leave.

53. Givenchy admits the grounds and material facts in paragraphs 9 and 12 of London Drugs’ application for leave.

54. Givenchy denies or has no knowledge of the grounds or material facts contained in all other paragraphs of London Drugs’ application for leave.

55. Givenchy requests that the proceedings be conducted in English.
56. Givenchy does not oppose London Drugs' request that documents be filed in electronic form.

V. ORDER SOUGHT

57. Givenchy requests that the Tribunal dismiss this leave application with costs.

DATED at Toronto, Ontario, this 13th day of April 2007.

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