

Competition Tribunal



Tribunal de la concurrence

Reference: *The Commissioner of Competition v. Hudson's Bay Company*, 2018 Comp Trib 12
File No.: CT-2017-008
Registry Document No.: 73

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

AND IN THE MATTER OF an application for orders pursuant to section 74.1 of the *Competition Act* for conduct reviewable pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the *Competition Act*.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Hudson's Bay Company
(respondent)



Decided on the basis of the written record
Before Judicial Member: J. Gagné J.
Date of Order: May 8, 2018

AMENDED CONFIDENTIALITY ORDER

FURTHER TO the application filed by the Commissioner of Competition (the “**Commissioner**”) against the Respondent, Hudson’s Bay Company (“**HBC**”) pursuant to paragraph 74.1(1)(a) and subsection 74.01(3) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “**Act**”);

AND FURTHER to the confidentiality order dated December 21, 2017 filed on consent by the Commissioner and HBC;

AND FURTHER to the draft confidentiality order filed on consent by the Commissioner and HBC, which makes provision for Level C Protected Records;

THE TRIBUNAL ORDERS THAT:

[1] For the purposes of this Order:

- (a) “**Act**” mean the *Competition Act*, RSC 1985, c C-34, as amended;
- (b) “**Affiliate**” means, in respect of a Person, any other Person controlling, controlled by or under common control with such first Person, whether directly or indirectly, and “control” means directly or indirectly hold securities or other interests in a Person (i) to which are attached more than 50% of the votes that may be cast to elect directors or persons exercising similar functions or (ii) entitling the holder to receive more than 50% of the profits of the Person or more than 50% of its assets on dissolution;
- (c) “**Commissioner**” means the Commissioner of Competition appointed pursuant to section 7 of the Act or any person designated by the Commissioner to act on his behalf;
- (d) “**Fact Witness**” means an individual who has personal knowledge of facts relevant to this proceeding, is expected to give evidence at the hearing, and has executed a confidentiality agreement in the form attached as Schedule A hereto;
- (e) “**Designated Representatives**” means up to three in-house counsel and up to four additional individuals designated by HBC as their respective representatives who will be permitted access to Records designated as Level B Protected Records in accordance with the terms of this Order, which designations shall be made by written notice to the Tribunal, with a copy sent concomitantly to the Commissioner. The Commissioner may make a motion to the Tribunal objecting to such designations;
- (f) “**Record Review Vendor**” means a professional service provider retained by a Party with respect to the Proceeding to facilitate the review of Records, both digital and paper, by legal professionals and who has executed a confidentiality agreement in the form attached as Schedule A hereto;
- (g) “**Independent Expert**” means an expert retained by a Party with respect to the Proceeding who (i) is not a current employee of the Respondent; (ii) has not been an employee of the Respondent or its Affiliates within 2 years prior to the date of this Order, (iii) is not a current employee of a competitor of the Respondent or its Affiliates; (iv) has not been an employee of a competitor of the Respondent within 2 years prior to the date of this

Order; and (v) has executed a confidentiality agreement in the form attached as Schedule A hereto;

(h) “**Parties**” means the Commissioner and the Respondent collectively, and “**Party**” means any one of them;

(i) “**Person**” means any individual or corporation or partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business, and any Affiliates thereof;

(j) “**Proceeding**” means the application filed by the Commissioner against the Respondent (File Number CT-2017-008);

(k) “**Protected Record**” means any Record (including the information such Record contains) that is produced in the Proceeding, including documents listed in affidavits of documents, excerpts from transcripts of examinations for discovery, answers to undertakings, documents produced with answers to undertakings, expert reports, lay witness statements, pleadings, affidavits or submissions that:

(i) the Party producing the Record claims is confidential pursuant to Section 4 of this Order; or

(ii) the Tribunal has determined is confidential;

(l) “**Record**” has the same meaning as in subsection 2(1) of the Act and, for greater certainty, includes any email or other correspondence, memorandum, pictorial or graphic work, spreadsheet or other machine readable record and any other documentary material, regardless of physical form or characteristics;

(m) “**Respondent**” means the Hudson’s Bay Company doing business as Hudson’s Bay, its directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by the Respondent, and the respective directors, officers, employees, agents, representatives, successors and assigns of each; ~~and~~

(n) “**Third Party**” means any Person other than the Commissioner or the Respondent; and

(o) “**Tribunal**” means the Competition Tribunal established pursuant to s. 3(1) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), as amended.

[2] Disclosure of Records containing any of the following types of information could cause specific and direct harm, and such Records may be designated as Protected Records:

(a) Information relating to prices (to the extent that such prices have not been published or made generally known to competitors and customers), capacity, specific output or revenue data or market shares, or negotiations with customers or suppliers about prices, rates or incentives;

- (b) Sales figures of the Respondents that are otherwise not public;
- (c) Confidential contractual arrangements between the Respondent and its customers, agents, and/or suppliers;
- (d) Financial data or reports, or financial information relating to the Respondent or its customers, suppliers or a Third Party;
- (e) Business plans, marketing plans, strategic plans, budgets, forecasts and other similar information;
- (f) Internal market studies and analyses;
- (g) Internal investigative and related documents belonging to the Commissioner;
- (h) Other Records containing competitively sensitive and/or proprietary information of a Party or Third Party.

[3] If information from a Protected Record is incorporated into any other Record, that Record shall be a Protected Record. Any Protected Record shall cease to be a Protected Record if: (a) it or the protected information contained therein becomes publicly available (except if it becomes publicly available through a breach of this Order); (b) if the Parties agree that the Record shall cease to be a Protected Record; or (c) the Tribunal determines that the Record shall cease to be a Protected Record.

[4] Protected Records will be identified in the following manner for the purpose of this Proceeding:

- (a) A Person who claims confidentiality over a Record shall, at the time of production of a Protected Record, mark it with the name of the entity producing the Record and with “Confidential – Level A”, ~~or~~ “Confidential – Level B” or “Confidential –Level C” on the face of each Record and/or on each page that is claimed as confidential;
- (b) Subject to Section 3 of this Order, all Records designated as Protected Records shall be treated as a Protected Record, save for determination otherwise by the Tribunal or re-designation pursuant to Section 8 below;
- (c) The inadvertent failure to designate a Record or portion thereof as Confidential at the time it is disclosed does not constitute waiver of the right to so designate after disclosure has been made;
- (d) If a Record originates with or from more than one Party and is designated by at least one Party as a Protected Record, the highest level of confidentiality shall universally attach to that Record, subject to the resolution of any challenge to that claim of confidentiality;
- (e) At any point in the Proceeding, a Party may challenge a claim of confidentiality or level of confidentiality made by another Party. The Parties shall use their best efforts

to agree as to whether the Records (or portions thereof) are to be treated as Protected Records; and

- (f) If agreement cannot be reached, the Parties may apply to the Tribunal to determine whether the Record or a portion thereof, is a Protected Record.

[5] Subject to a further order of the Tribunal, the consent of the Party or Parties that produced and claimed confidentiality over the Protected Record, or as required by law, Protected Records marked “Confidential – Level A” (“**Level A Protected Records**”) may be disclosed only to:

- (a) the Commissioner, counsel to the Commissioner, and the Commissioner’s staff who are directly involved in the Proceeding;
- (b) outside counsel to the Respondent and outside counsel’s staff who are directly involved in the Proceeding;
- (c) Independent Experts and their staff who are directly involved in the Proceeding;
- (d) Record Review Vendors; and
- (e) a Fact Witness, but such disclosure may be done only in preparation of the witness to give evidence at the hearing and the confidential documents disclosed must bear upon the witness’ expected evidence.

[6] Subject to a further order of the Tribunal, the consent of the Party or Parties that produced and claimed confidentiality over the Protected Record, or as required by law, Protected Records marked “Confidential – Level B” (“**Level B Protected Records**”) may be disclosed only to:

- (a) the individuals described in Section 5 above; and
- (b) Designated Representatives of the Respondent who have executed a confidentiality agreement in the form attached as Schedule A.

[7] Subject to a further order of the Tribunal, the consent of the Commissioner, or as required by law, Protected Records marked “Confidential – Level C” by the Commissioner (“**Level C Protected Records**”) may be disclosed only to:

- (a) outside counsel of the Respondent and its staff who are directly involved in the Proceeding;
- (b) Independent Experts and their staff of the Respondent who are directly involved in the Proceeding;
- (c) Record Review Vendors of the Respondent; and
- (d) the person who supplied Level C Protected Records to the Commissioner.

[8] Notwithstanding any provision of this Order, the Commissioner may disclose any Level A Protected Records, ~~or Level B Protected Records~~ or Level C Protected Records that he has so designated, and that have not been produced in this Proceeding by the Respondent or otherwise originated from the Respondent, subject to the limits prescribed by section 29 of the Act; and the Respondent may do the same with respect to documents it has so designated, and that have not been produced in this Proceeding by the Commissioner or otherwise originated from the Commissioner.

[9] A Party may at any time and with prior reasonable notice to the other Parties re-designate any of its own Level A Protected Records as Level B Protected Records or public documents, its Level C Protected Records as Level A Protected Records, Level B Protected Records or public documents, and/or may re-designate any of its own Level B Protected Records as public documents. Where another Party disputes the re-designation, the Tribunal shall determine the proper designation. Records re-designated as public shall cease to be Protected Records and shall form part of the public record if introduced into evidence at the hearing of the Proceeding, unless the Parties agree otherwise or the Tribunal so orders. If a Party changes the designation of a Record to confidential, a prior disclosure of it shall not constitute a breach of this Order.

[10] If a Party is required by law to disclose a Protected Record, or if a Party receives written notice from a Person who has signed a confidentiality agreement pursuant to this Order that they are required by law to disclose a Protected Record, that Party shall give prompt written notice to the Party that claimed confidentiality over the Protected Record so that a protective order or other appropriate remedy may be sought.

[11] Outside counsel to the Respondent and his or her staff, counsel to the Commissioner, the Commissioner and his staff, and Independent Experts and their staff, may make copies of any Protected Record as they require in connection with the Proceeding.

[12] Nothing in this Order prevents a Party from having full access to Protected Records that originated from that Party.

[13] For greater certainty, in accordance with section 62 of the *Competition Tribunal Rules*, all Persons who obtain access to Records and information through documentary, written and oral discovery through this Proceeding are subject to an implied undertaking to keep the Records and information confidential and to use the Records and information solely for the purposes of this Proceeding (including any application or proceedings to enforce any order made by the Tribunal in connection with this Proceeding) and any related appeals.

[14] At the hearing of the Proceeding:

- (a) Protected Records tendered as evidence at the hearing of the Proceeding shall be identified and clearly marked as such, in accordance with paragraph 4(a), above;
- (b) The Tribunal may determine whether the Record should be treated as a Protected Record;
- (c) Protected Records shall not form part of the public record unless the Party or Parties claiming confidentiality waive the claim, or the Tribunal determines that the Record is not a Protected Record;

- (d) Records over which no privilege or confidentiality claim has been asserted shall, unless otherwise determined by the Tribunal at the hearing, form part of the public record in this Proceeding if introduced into evidence or otherwise placed on the record. Public Records shall be marked “Public” on the face of the document; and
- (e) Nothing in this Order shall abrogate or derogate any legal burden or requirement applicable to a sealing order or abrogate or derogate in any way from the rights of the Parties to assert confidentiality claims during the course of the hearing.

[15] The Parties shall provide the Tribunal with redacted versions of Protected Records at the time any such Records are introduced into evidence or otherwise placed on the record, which redacted versions shall be marked “Public” on the face of the document and shall form part of the public record in this Proceeding. Each Protected Record shall identify the portions of the document which have been redacted from the “Public” version, by highlighting such portions in the Protected Record.

[16] The termination of the Proceeding shall not relieve any person to whom Protected Records were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such Protected Records in accordance with the provisions of this Order and any confidentiality agreement, subject to any further order of the Tribunal.

[17] Upon completion or final disposition of the Proceeding and any related appeals, all Protected Records and any copies of Protected Records, with the exception of Protected Records in the possession of the Commissioner and his staff, shall be destroyed or returned to the Party that produced them unless the Party that produced the Protected Records states, in writing, that they may be disposed of in some other manner, provided that outside counsel to the Respondent and counsel to the Commissioner may keep copies of Protected Records in their files and that any copies of Protected Records as may exist in the Parties' automatic electronic backup and archival systems may be kept provided that deletion is not reasonably practical and the copies are retained in confidence and not used for any purpose other than backup and archival purposes.

[18] The Parties shall bear their own costs associated with the request for and issuance of this Order.

[19] Nothing in this Order prevents or affects the ability of a Party from applying to the Tribunal for further order or directions with respect to the use or disclosure of Records or information produced by another Party.

[20] The Tribunal shall retain jurisdiction to deal with any issues relating to this Order, including, without limitation, the enforcement of this Order and any undertakings executed pursuant to this Order. This Order shall be subject to further direction of the Tribunal and may be varied by order of the Tribunal.

DATED at Ottawa, this 8th day of May, 2018.

SIGNED on behalf of the Tribunal by the presiding judicial member

(s) Jocelyne Gagné

SCHEDULE "A"

Confidentiality Undertaking

IN CONSIDERATION of being provided with information or documentation in connection with the Proceeding prior to the issuance of a Confidentiality Order by the Competition Tribunal or a further agreement between the parties to that proceeding relating to confidentiality (the "**Confidential Information**"), I _____, of the City of _____, in the Province/State of _____, hereby agree to maintain the confidentiality of the Confidential Information so obtained, until such a Confidentiality Order or further agreement is reached that may supersede or amend this Undertaking.

1. I will not copy or disclose the Confidential Information so obtained to any other person, except, as applicable, (a) my staff who are directly involved in this matter who have signed an Undertaking in substantially the same form as this one; (b) counsel for the Party on whose behalf I have been retained, members of counsel's firm who are directly involved in this Proceeding and, in the case of the Commissioner, the Commissioner's staff directly involved in the Proceeding; (c) other experts retained by or on behalf of the Party on whose behalf I have been retained and who have signed a similar confidentiality Undertaking; and (d) persons permitted by order of the Competition Tribunal. Nor will I use the Confidential Information so obtained for any purpose other than in connection with this Proceeding and any related proceedings.

2. Upon completion of this Proceeding and any related proceedings, I agree that the Confidential Information, and any copies of same, shall be dealt with in accordance with instructions from counsel for the Party I am retained by or as prescribed by the Order of the Competition Tribunal.

3. I acknowledge and agree that the completion of this Proceeding and any related proceedings shall not relieve me of the obligation of maintaining the confidentiality of the Confidential Information in accordance with the provisions of this Undertaking, subject to any further order of the Tribunal. I acknowledge that I am aware of the Confidentiality Order granted by the Competition Tribunal in this matter and agree to be bound by same. I further acknowledge and agree that any Party shall be entitled to injunctive relief to prevent breaches of this Undertaking and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled in law or in equity.

4. In the event that I am required by law to disclose any of the Confidential Information, I will provide counsel for the Party on whose behalf I have been retained with prompt written notice so that the Party that claimed confidentiality over such Confidential Information may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Confidential Information that is legally required and I will exercise my best efforts to obtain reliable assurances that confidential treatment will be accorded to the Confidential Information.

5. I will promptly, upon the request of the person providing the Confidential Information, advise where such material is kept. At the conclusion of my involvement, I will, upon the request and direction of the person providing the Confidential Information, destroy, return or otherwise dispose of all Confidential Information received or made by me having been duly authorized and directed to do so.

6. I hereby attorn to the jurisdiction of the Federal Court of Canada and/or the Competition Tribunal to resolve any disputes arising under this Undertaking.

DATED this _____ day of _____, 201__.

SIGNED, SEALED & DELIVERED in the presence of:

Name of Signatory

Name of Witness

COUNSEL OF RECORD

For the applicant:

The Commissioner of Competition

Alexander Gay
Katherine Rydel
Derek Leschinsky

For the respondent:

Hudson's Bay Company

Eliot Kolers
Mark Walli
William Wu