

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT Date: January 23, 2018 CT-2017-008 Bianca Zamor for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	#37

CT-2017-008

THE COMPETITION TRIBUNAL

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*.

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

HUDSON'S BAY COMPANY

Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the Commissioner of Competition (the "**Commissioner**") will make a motion to the Competition Tribunal ("**Tribunal**") on February 9, 2018.

THE MOTION IS FOR:

- a) An order for leave to amend the Notice of Application;
- b) Costs, should Hudson's Bay Company ("**HBC**") oppose this motion; and
- c) Such further and other relief as counsel may request and the Tribunal may permit.

THE GROUNDS FOR THE MOTION ARE:

- a) The Commissioner alleges that HBC has engaged and continues to engage in conduct reviewable pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”);
- b) On November 14, 2017, the Commissioner brought a motion seeking to require HBC to produce an Affidavit of Documents concerning the period after February 2015 on the basis that HBC’s conduct is ongoing;
- c) In an Order dated December 7, 2017 the Tribunal granted the Commissioner’s motion in part. HBC was ordered to produce documents after 2015 in respect of the Commissioner’s allegations pursuant to paragraph 74.01(1)(a) of the Act as the Commissioner’s Notice of Application was clear in alleging that HBC’s conduct was ongoing in respect of its allegedly deceptive clearance/end of line representations. HBC was not ordered to produce post-2015 documents in respect of subsection 74.01(3) of the Act because the Commissioner’s Notice of Application was found to give the erroneous impression that the Commissioner’s allegations were limited to six specified sleep set advertisements from July 19, 2013 to October 30, 2014;
- d) The proposed Amended Notice of Application clarifies the Commissioner’s allegations in respect of subsection 74.01(3) of the Act by elaborating on the points at issue between HBC and the Commissioner. The proposed amendments also seek to clarify the erroneous impression given by the original Notice of Application that the Commissioner reviewed all of HBC’s sleep set advertisements and was only able to identify six advertisements making allegedly deceptive ordinary sale price representations -- which is not correct;
- e) Allowing the amendment does not prejudice HBC and rather serves the interests of justice;

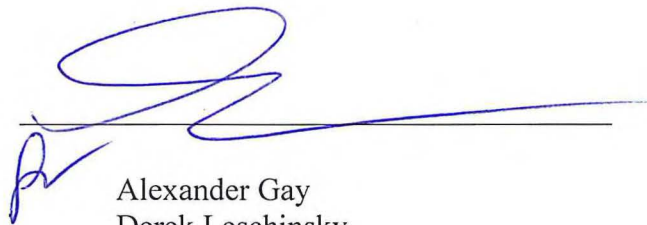
- f) The costs to HBC in producing documents in relation to the proposed Amended Notice of Application are not costs thrown away. The proposed amendments cover a period of time for which HBC did not produce documents and for which it did not conduct electronic searches. While there may be added costs to HBC, they are not duplicative of the efforts that have already been made;
- g) If this Tribunal grants this motion, the Commissioner requests that HBC be made to produce a supplemental Affidavit of Documents on a timely basis. However, in the alternative, to the extent that this Tribunal has concerns relating to the schedule, the Commissioner is prepared to proceed to examination based on HBC's existing Affidavit of Documents. Any additional documentary request can be dealt with by way of undertakings at discovery;
- h) The Commissioner is of the view that while there may have to be some minor consequential adjustments to the Scheduling Order, the November 2018 dates for a hearing can be preserved;
- i) The *Competition Tribunal Rules*, Rule 34 and the *Federal Court Rules*, Rule 75; and
- j) Such further or other grounds as counsel may advise and the Tribunal may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of this motion:

- a) The proposed Amended Notice of Application; and
- b) Such further or other documents as counsel may advise and this Tribunal may permit.

DATED AT OTTAWA, ONTARIO, this 23rd day, January, 2018.

SIGNED BY:



Alexander Gay
Derek Leschinsky
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Counsel to the Commissioner of Competition

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AND TO: **The Registrar**
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