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	April 12, 2024 12 avril 2024		
	Brittney Channer		
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Court File No.

FEDERAL COURT

B E T W E E N :

EMPIRE COMPANY LIMITED and SOBEYS INC.

Applicants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard in Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitors WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE
GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

April 12, 2024

Issued by: _____

Address of local office: 180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6

TO: ATTORNEY GENERAL OF CANADA
c/o This Honourable Court pursuant to Rule 133(1)

AND TO: COMMISSIONER OF COMPETITION
Competition Bureau
50 Victoria Street, Room C-114
Gatineau, Quebec K1A 0C9

APPLICATION

1. This is an Application for judicial review in respect of a decision by the Commissioner of Competition (the “**Commissioner**”) to commence an inquiry (the “**Inquiry**”) pursuant to paragraph 10(1)(b)(ii) of the *Competition Act*, RSC 1985, c C-34 (the “**Competition Act**” or the “**Act**”) into alleged conduct by Empire Company Limited (“**Empire**”) and/or its affiliates, including Sobeys Inc. (“**Sobeys**”; together with Empire, the “**Applicants**”).
2. The decision to commence the Inquiry (the “**Decision**”) was communicated to the Applicants by a letter dated March 6, 2024, but delivered only on March 13, 2024 (the “**Initial Letter**”).
3. The Applicants make application for:
 - (a) an Order that the Decision was invalid or unlawful, and quashing or setting it aside;
 - (b) an interim Order staying any application by the Commissioner under section 11 of the *Competition Act* seeking orders for oral examinations, productions or written returns until final disposition of this Application;
 - (c) costs of the Application; and
 - (d) such further and other relief as counsel may request and this Honourable Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE:

The Applicants

4. The Applicant Empire is a Canadian public company headquartered in Stellarton, Nova Scotia, which invests in businesses that operate primarily in the food retail and real estate sectors.

5. The Applicant Sobeys is a wholly-owned subsidiary of Empire. Sobeys is a national supermarket chain that operates approximately 1,600 stores in all ten provinces of Canada.

The Decision Communicated to the Applicants

6. On March 13, 2024, the Applicants received the Initial Letter, informing them of the Commissioner's Decision to commence the Inquiry under Part VIII of the *Act*, with a stated focus on the abuse of dominance provisions.

7. According to the Initial Letter, the Inquiry seeks to determine the facts in respect of the Applicants' use of (i) restrictive covenants and (ii) exclusivity clauses in leases, together defined by the Commissioner as "**Property Controls**". The Initial Letter alleges that Property Controls that restrict third parties from offering food products for retail sale on specific "plots of land" or in specific geographic areas may prevent or lessen competition in the retail supply of food products to consumers in certain local markets in Canada.

8. According to the Initial Letter, the Inquiry also seeks to assess the nature of the relationship between the Applicants and Crombie Real Estate Investment Trust (collectively with its affiliates, "**Crombie**"), including whether the Applicants have the ability to influence the economic behaviour of Crombie.

9. On March 27, 2024, the Applicants' counsel received a letter from the Commissioner's counsel providing a draft *ex parte* order for production of records and information pursuant to section 11 of the *Act*. The draft order focuses on production of records and information regarding Sobeys' retail food stores in the Halifax Regional Municipality ("**Halifax**").

10. By letter dated April 3, 2024, counsel for the Applicants requested the affidavit proposed to be filed by the Commissioner in his application for a section 11 order. The affidavit would be expected to explain the basis for the Commissioner's Decision. The Commissioner's representatives advised that

“any affidavit” would be provided “once it has been filed with the Federal Court”. The Commissioner has advised that the application for a section 11 order would be brought on an *ex parte* basis.

The Decision is Unsupportable as a Matter of Fact and Law

11. In order for the Commissioner to commence an inquiry under paragraph 10(1)(b)(ii) of the *Act*, he must have “reason to believe” that grounds exist for the making of an order under Part VII.1 or Part VIII of the *Act*.

12. The Commissioner can have no “reason to believe” that grounds exist for making of an order under the abuse of dominance provisions in section 79 of Part VIII of the *Act*. In particular, the Commissioner can have no “reason to believe” that **(i)** the Applicants have a dominant position in any properly defined antitrust market; **(ii)** the Property Controls are anti-competitive or constitute a practice of anti-competitive acts; and **(iii)** the Property Controls could substantially prevent or lessen competition.

i. No Dominant Position

13. An order may only be made under the abuse of dominance provisions (section 79 in Part VIII of the *Act*) against “one or more persons [who] substantially or completely control a class or species of business throughout Canada or any area of Canada”, i.e. a legal person which has a dominant position in a properly defined antitrust market.

14. The Competition Bureau’s Abuse of Dominance Enforcement Guidelines (the “**Guidelines**”) indicate that where a market participant’s market share is less than 50%, further examination is not warranted absent other evidence of a substantial degree of market power or the potential for market power. As set out in more detail below, there is no basis for a contention by the Commissioner that such market power exists in the case of the Applicants by reason of the Property Controls or otherwise.

15. Quite apart from the Commissioner's stated approach found in the Guidelines, the Competition Bureau has repeatedly reviewed and articulated its approach to defining antitrust markets in the grocery sector specifically, and the retail sector more generally.

16. The Commissioner has also frequently described the importance of transparency and consistency regarding the Competition Bureau's enforcement approach. Businesses, the public, and governments rely on the articulation by the Competition Bureau of its approach to particular competition law matters, and quite properly expect transparency and consistency from the Commissioner.

17. The Applicants' lack of a dominant position would be evident to the Commissioner from his extensive previous and more recent examinations into the grocery sector, and public and other information and data available to the Commissioner.

18. As repeatedly acknowledged by the Competition Bureau, the Applicants face vigorous actual and potential competition from Loblaw, Wal-Mart, Costco, and Metro, along with many other regional and local retailers.

19. As a matter of fact and law, the Commissioner can have no "reason to believe" that grounds exist for an order under the abuse of dominance provisions, as the Applicants do not have a dominant position in any properly defined antitrust market. As is clear from the draft section 11 order, the Inquiry is focused on Halifax. Market definition under Canadian law and the principles of economics cannot support a contention that the Applicants are dominant in any properly defined antitrust market in Halifax.

20. Reflecting the reality of competition in the grocery sector, the Applicants estimate that their share of retail grocery sales in Halifax is only about 35%. This market share is well below the 50% threshold set out in the Guidelines, any market share the Competition Tribunal has ever found to represent a

dominant position, and the market share in Halifax of what the Applicants understand to be the largest grocery retailer, Loblaw.

ii. No Practice of Anti-Competitive Acts

21. There is also no “reason to believe” that the Property Controls amount to “a practice of anti-competitive acts”, as required for an order pursuant to section 79(1)(a). On the contrary, these common contractual provisions have a clear pro-competitive purpose and are not directed at entrenching or sustaining a dominant position.

22. Property Controls are not unique to the grocery sector, but have been widely used for decades in a range of retail and other sectors across the country. Their principal purpose is pro-competitive and not exclusionary: among other things, they safeguard and thus create an incentive for investments by landlords and tenants, including in fixtures and other property improvements, as well as in the promotion by a retailer of its store as part of a shopping centre or plaza.

23. Furthermore, Property Controls could not be used to entrench or sustain a dominant position. By their nature, Property Controls only restrict the leasing behaviour of the landlord subject to them, and do not restrict other land in an area. The geographic scope of Property Controls is far smaller than the geographic market for retail grocery sales.

24. Given these readily apparent facts – quite apart from the fact that there is no market dominance by the Applicants in any properly defined antitrust market – there is no basis to assert that the use of Property Controls is intended to exclude any competitor from a market. The properties subject to such controls could not plausibly represent a sufficient portion of the real estate in any given area to have such an effect.

iii. *No Substantial Prevention or Lessening of Competition*

25. Finally, the Commissioner can have no “reason to believe” that the Property Controls result in a substantial prevention or lessening of competition in any properly defined antitrust market in Halifax or elsewhere in Canada, as required for an order pursuant to section 79(1)(b).

26. Given their modest market shares in Halifax and across Canada, as well as the highly fragmented nature of commercial real estate, the Applicants’ Property Controls necessarily apply to only a small fraction of the available real estate in each market, including in Halifax. In short, there is no reason to believe that Property Controls have the effect of preventing entry into or otherwise preventing or lessening competition substantially in any properly defined retail grocery market.

The Decision Appears to Have Been Made for an Improper Purpose or Based on Irrelevant Considerations

27. The grocery sector in Canada has been the subject of an inordinate amount of attention from representatives of government. The Commissioner is the head of the Competition Bureau, which is described as an independent law enforcement agency, and he is meant to make decisions free from political interference or direction (except as specifically delineated under the *Act*, which provisions are not engaged with respect to the Decision). Nevertheless, the federal government has repeatedly and publicly referred to the use of the *Act* and the powers of the Commissioner in discussing the grocery sector, raising at least the appearance of a lack of independence of the Commissioner.

28. For the Applicants, the perception of being unfairly targeted is well-founded. By way of only very recent examples:

- (a) In late 2022, the Commissioner initiated a market study into the retail grocery industry, described by the Minister of Innovation, Science and Industry (the “**Minister**”) as “something I asked for”;

- (b) In 2023, the federal government developed amendments to the *Act* that were described as being targeted specifically at grocers; and
- (c) In early 2024, the Minister wrote the Commissioner a letter describing “food price inflation” as a serious concern for Canadians and stating that new powers in recent amendments to the *Act* were passed because of this issue. The Minister’s letter included this statement: “Recognizing that you have an independent mandate to execute, I am confident that these new powers will be used...”.

29. Where there is no basis as a matter of fact and law for the Commissioner to have “reason to believe” that the Applicants are dominant in a properly defined antitrust market, the Decision appears arbitrary in the sense of being motivated by considerations other than the statutory purposes and objects of the *Act* in accordance with due process.

Grounds for Relief Sought

30. The Decision should be declared invalid or unlawful, quashed, or set aside pursuant to the *Federal Courts Act*, RSC 1985, c F-7 on the grounds that:

- (a) the Commissioner erred in law in making the Decision and unreasonably interpreted and applied section 10(1)(b)(ii) and section 79 of the *Act*;
- (b) the Commissioner made the Decision on an unfounded factual basis, in an arbitrary or capricious manner or without regard to the material before him, his prior approach to the grocery sector, and legal and economic principles; and

- (c) in making the Decision, the Commissioner appears to have exercised his discretion under section 10(1)(b)(ii) for an improper purpose or based on irrelevant considerations.

31. The Applicants rely on:

- (a) Sections 10, 11 and 79 of the *Act*;
- (b) Sections 18, 18.1, 18.2, and 44 of the *Federal Courts Act*;
- (c) Rule 317 of the *Federal Courts Rules*, SOR/98-106; and
- (d) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

- 1. Affidavit(s) to be filed in support of the application; and
- 2. Such further and other material as counsel may advise and this Honourable Court may permit.

THE APPLICANTS REQUEST the Commissioner to send a certified copy of the following material that is not in the possession of the Applicants but is in the possession of the Commissioner to the Applicants and to the Registry:

- 1. All memoranda, documents, reports, working papers, and other material prepared, used, considered and provided by and to the Commissioner in connection with the making of the Decision.



April 12, 2024

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