

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:

COMMISSIONER OF COMPETITION

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  <b>FILED / PRODUIT</b> Date: November 28, 2017 CT-2017-008 Bianca Zamor for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	#24

**Applicant**

**-and-**

**HUDSON'S BAY COMPANY**

**Respondent**

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**Memorandum of Fact and Law of the Commissioner of Competition**

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**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
Competition Bureau Legal Services  
Place du Portage, Phase 1  
50 Victoria Street, 22nd Floor  
Gatineau, QC K1A 0C9  
Fax: (819) 953-9267

**Alexander Gay** (LSUC: 37590R)

Tel: (613) 670-8497

Alexander.Gay@justice.gc.ca

**Derek Leschinsky** (LSUC: 48095T)

Tel: (819) 956-2842

Derek.Leschinsky@canada.ca

**Katherine Rydel** (LSUC: 58143I)

Tel: (819) 997-2837

Katherine.Rydel@canada.ca

Counsel to the Commissioner of Competition

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**Overview**

1. This motion is for an order directing the Hudson's Bay Company ("**HBC**") to comply with the Scheduling Order dated May 26, 2017 (the "**Scheduling Order**") and that it be made to produce a further and better affidavit of documents, inclusive of the period from approximately February 2015 until now (the "**Disputed Time Period**"), within ten days of this motion, failing which the HBC Response is to be struck preemptively. HBC has failed to identify a single document to the Commissioner of Competition (the "**Commissioner**") in respect of the Disputed Time Period.

2. HBC and the Commissioner, with the assistance of the Competition Tribunal (the “**Tribunal**”), agreed to a Scheduling Order which required the parties to produce an affidavit of documents. The Scheduling Order accommodated HBC’s request for additional time to produce its affidavit of documents. Despite the clear terms of the Scheduling Order, HBC has failed to produce an affidavit of documents for the Disputed Time Period. HBC is in substantial non-compliance with the Scheduling Order.
3. The deficiencies of HBC’s affidavit of documents cannot be cured or addressed through oral discoveries. HBC has failed to identify documents for almost a three year period. There is a marked difference between situations where (a) a select number of documents have not been produced and where the examination for discovery can elicit this missing documentary information and (b) there has been substantial non-compliance with a production order and discovery obligations. The latter cannot be cured through oral discoveries. HBC must be made to produce a complete affidavit of documents in advance of oral discoveries.
4. HBC’s conduct is a deliberate attempt to narrow these proceedings into its “reviewable conduct” and preclude the Commissioner from addressing the entirety of HBC’s conduct. HBC is attempting to limit discovery and ultimately the Tribunal’s remedial powers to those discrete misrepresentations identified in the Commissioner’s Notice of Application. HBC misreads the Notice of Application. HBC continues to engage in “reviewable conduct” and substantially similar reviewable conduct as it relates to sleep sets, conduct that extends well beyond 2015. The promotional practices underlying HBC’s “reviewable conduct” are also widespread and apply to other products, beyond sleep sets. The purpose of Part VII.1 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “**Act**”) is to remedy the harm caused by the deceptive marketing practices for the benefit of consumers and the Canadian economy. In furtherance of that purpose, which is provided for in the Act, the Commissioner is entitled to seek a remedy (and hence obtain discovery and a complete affidavit of documents) for the conduct in issue or substantially similar conduct. The Commissioner is entitled to inquire into the extent to which HBC continues to engage in “reviewable conduct” as it relates to sleep sets for the Disputed Time Period and, more broadly, how the underlying promotional practices have been applied and continue to be applied by HBC to other products.

5. The Commissioner is not engaged in a fishing expedition. To the contrary, the Commissioner has a very clear view of what category of documents should be produced by HBC in these proceedings for the Disputed Time Period, which should, for example, include: (a) documents relating to HBC's post-January 2015 practices for setting prices for sleep sets, including documents related to setting the regular price and promotional prices; changing the regular or promotional price; monitoring of competitors' prices; influence of manufacturers on prices, etc.; (b) documents relating to HBC's post-January 2015 sleep set marketing practices, including documents related to the marketing process; market research and studies; (c) HBC's post-January 2015 financial documents related to sleep sets including documents setting out gross margin analysis; profitability; revenues; strategic planning and growth strategies; forecasting, etc.; (d) documents relating to HBC's post-Jan 2015 practices regarding compliance with the Act for sleep sets; (e) documents relating to HBC's continued use of "end of line" representations with respect to sleep sets; and (f) documents relating to HBC's compliance practices and policies for the products other than sleep sets HBC offers and has offered for sale. A more detailed listing of categories of documents, which is cross-referenced to the Notice of Application, is found at Annex "A" to this Memorandum of Fact and Law.

## **Part I – The Facts**

6. Pursuant to an application by the Commissioner, the Federal Court issued an order pursuant to paragraph 11(1)(b) of the *Act* requiring HBC to produce records up to the date of issuance of that Order, January 30, 2015 (the "**Section 11 Order**"). HBC produced approximately 27,000 records in response to the Section 11 Order. These documents, which were produced prior to these proceedings, form part of the 37,000 that were produced in the HBC affidavit of documents.
7. On February 22, 2017, the Commissioner filed a Notice of Application for an order pursuant to section 74.1 of the *Act*, in respect of conduct reviewable pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the *Act*. The Commissioner is seeking an order prohibiting HBC from engaging in the reviewable conduct or substantially similar reviewable conduct for **any** product supplied by HBC in Canada. The remedy is broad and extends beyond sleep sets.

8. The Notice of Application states that HBC's conduct is ongoing and HBC has engaged in deceptive marketing practices since at least March 1, 2013 until now. The Notice of Application contains discrete examples of sleep set representations made by HBC which constitute "reviewable conduct" under the *Act*, but the remedy sought is not limited to only those examples.<sup>1</sup> HBC continues to promote sleep sets and many other types of products using the same promotional practices as are illustrated in the Notice of Application.
9. The Notice of Application states that HBC's internal compliance mechanism applies to all products that it offers for sale. Yet this same compliance program was unable to ensure that the representations identified in the Notice of Application were compliant with subsection 74.01(3) and paragraph 74.01(1)(a) of the *Act*.<sup>2</sup> The same compliance measures used by HBC for sleep sets also apply to all other products HBC offers for sale.
10. In his Reply, the Commissioner states: "[T]he conduct at issue is HBC's promotional practices. Requiring HBC to comply with the law for similar representations regardless of product is in line with an order prohibiting 'substantially similar reviewable conduct'. HBC's compliance program applies to a full host of products HBC offers for sale to consumers and in the example of [the representations in the Application]..., utterly failed to prevent breaches of the *Act*."<sup>3</sup>
11. On May 25, 2017, a Case Management Conference was held during which the scheduling of the steps in these proceedings was discussed with counsel. HBC's counsel indicated HBC required additional time to produce an affidavit of documents given the volume of documents that it had previously collected but not produced in response to the Section 11 Order. The time requested by counsel for HBC was agreed to by the Commissioner, but it was assumed that

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<sup>1</sup> Notice of Application, at p.10 of Commissioner's Motion Record, Exhibit "A" of Affidavit of Alexander, at para. 3, Commissioner Motion Record, at p. 6.

<sup>2</sup> Paras. 106 to 110 of the Notice of Application, at p.48 of Commissioner's Motion Record, Exhibit "A" of Affidavit of Alexander, at para. 3, Commissioner Motion Record, at p. 6.

<sup>3</sup> Para 19 of the Reply, at p.88 of Commissioner's Motion Record, Exhibit "C" of Affidavit of Alexander, at para. 4, Commissioner's Motion Record, at p. 6.

HBC would produce a complete affidavit of documents in due course and as provided for in the eventual Scheduling Order.<sup>4</sup>

12. On May 26, 2017, the Tribunal issued the Scheduling Order in which it ordered the parties to exchange affidavits of documents and produce the documents listed therein on or before September 29, 2017.<sup>5</sup>
13. By agreement of counsel, both HBC and the Commissioner agreed to list but not reproduce the documents already provided in response to the Section 11 Order in their respective affidavits of documents.<sup>6</sup>
14. On September 29, 2017, HBC provided a copy of its affidavit of documents to the Commissioner. HBC produced approximately 10,000 documents with its affidavit of documents, supplementing the approximately 27,000 documents previously produced pursuant to the Section 11 Order. HBC failed to list or produce any documents after February 9, 2015, in its affidavit of documents. HBC's production extends only 10 days beyond the issuance of the 2015 Section 11 Order.<sup>7</sup> HBC contends that anything beyond the February 9, 2015, date is not relevant, regardless of the fact that it continues to make the same type of representations to promote sleep sets and other products.
15. HBC has not disclosed any documents for the Disputed Time Period. Almost three years of HBC's conduct is unaccounted for in its documentary production notwithstanding that the Notice of Application for this proceeding states HBC's conduct is ongoing and that the underlying promotional practices are widespread.<sup>8</sup>

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<sup>4</sup> Affidavit of Alexander, at para.6, Commissioner's Motion Record, at p. 6.

<sup>5</sup> Scheduling Order, at pgs 91-96 of Commissioner's Motion Record, "Exhibit "D" of Affidavit of Alexander, at para.6, Commissioner's Motion Record, at p. 6.

<sup>6</sup> Affidavit of Alexander, at para.8, Commissioner's Motion Record, at p. 6.

<sup>7</sup> Affidavit of Alexander, at para.9, Commissioner's Motion Record, at p. 7.

<sup>8</sup> Affidavit of Alexander, at para.10, Commissioner's Motion Record, at p. 7.

16. On October 24, 2017, counsel for the Commissioner wrote to counsel for HBC to advise him of the deficiencies in HBC's affidavit of documents. Counsel for the Commissioner requested an explanation for the limited scope of HBC's production.<sup>9</sup>
17. On October 31, 2017, counsel for HBC responded and advised that "it may be appropriate [for HBC] to make some supplementary production" in **due course** [emphasis added]. Counsel for HBC went on to say "Assuming that HBC will make some supplementary production, we are hoping to be able to do so **by mid-December**" [emphasis added]. No firm time frame or commitment to produce the documents was communicated by counsel for HBC.<sup>10</sup> At no time did HBC indicate that the Disputed Time Period was not relevant to the proceedings.
18. On November 6, 2017, counsel for the Commissioner advised counsel for HBC that he required a commitment from HBC to produce the documents, with a date for the production of these documents. Further, counsel for the Commissioner requested a response from HBC, in order to avoid a motion before the Tribunal.<sup>11</sup> The language used in the October 31, 2017 HBC email was tentative, non-committal and indicative of a party that was not prepared to comply with the Scheduling Order.
19. To date, a total of approximately 37,000 documents have been produced by HBC as part of these proceedings. Of these, 27,000 documents had already been produced under the Section 11 Order. Given the number of documents HBC has already produced, HBC may be in possession of tens of thousands of additional documents relevant to this Application that it has not listed or produced.<sup>12</sup>

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<sup>9</sup> Pg 98 of Commissioner's Motion Record, Exhibit "E" of Affidavit of Alexander, at para.11, Commissioner's Motion Record, at p. 7.

<sup>10</sup> Pg 100 of Commissioner's Motion Record, Exhibit "F" of Affidavit of Alexander, at para.12, Commissioner's Motion Record, at p. 7.

<sup>11</sup> Pg 103 of Commissioner's Motion Record, Exhibit "G" of Affidavit of Alexander, at para.13, Commissioner's Motion Record, at p. 7.

<sup>12</sup> Affidavit of Alexander, at para.14, Commissioner's Motion Record, at p. 8.

20. Following the filing of the Commissioner's motion, HBC has now changed its position from what it communicated to the Commissioner in the email of October 31, 2017 and it has now taken the position that the documents for the Disputed Time Period are either not relevant or the efforts required to produce them are disproportionate.<sup>13</sup>

## **Part II - The Issue**

21. The issue to be resolved is as follows:

Is the Commissioner entitled to a remedy in respect of HBC's substantial non-compliance with the Scheduling Order requiring it to produce a complete affidavit of documents?

## **Part III – Argument**

### *There has been Substantial Non-Compliance with Tribunal Order*

22. HBC has failed to comply with the Scheduling Order. While HBC delivered its affidavit of documents on September 29, 2017 in accordance with the date in the Scheduling Order, its affidavit of documents fails to list documents from the Disputed Time Period. This is substantial non-compliance with a Tribunal Order that must attract serious sanctions.

23. Within the context of court orders issued under status review, the Federal Court has made it clear in that any unjustified non-compliance with a scheduling order is a serious matter in itself. An unjustified default is sufficient for the Court to strike the pleading of a Respondent.<sup>14</sup> An affidavit of documents that omits to identify almost three-year's worth of documents is clearly an unjustified default.

24. This is not a case where there has been a mere omission for which a remedy can be dispensed under Rule 227 of the *Federal Courts Rules*. This is a case about substantial non-compliance

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<sup>13</sup> Pg 100 of Commissioner's Motion Record, Exhibit "F" of Affidavit of Alexander, at para.12, Commissioner's Motion Record, at p. 7.

<sup>14</sup> *Créations Magiques (CM) Inc. v. Madispro Inc.*, 2005 FC 281, at paras 20 – 21.



with a Scheduling Order for which this Tribunal is not limited to the remedies provided for under Rule 227. Striking out the HBC Response is very much an option for the Tribunal.

25. While the striking out of the HBC Response is a serious act, the prejudice to HBC should not be of great concern to the Tribunal. As is the case with the breach of a scheduling order under status review, an assessment of the prejudice to a party is not part of the equation that is to be applied. If any prejudice should be taken into consideration, it is the prejudice to the Tribunal and those of its users who comply with the rules and the orders that it issues.<sup>15</sup> Every single day that this matter is delayed is a day where HBC engages in potentially reviewable conduct in the promotion of the products it offers for sale and generates significant revenues from the sale of those products.
26. HBC identified almost 37,000 documents in its affidavit of documents. Based on the number of documents already produced, the Commissioner will be seriously prejudiced in having to process what may be thousands of additional documents. The Commissioner also has no idea of when HBC will produce the remaining documents, if at all, and whether he will have sufficient time to review them in time for the oral discovery. These delays are prejudicial to the mandate of the Commissioner which among other things is to ensure that consumers are not misled when making purchasing decisions.
27. HBC has acknowledged in its correspondence that its affidavit of documents does not cover the Disputed Time Period. At first, as seen in the HBC October 31, 2017 email, counsel remained tentative on its obligation to produce documents for the Disputed Time Period, almost suggesting that a further production would follow. That tune has now changed. The position now taken by HBC is that the Disputed Time Period is not relevant to these proceedings as the inquiry is only in respect of a select number of sleep sets. HBC misreads the Notice of Application or chooses to read it in a manner that is self-serving. The Commissioner has no option but to request a remedy from this Tribunal.

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<sup>15</sup> *Trusthouse Forte California Inc. et al. v. Gateway Soap & Chemical Co.* (1998), 1998 CanLII 8897 (FC), 161 F.T.R. 88, at page 89.

*HBC must be ordered to produce a further and better Affidavit of Documents*

28. There has been substantial non-compliance by HBC of its discovery obligations under the Tribunal rules and it must be ordered to produce a further and better affidavit of documents within a period of ten days, failing which its Response must be struck pre-emptively. HBC has had the benefit of an inordinate amount of time under the Scheduling Order to produce an affidavit of documents, which it has failed to do.
29. Rule 60 (1) of the *Competition Tribunal Rules* provides that the applicant and the respondent must, within the time prescribed at a case management conference, serve an affidavit of documents on each other party. Rule 60(2) further provides that the affidavit of documents must, amongst other things, include a list identifying the documents that are relevant to any matter in issue and that are or were in the possession, power or control of the party.<sup>16</sup> The obligations found in Rule 60(1) were rolled up and inserted into a Scheduling Order which elevates the legal obligations that HBC had in producing a complete affidavit of documents.
30. In any event, when faced with a deficient affidavit of documents, a party to a proceeding has one of two choices: (a) it may wait until examination for discovery and elicit the documents that it requires at discoveries, or (b) it may move before the Tribunal compelling a further and better affidavit of documents. However, the tipping point is where the affidavit of documents is so deficient and lacking that eliciting of documents at discoveries is not a suitable substitute. In this case, not a single document has been produced for the period February 2015 to present.
31. There is no debate between the parties that an entire period has not been included in HBC's affidavit of documents. More than 37,000 documents have been produced up to February 2015. HBC has, however, failed to produce a complete and accurate affidavit of documents and thousands of documents may be missing.

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<sup>16</sup> Rule 60(1) and 60(2) of the *Competition Tribunal Rules*, Commissioner's Book of Authorities, at Tab 2.

32. The failure on the part of HBC to produce a complete affidavit of documents for the Disputed Time period is not a mere accidental omission that can be cured through oral discoveries. The non-compliance is a deliberate attempt to thwart the proceedings into the company's deceptive marketing practices. Waiting for oral discoveries is simply not an option for the Commissioner.
33. The Commissioner is "presumed to act in the public interest, and significant weight should be given to these public interest considerations".<sup>17</sup> The Commissioner is entitled to discovery respecting the conduct at issue in the pleadings, namely HBC's promotional practices. Discovery is not limited to a discrete number of allegedly misleading representations, namely the sleep sets referred to in the pleading. These are mere examples of a broader commercial conduct. This very point was made in *The Commissioner of Competition v. Rogers et al.*:

I agree that the discoveries should not simply consist of a review of a discrete number of allegedly misleading consumer representations. The Commissioner is entitled to explore whether these alleged misrepresentations are generically the product of a close business or working relationship between the defendant wireless companies and the content providers who create the products in question and who, the Commissioner argues, are in effect partners with the defendant wireless companies in the premium text messaging business.<sup>18</sup>

34. By limiting its production to a discrete number of sleep sets, HBC is attempting to narrow the remedy from these proceedings and thereby preclude the Commissioner from addressing the entirety of the HBC's underlying promotional marketing practices – deceptive or otherwise. HBC's hope is to limit discovery and ultimately the Tribunal's remedial powers under the *Act* to those discrete misrepresentations specifically identified in the Commissioner's Notice of Application. However, the purpose of the Deceptive Marketing Practices provisions of the *Act* is to remedy the harm caused by deceptive marketing practices for the benefit of the public at large and the Canadian economy. In furtherance of that purpose, the Commissioner may seek a remedy (and hence obtain discovery) for the conduct in issue or substantially similar conduct and not merely for a discrete set of misrepresentations.

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<sup>17</sup> *Commissioner of Competition v. Parkland Industries Ltd.*, 2015 Comp. Trib. 4 at paras. 59, 107 and 114.

<sup>18</sup> *The Commissioner of Competition v. Rogers et al.*, 2013 ONSC 3224 (CanLII), at para 16.

35. In *Canada (Commissioner of Competition) v. Premier Career Management Group Corp*, the Federal Court of Appeal explained the objective of the civil deceptive marketing provisions of the *Act*. These provisions aim to improve the accuracy of information in the market and to discourage deceptive marketing practices to ensure the market – and hence the Canadian economy – functions efficiently.

With the purpose clause in mind [section 1.1 of the Act], it becomes clear that the objective of the deceptive marketing provisions in subsection 74.01 is to incent firms to compete based on lower prices and higher quality, in order “to provide consumers with competitive prices and product choices”. Importantly, the deceptive marketing provisions – unlike many other provisions of the *Act* – do not list actual harm to competition as an element of the offence. Since harm to competition is not listed as an element of the offence in this case, but it is a truism that the *Act* always seeks to prevent harm to competition, it is presumed that whenever the elements of paragraph 74.01(1)(a) are made out, there is per se harm to competition.

When a firm is permitted to make misleading representations to the public, putative consumers may be more likely to choose the inferior products of that firm over the superior products of an honest firm. When consumer information is distorted in this manner, firms are encouraged to be deceitful about their goods or services, rather than to produce or provide higher quality goods or services, at a lower price. Therefore, as the appellant contends, when a firm feeds misinformation to potential consumers, the proper functioning of the market is necessarily harmed, and the *Act* is rightly engaged, given its stated goals.<sup>19</sup>

36. Accordingly, the inquiry under section 74.01 is concerned with whether a particular misrepresentation was made. However, section 74.1 of the *Act* allows the Tribunal to fashion a broad remedy that is not limited to the specific representation at issue. By allowing for a remedy that addresses substantially similar conduct, section 74.1 recognizes that conduct that may otherwise comply with the *Act* can still be subject to an order addressing a specific instance of reviewable conduct under the *Act*. Thus, the demand by the Commissioner that HBC produce a complete affidavit of documents.

37. In support of issuing an order addressing substantially similar conduct, even if that conduct does not constitute “reviewable conduct” under the *Act*, subsection 74.03(4) of the *Act* does not require that the Commissioner establish that any person was deceived or misled. As noted in the *Canada (Commissioner of Competition) v. Premier Career Management Group Corp* quote in paragraph 33 above, “... it is a truism that the *Act* always seeks to prevent harm to competition ...”. Subsection 74.03(4) of the *Act* provides as follows:

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<sup>19</sup> *Canada (Commissioner of Competition) v. Premier Career Management Group Corp.*, 2009 FCA 295 at paras. 61-62.

74.03(4) For greater certainty, in proceedings under sections 74.01 and 74.02, it is not necessary to establish that

- (a) any person was deceived or misled;
- (b) any member of the public to whom the representation was made was within Canada; or
- (c) the representation was made in a place to which the public had access.

38. Section 74.1 of the *Act* authorizes the Tribunal to remedy the “reviewable conduct” at issue and substantially similar conduct. The provision permits the Commissioner to seek a remedy for the underlying marketing practices and conduct that is broader in scope than merely seeking a remedy for a discrete misrepresentation.
39. Furthermore, section 74.1 of the *Act* specifically contemplates that a remedy limited to the “reviewable conduct” may not be sufficient to overcome the harm. Limiting a remedy to only a handful of sleep sets is not helpful to consumers. The *Act* therefore also permits the Tribunal to prohibit “substantially similar reviewable conduct.” Thus, the remedies under section 74.1 of the *Act* are designed to allow the court to correct the full extent and systemic nature of the deceptive marketing practices, such as the ones at issue in this proceeding. In this way, the Tribunal can effectively address the harm these practices cause to the proper functioning of the Canadian economy. The effectiveness of the remedy would be severely compromised if it were limited to addressing only discrete instances of deception.
40. When the deficiencies of the affidavit of documents are so serious, as is the case here, the only option for the Tribunal is to compel the party to comply with its obligations and deliver what the *Federal Courts Rules* require or, as is the case here, what is provided for in the Scheduling Order. There must be a preemptive sanction in the order to ensure compliance and prevent recidivist conduct.
41. Rule 227 of the *Federal Courts Rules* provides for sanctions in the event that there is non-compliance with a party’s discovery obligations. One of the sanctions is the requirement to produce a further and better affidavit of documents, failing which the pleading can be struck. Rule 227 reads as follows:

227 On motion, where the Court is satisfied that an affidavit of documents is inaccurate or deficient, the Court may inspect any document that may be relevant and may order that

- (a) the deponent of the affidavit be cross-examined;
- (b) an accurate or complete affidavit be served and filed;
- (c) all or part of the pleadings of the party on behalf of whom the affidavit was made be struck out; or
- (d) that the party on behalf of whom the affidavit was made pay costs.

42. This Tribunal clearly has the authority to request that HBC produce a complete affidavit of documents and impose a sanction if there is non-compliance with the terms. The Tribunal has already been overly indulgent by giving HBC an abundance of time to produce an affidavit of documents.
43. The Tribunal has tried hard in the last few years to establish confidence in its processes by imposing strict scheduling orders and making the Tribunal a place where litigants will want to have their cases adjudicated. The Tribunal has signaled that it would hold all litigants to the strict time-lines provided for in the Scheduling Orders and that it would not tolerate unexplained delays. HBC must be held to account by the Tribunal.

*Request for Documents does not Offend the Principles of Proportionality*

44. HBC cannot contend that the Commissioner's request for further production offends the principles of proportionality. There is no evidence on the record on the number of documents still to be produced, the efforts that HBC would have to make to produce them, the cost of producing them or the length of time that HBC would require to produce a complete affidavit of documents.
45. The Commissioner in this case has provided a clear vision of the different categories of documents that he would expect to be included in the affidavit of documents (see Annex "A" of Memorandum of Fact and Law), all of which is grounded in the pleading. This is not a fishing expedition.
46. While the Esposito affidavit that has been filed by HBC describes the efforts made in producing the affidavit of documents, it is misleading in some respects. The sum of \$425,000.00 (US) that it has expended is with respect to both documents produced under the Section 11 Order and the within proceedings. The amounts expended prior to the filing of the Notice of

Application are irrelevant in making any assessment. HBC has expended \$160,000.00 (US) in respect of the affidavit of documents. From the amounts that have been expended, the Esposito affidavit is silent on the efforts, if any, that were made by HBC or its agents in respect of the Disputed Time Period. HBC has also not disclosed the number of documents that it would have to review for this period or the length of time that it would take to produce a complete affidavit of documents. The Esposito affidavit is of no value in assessing the burden that the production request imposes on HBC.

47. In a context where not a single document has been produced for the Disputed Time Period and in the absence of any evidence explaining the efforts that have been made or that would be required to identify the relevant documents, it does not lie in HBC's mouth to suggest to the Tribunal that the Commissioner's request for a further and better affidavit of documents offends the principles of proportionality. Proportionality is not an answer against a proper and measured documentary request, as is the case here.
48. To make matters worse, HBC was accommodated and provided with a very generous time frame to produce an affidavit of documents. The production of a seriously deficient affidavit of documents that is framed on a very narrow reading of the Notice of Application should come as a complete surprise to the Tribunal.

#### **Part IV – Order Sought**

49. The Commissioner seeks an Order:
  - (a) Requiring HBC to comply with the Scheduling Order and produce an affidavit of documents inclusive of the period from approximately February 2015 until now for which it has failed to produce, and deliver the omitted documents to the Commissioner within ten days of this motion, failing which its Response is to be struck;
  - (b) To the extent HBC has failed to produce an affidavit of documents inclusive of the period from approximately February 2015 until now, an order compelling HBC to produce a

further and better affidavit of documents and deliver the omitted documents to the Commissioner within ten days of this motion, failing which its Response is to be struck;

(c) Costs of this motion, payable forthwith; and

(d) Such further and other relief as counsel may request and the Tribunal may permit.

**ALL OF WHICH IS RESPECTUFLY SUBMITTED THIS 28<sup>TH</sup> DAY OF NOVEMBER,  
2017**

*Alexander Gay*

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Alexander Gay  
Derek Leschinsky  
Katherine Rydel

Counsel to the Commissioner of Competition



## **Part V – List of Authorities**

### Statutes and Regulations

*Competition Act*, R.S.C. 1985, c. C-34, s. 74.1

*Competition Tribunal Rules*, SOR/2008-141, Rule 60

*Federal Courts Rules*, SOR/98-106, Rule 227

### Jurisprudence

*Canada (Commissioner of Competition) v. Premier Career Management Group Corp.*, 2009 FCA 295

*Commissioner of Competition v. Parkland Industries Ltd.*, 2015 Comp. Trib. 4

*The Commissioner of Competition v. Rogers et al.*, 2013 ONSC 3224

*Créations Magiques (CM) Inc. v. Madispro Inc.*, 2005 FC 281

*Trusthouse Forte California Inc. et al. v. Gateway Soap & Chemical Co.* (1998), 161 F.T.R. 88

ANNEX “A”

CATEGORIES OF DOCUMENTS	LINK TO PLEADINGS	SAMPLE DOCUMENTS FROM HBC’S AFFIDAVIT OF DOCUMENTS
<p><b>A. Documents relating to HBC's post- Jan 2015 practices regarding setting prices for sleep sets, including documents related to setting and establishing regular and promotional prices; monitoring the price; changing the regular or promotional price; monitoring or review of competitors’ prices; the influence of manufacturers on prices.</b></p> <p><b>B. Documents relating to HBC’s post-Jan 2015 sleep set marketing practices, including documents related to the marketing process (approvals, promotional event calendars); market research and studies (but not including actual representations).</b></p> <p><b>C. Documents relating to HBC's post-2015 financial results and estimates for sleep sets, including documents setting out gross margin analysis; profitability; revenues; strategic planning and growth strategies, forecasting; internal sales estimates and actual volumes.</b></p>	<p><u>APPLICATION</u></p> <p>Paragraph 2 – “HBC has engaged in deceptive marketing practices by offering sleep sets at grossly inflated regular prices, and then advertising deep discounts off these deceptive regular prices in order to promote the sale of the sleep sets to the public. The regular prices of the sleep sets were so inflated above what the market would bear that sales at the regular price were virtually non-existent.”</p> <p>Paragraph 3 – “HBC markets many of the products it sells using a ‘high-low’ pricing strategy. Under this strategy, HBC offers merchandise at a high regular price with frequent deep promotional discounts off that price.”</p> <p>Paragraph 8 – “HBC continues to offer sleep sets using both of these types of deceptive marketing practices. HBC has been making these types of representations throughout Canada to promote the sale of various products since at least 1 March 2013 until now.”</p> <p>Paragraph 111 – “HBC has made, and continues to make, the foregoing false or misleading representations to the public for the purpose of promoting sleep sets and their business interests more generally.”</p> <p>Paragraph 112 – “Pursuant to subsection 74.1(5) of the Act, the deceptive conduct described herein is aggravated by the following: ... b. HBC has made the same or similar representations frequently and over an extended period of time...”</p> <p><u>RESPONSE</u></p> <p>Paragraph 31 – “Each year, Hudson's Bay offers numerous collections and, within those collections, multiple sleep sets, for sale in Canada. In 2013, for example, Hudson's Bay offered approximately two dozen collections of mattresses for sale, consistent with a product assortment developed by Hudson's Bay's mattress buyer in conjunction with managers in Hudson's Bay's major home products division. The Commissioner's Application in respect of HBC's purported breach of subsection 74.01(3) of the Act relates only to four particular sleep sets offered for sale by Hudson's Bay in 2013 and 2014.”</p>	<p><u>A - SETTING PRICES</u></p> <ul style="list-style-type: none"> <li>• Setting regular and promotional price: <ul style="list-style-type: none"> <li>○ HBC00023315</li> </ul> </li> <li>• Establishing regular price (flooring at regular price prior to any promotions): <ul style="list-style-type: none"> <li>○ HBC00035526</li> </ul> </li> <li>• Monitoring and changing the price: <ul style="list-style-type: none"> <li>○ HBC00039850</li> </ul> </li> <li>• Monitoring or review of competitors prices: <ul style="list-style-type: none"> <li>○ HBC00026876</li> </ul> </li> <li>• Influence of manufacturers on prices: <ul style="list-style-type: none"> <li>○ HBC00026987</li> </ul> </li> </ul> <p><u>B - MARKETING</u></p> <ul style="list-style-type: none"> <li>• Planning/Approvals: <ul style="list-style-type: none"> <li>○ HBC00032825</li> <li>○ HBC00028492</li> </ul> </li> <li>• Promotional Event Calendars: <ul style="list-style-type: none"> <li>○ HBC00013682 (tab-Marketing Calendar 2013)</li> </ul> </li> <li>• Market analysis, research and studies: <ul style="list-style-type: none"> <li>○ HBC00034775</li> <li>○ HBC00006106</li> <li>○ HBC00009235</li> </ul> </li> <li>• Marketing costs: <ul style="list-style-type: none"> <li>○ HBC00031195</li> </ul> </li> </ul> <p><u>C - FINANCIALS</u></p>

CATEGORIES OF DOCUMENTS	LINK TO PLEADINGS	SAMPLE DOCUMENTS FROM HBC'S AFFIDAVIT OF DOCUMENTS
		<ul style="list-style-type: none"> <li>• Margin analysis: <ul style="list-style-type: none"> <li>○ HBC00039406</li> </ul> </li> <li>• Profitability: <ul style="list-style-type: none"> <li>○ HBC00021515</li> </ul> </li> <li>• Revenues: <ul style="list-style-type: none"> <li>○ HBC00003022</li> </ul> </li> <li>• Growth strategies / Strategic planning: <ul style="list-style-type: none"> <li>○ HBC00012016</li> <li>○ HBC00002812</li> </ul> </li> <li>• Internal sales estimates and forecasts: <ul style="list-style-type: none"> <li>○ HBC00013682 (tab-Sales Forecast)</li> <li>○ HBC00002784</li> </ul> </li> <li>• Actual volume of sales: <ul style="list-style-type: none"> <li>○ HBC00038061</li> <li>○ HBC00030439</li> </ul> </li> </ul>
<p><b>D. Documents relating to HBC's post-Jan 2015 practices regarding compliance with the Competition Act for sleep sets, including documents related to monitoring of volumes of sleep sets sold at the regular price; sleep set compliance sales grids ; compliance policies, procedures and manuals; practical application of compliance policies; remedial actions taken as a result of breaches with compliance policies, procedures or manuals; internal reporting related to compliance; management monitoring and verification of</b></p>	<p><u>APPLICATION</u></p> <p>Paragraph 100 – “HBC’s compliance monitoring, verification and reporting mechanisms are all ineffective. Three successive Mattress Buyers conducted ongoing monitoring of promotional representations and yet HBC continued to make deceptive representations during the tenure of all three. Further, HBC management continually failed to verify if monitoring was being done properly and instead relied entirely on the Mattress Buyers self-reporting on whether they were compliant.”</p> <p>Paragraph 106 – “Deceptive OSP representations and false or misleading clearance and end of line representations promoting sleep sets occurred despite HBC’s compliance mechanism. HBC’s compliance mechanism was completely ineffective in preventing contraventions of the law. The shortcomings in HBC’s compliance program and its ineffectiveness regarding sleep sets are representative of the overall poor functioning of HBC’s compliance mechanism. The egregious compliance failures with respect to sleep sets are the inevitable outcome of HBC’s flawed compliance model.”</p>	<ul style="list-style-type: none"> <li>• Volume sold at regular price: <ul style="list-style-type: none"> <li>○ HBC00022023</li> </ul> </li> <li>• Compliance Sales Grids: <ul style="list-style-type: none"> <li>○ HBC00036295</li> </ul> </li> <li>• Compliance policies, procedures, manuals and training: <ul style="list-style-type: none"> <li>○ MMFG00012_00000453</li> </ul> </li> <li>• Practical application of compliance: <ul style="list-style-type: none"> <li>○ HBC00017477</li> </ul> </li> </ul>

CATEGORIES OF DOCUMENTS	LINK TO PLEADINGS	SAMPLE DOCUMENTS FROM HBC'S AFFIDAVIT OF DOCUMENTS
<p><b>compliance; changes or modifications in compliance structure and reporting.</b></p>	<p><u>RESPONSE</u></p> <p>Paragraph 9 – “In addition, even if some of Hudson's Bay's advertising did contravene section 74.01 of the Act, which is denied, the Commissioner is not entitled to the corrective notices and administrative monetary penalty he is seeking against HBC because HBC exercised due diligence to prevent the reviewable conduct from occurring. HBC has (and at the relevant times, had) a strict and comprehensive advertising compliance program and trains all of its employees engaging in marketing or buying the mattresses that Hudson's Bay offers for sale on the importance of being, and how to be, compliant with advertising law.”</p> <p><u>REPLY</u></p> <p>Paragraph 18 – “HBC has neither a credible and effective compliance program, nor has it demonstrated a clear, continuous and unequivocal commitment to compliance with the Act, notwithstanding past judicial proceedings under the Act. The simple existence of a compliance manual and training are not a sufficient exercise of due diligence to prevent reviewable conduct from occurring, as provided for in subsection 74.1(3) of the Act. HBC's failure to adhere to an effective compliance program is illustrative of a corporate culture focused more on sales than on compliance.”</p>	<ul style="list-style-type: none"> <li>• Internal reporting / management monitoring and verification: <ul style="list-style-type: none"> <li>○ HBC00019319</li> </ul> </li> <li>• Modifications in compliance structure: <ul style="list-style-type: none"> <li>○ HBC00020740</li> </ul> </li> </ul>

CATEGORIES OF DOCUMENTS	LINK TO PLEADINGS	SAMPLE DOCUMENTS FROM HBC'S AFFIDAVIT OF DOCUMENTS
<p><b>E. Documents relating to HBC's continued use of "end of line" representations with respect to sleep sets.</b></p>	<p><u>APPLICATION</u></p> <p>Paragraph 73 – “In addition to making deceptive OSP representations, as set out above, HBC has also made deceptive clearance representations to consumers in order to further promote sales of sleep sets. HBC has failed to comply with paragraph 74.01(1)(a) of the Act concerning the making of false or misleading representations to the public. HBC has made and continues to make representations to the public that are false or misleading in a material respect in its clearance and end of line promotions of sleep sets.”</p> <p>Paragraph 74 – “HBC made clearance representations for the purpose of promoting sleep sets since at least 1 March 2013. HBC changed the language of its representations promoting sleep sets from ‘clearance’ to ‘end of line’ on or about 26 December 2014.”</p> <p>Paragraph 86 – “Effective December 2014, HBC adopted a revised ‘Mattress Transition Pricing Policy’. The policy states that no new orders for end of line sleep sets could be placed with the sleep set manufacturer after a predetermined date (known as the ‘D-Date’). Twenty three days prior to the D-Date, the sleep set moves to end of line promotional pricing.”</p> <p>Paragraph 87 – “In line with the revised policy, HBC stopped making ‘clearance’ representations with respect to sleep sets starting with the Boxing Week 2014 promotional materials and instead changed to ‘end of line’ representations.”</p> <p><u>RESPONSE</u></p> <p>Paragraph 16 – “With respect to the allegations in paragraphs 86-87 of the Application, HBC admits that Hudson's Bay changed from making ‘clearance’ to ‘end of line’ promotional representations in respect of mattresses/sleep sets in or about December 2014. HBC further states that the Commissioner was aware of Hudson's Bay's change in this regard at the time it was made, and did not object to the use of ‘end of line’ representations by Hudson's Bay until the Application was filed.”</p>	<ul style="list-style-type: none"> <li>• End of Line: <ul style="list-style-type: none"> <li>○ HBC00026573</li> <li>○ HBC00027401</li> <li>○ HBC00038954</li> </ul> </li> </ul>

**F. Documents relating to HBC's post-January 2015 compliance practices and policies for the products other than sleep sets HBC offers and has offered for sale; documents concerning whether or the extent to which HBC complies with such policies; compliance policies, procedures and manuals; remedial actions taken as a result breaches with compliance policies, procedures or manuals; internal reporting related to compliance; management monitoring and verification of compliance; changes or modifications in compliance structure and reporting.**

APPLICATION

Paragraph 107 – “Furthermore, the policies in the Compliance Manual apply not only to promotions of sleep sets, but to ALL products HBC offers for sale. With the exception of seasonal products and occasion-specific goods, the sections of the Compliance Manual which are meant to promote compliance with subsection 74.01(3) and paragraph 74.01(1)(a) of the Act apply to ALL the products HBC offers for sale.”

Paragraph 108 – “The type of representations used to promote sleep sets are used extensively by HBC to promote other products. Sleep sets are but a subset of the larger ‘Major Home Division’ which is responsible for furniture, sleep sets and major appliances. More specifically, the Major Home Division is part of the larger Home Division, which also includes three other divisions offering bed and bath linens, seasonal home products and housewares. All of these divisions, as well as many others, use OSP representations to promote the sale of HBC products. For example, in the 9 to 15 December 2016 flyer, HBC used OSP representations to promote the sale of luggage, women’s clothing, men’s clothing, small appliances, toys, footwear, cookware, jewellery, linen, towels, and glassware as well as sleep sets.”

Paragraph 109 – “The consequence of HBC’s lack of a credible and effective compliance program is HBC’s inability to ensure the numerous OSP and clearance representations it makes to the public are compliant with the Act.”

Paragraph 110 - “HBC’s internal compliance mechanism, which applies to ALL the HBC products it sells, is unable to ensure compliance with subsection 74.01(3) and paragraph 74.01(1)(a) of the Act.”

REPLY

Paragraph 2 – “The sleep set sample and the representations relied on in the Notice of Application are representative of HBC’s overall business practices.”

Paragraph 19 – “Paragraph 74.1(1)(a) of the Act states that the Tribunal may make an order that HBC not “engage in the conduct or substantially similar reviewable conduct” [emphasis added]. The conduct at issue is HBC’s promotional practices. Requiring HBC to comply with the law for similar representations regardless of product is in line with an order prohibiting ‘substantially similar reviewable conduct’. HBC’s compliance program applies to a full host of products HBC offers for sale to consumers and in the example of the Specified Sleep Sets, utterly failed to prevent breaches of the Act.”

- Compliance practices for other products:
  - Compliance Manual - MMFG00012\_00000453

**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*.

**BETWEEN:**

**COMMISSIONER OF COMPETITION**

**Applicant**

**- and -**

**HUDSON'S BAY COMPANY**

**Respondent**

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**Memorandum of Fact and Law of the Commissioner of Competition**

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**ATTORNEY GENERAL OF CANADA**  
Department of Justice Canada  
Competition Bureau Legal Services  
Place du Portage, Phase 1  
50 Victoria Street, 22nd Floor  
Gatineau, QC K1A 0C9  
Fax: (819) 953-9267

**Alexander Gay** (LSUC: 37590R)  
Tel: (613) 670-8497  
Alexander.Gay@justice.gc.ca

**Derek Leschinsky** (LSUC: 48095T)  
Tel: (819) 956-2842  
Derek.Leschinsky@canada.ca

**Katherine Rydel** (LSUC: 58143I)  
Tel: (819) 997-2837  
Katherine.Rydel@canada.ca

**Counsel to the Commissioner of Competition**