

THE COMPETITION TRIBUNAL

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

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

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT Date: November 28, 2017 CT-2017-008 Bianca Zamor for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 26

Applicant

- and -

HUDSON'S BAY COMPANY

Respondent

**FACTUM OF HUDSON'S BAY COMPANY
 (Motion for Further and Better Affidavit of Documents)**

1. The Respondent, Hudson's Bay Company ("**HBC**") submits this factum in opposition to the Motion of the Commissioner of Competition (the "**Commissioner**") for a Further and Better Affidavit of Documents from HBC (the "**Motion**").

I. OVERVIEW

2. On this motion, the Commissioner seeks an Order compelling HBC "to produce an Affidavit of Documents inclusive of the period from approximately February 2015 until now" (the "**Disputed Time Period**") and to "deliver the omitted documents to the Commissioner within ten days of this motion."¹ The Affidavit of Beth Alexander, sworn November 10, 2017 (the "**Alexander Affidavit**"), in support of the Motion asserts that "HBC

may be in possession of tens of thousands of additional documents relevant to this Application that it has not listed or produced.”²

3. The purported basis on which the Motion has been brought is that the “Notice of Application for this proceeding states that HBC’s conduct is ongoing and HBC has engaged in deceptive marketing practices as it relates to a wide range of products.”³ That assertion is untenable. There is only one product sold by HBC at issue in this case - mattresses (or “sleep sets”). Furthermore, the Commissioner’s pleadings do not identify a single instance in the Disputed Time Period (*i.e.*, after January 30, 2015) in which HBC’s marketing of and/or representations concerning its mattresses is alleged to have contravened the *Act*. The “matters at issue” in this Application plainly do not relate to the Disputed Time Period.

4. In addition, the Commissioner’s attempt to require that HBC gather, review, and produce potentially “tens of thousands” of additional documents in this proceeding “within ten days”, aside from being impossible from a practical perspective, would impose a burden on HBC that is grossly disproportionate to the relevance, if any, of documents from the Disputed Time Period. HBC (conservatively) estimates that it already has expended more than 6,500 person hours and more than US \$425,000 in producing the 37,000 documents listed in Schedule 1 to its AOD.⁴ The Commissioner’s apparent expectation that HBC identify, list and produce thousands of additional documents would impose comparable additional expense on HBC – expense which would not be justified or proportional in respect

¹ Notice of Motion dated November 10, 2017, Commissioner’s Motion Record (“MR”), Tab 1, p.1, para 1(a)

² Alexander Affidavit, MR Tab 2, p.8, para 14

³ Alexander Affidavit, MR Tab 2, p.6, para 3

⁴ Affidavit of Lucy Esposito, sworn November 21, 2017 (“Esposito Affidavit”), para. 6.

of documents in the Disputed Time Period (even apart from the time frame in which the Commissioner expects this to be accomplished).

5. Furthermore, the Commissioner has brought his broad-brush Motion notwithstanding that HBC has stated, in response to the Commissioner's "concerns" about the temporal scope of production, that it was collecting some documents in the Disputed Time Period and anticipated making some supplementary production before examinations for discovery are scheduled to take place in this action. The fact that HBC anticipates making a supplementary production of documents, and that the Commissioner could pursue any further, targeted requests for documents during the examination for discovery process, provides additional grounds for dismissal of the Motion.

6. The Commissioner's Motion seeks production of documents in respect of the Disputed Time Period which do not relate to the matters at issue in this proceeding and would impose an unjustified and disproportionate burden on HBC. Accordingly, the Motion should be dismissed, with costs to HBC.

II. FACTS

A. THE MATTERS AT ISSUE DO NOT RELATE TO THE DISPUTED TIME PERIOD

7. The Commissioner's Application seeks an Order under section 74.1 of the *Act* on the purported basis that HBC has contravened "paragraph 74.01(1)(a) and subsection 74.01(3) of the *Act*."⁵

⁵ Application, MR Tab 2A, p.12, para 1(a)

8. As a review of the Application makes clear, the Commissioner's contention that HBC contravened these sections of the *Act* is based on alleged conduct which took place prior to the Disputed Time Period.

1. HBC's purported violation of section 74.01(3) of the Act

9. Part III of the Application is addressed to the Commissioner's claim that HBC contravened section 74.01(3) of the *Act*, which tellingly uses the past tense in its title: "HBC **promoted** sleep sets using deceptive ordinary price representations" (emphasis added).⁶

10. Paragraph 26 of the Application pleads that "[f]rom the various sleep sets offered by HBC," the Commissioner identified four sleep sets "for review under subsection 74.01(3) of the Act": the Brooklyn, the Mount Royal, the Ashcroft and the Northampton (collectively referred to in the Application as the "**Specified Sleep Sets**").⁷

11. Paragraphs 28-72 of the Application make clear that the Commissioner's claim that HBC "made ordinary price claims containing deceptive regular prices to promote the sale of its sleep sets" is based upon representations which "were contained in advertisements in six different promotional flyers over six different time periods throughout the lifecycle of the Specified Sleep Sets."⁸ The "six different time periods" identified by the Commissioner in the Application are:

(a) 19 July to 1 August 2013;

(b) 29 November to 5 December 2013;

- (c) 7 to 13 February 2014;
- (d) 11 to 24 April 2014;
- (e) 25 April to 1 May 2014; and
- (f) 24 to 30 October 2014.⁹

12. Thus, in this proceeding, the Commissioner contends – and HBC denies – that HBC contravened section 74.01(3) of the *Act* by making deceptive ordinary price claims in respect of the four Specified Sleep Sets in representations made over the course of the lifecycle of those four sleep sets, from July 2013 through October 2014.

2. HBC's purported violation of section 74.01(1)(a) of the *Act*

13. Part IV of the Application is addressed to the Commissioner's claim that HBC contravened section 74.01(1)(a) of the *Act* by purportedly making "false or misleading representations in clearance and end of line promotions of sleep sets."¹⁰

14. Paragraphs 74-85 of the Application concern HBC's use of the term "clearance" in sleep set promotions. The clearance representations impugned by the Commissioner in the Application were contained in advertising flyers which ran from 10 to 16 January 2014 and 14 to 27 February 2014 – that is, approximately one year before the Disputed Time Period begins.¹¹ Moreover, paragraphs 74 and 87 of the Application expressly acknowledge that

⁶ Application, MR Tab 2A, p.14, heading III

⁷ Application, MR Tab 2A, p.16, para 26

⁸ Application, MR Tab 2A, p.17, para 28 et seq.

⁹ Application, MR Tab 2A, pp.18-24, paras 28-36

¹⁰ Application, MR Tab 2A, p.37, heading IV

¹¹ Application, MR Tab 2A, pp.39-42, paras 78-85

HBC “stopped making clearance representations” starting with “Boxing Week 2014 promotional materials”, before the start of the Disputed Time Period.¹²

15. Paragraphs 91 to 95 of the Application concern HBC’s use of the term “end of line” in sleep set promotions. The only such representations impugned by the Commissioner in the Application were made in respect of two sleep sets in an HBC advertising flyer which ran from 9 to 15 January 2015, which also pre-date the Disputed Time Period.¹³

16. Thus, while the Application contains the bald assertion that “HBC continues to offer sleep sets using both of these types of deceptive marketing practices,”¹⁴ there is not a single factual allegation in the Application which supports that contention; the conduct impugned by the Commissioner in the Application all allegedly took place in or prior to January 2015, (generally, many months) before the Disputed Time Period began.

B. HBC’S AFFIDAVIT OF DOCUMENTS

17. In accordance with the Tribunal’s May 26, 2017 Scheduling Order, HBC served its Affidavit of Documents in this proceeding on September 29, 2017 (the “AOD”).

18. As the Commissioner’s materials on the Motion acknowledge, Schedule 1 to HBC’s AOD lists approximately 37,000 relevant, non-privileged documents, including approximately 10,000 relevant documents that HBC gathered and reviewed after this proceeding was commenced and produced with its AOD. Those 10,000 documents are in addition to the approximately 27,000 relevant documents that HBC had previously collected, reviewed and produced to the Commissioner in response to the Federal Court Order which

¹² Application, MR Tab 2A, p.38, para 74 & p.43, para 87

the Commissioner obtained pursuant to Section 11 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “*Act*”), dated January 30, 2015 (the “**Section 11 Order**”).

19. To assist with responding to the Section 11 Order and in gathering, processing and reviewing documents for purposes of preparing its AOD in this proceeding, HBC retained the services of a third-party document review service provider.¹⁵ HBC (conservatively) estimates that it has already expended in excess of 6,500 person hours and US\$425,000 in gathering, reviewing and producing the 37,000 documents listed in Schedule 1 to its AOD (figures that do not include the time spent by HBC’s outside counsel as part of this process).¹⁶ This includes more than 4,200 person hours and approximately US\$265,000 expended to gather, review and produce the approximately 27,000 documents produced in response to the Section 11 Order, which were listed in Schedule 1 to HBC’s AOD.¹⁷ In addition, HBC has expended more than 2,300 person hours and approximately US\$160,000 in gathering the approximately 10,000 additional documents not previously produced in response to the Section 11 Order.¹⁸

C. THE COMMISSIONER’S MOTION

20. On October 24, 2017, the Commissioner’s counsel wrote to HBC’s counsel concerning HBC’s AOD. The Commissioner’s counsel stated that he was concerned “with the scope of production” insofar as “no records have been produced for the period after the issuance of” the Section 11 Order “to the present.” The Commissioner raised no issue with

¹³ Application, MR Tab 2A, pp.44-46, paras 91-95

¹⁴ Application, MR Tab 2A, p.14, para 8

¹⁵ Esposito Affidavit, para 3.

¹⁶ Esposito Affidavit, para 6.

¹⁷ Esposito Affidavit, para 4.

¹⁸ Esposito Affidavit, para 5.

the scope of HBC's Schedule 1 production insofar as it related to the period prior the issuance of the Section 11 Order.¹⁹

21. On October 31, 2017, HBC's counsel advised the Commissioner's counsel by email that HBC had considered the issue raised by his October 24, 2017 letter and was "in the process of seeking to collect some additional documents." HBC's counsel further advised that "we anticipate making some supplementary production in due course."²⁰

22. The Commissioner served his materials on the Motion less than two weeks later, on November 10, 2017.

III. ISSUES ON THE MOTION

23. HBC submits that the Commissioner's request for an Order compelling HBC to deliver an Affidavit of Documents covering the Disputed Time Period requires a determination of the following issues:

- (a) Whether documents in the Dispute Time Period are relevant to the matters at issue in this proceeding; and,
- (b) If documents in the Disputed Time Period are relevant, whether the Commissioner's request is consistent with the principle of proportionality in discovery.

¹⁹ Letter from Alexander Gay to Eliot Kolers, dated October 24, 2017, Alexander Affidavit, Ex. E, MR Tab 2E, p. 98

²⁰ Email from Eliot Kolers to Alexander Gay dated October 31, 2017, Alexander Affidavit, Ex. F, MR Tab 2F, p. 100

IV. LAW AND ARGUMENT

A. THE MOTION SHOULD BE DISMISSED

24. Rule 60 of the Tribunal's *Rules* requires the applicant and each respondent who has filed a response to serve an affidavit of documents which includes "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."²¹

25. While the Tribunal's Rules do not define relevance, Rule 34(1) provides that, where "a question arises as to the practice or procedure to be followed in cases not provided for by the Rules, the practice and procedure set out in the Federal Courts Rules may be followed."²²

26. Rule 223 of the Federal Courts Rules, which is addressed to the requirement that parties serve affidavits of documents, is analogous to Tribunal Rule 60. Rule 222(2) of the Federal Court Rules provides that for the purposes of Rule 223 (and other rules) "a document of a party is relevant if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case."²³

27. Thus, the "focus of the rule is clearly on matters that are necessary and relevant for the trial" of the proceeding.²⁴ For purposes of discovery, the "test" for document production is "whether there is a reasonable likelihood that a document sought for production would lead

²¹ *Competition Tribunal Rules*, SOR/2008-141, Rule 60

²² *Competition Tribunal Rules*, SOR/2008-141, Rule 34(1)

²³ *Federal Courts Rules*, SOR/98-106, Rule 222(2)

²⁴ *Khadr v. Canada*, 2010 FC 564 (CanLII), HBC's Book of Authorities ("BOA"), Tab 1, para 10 (hereinafter "*Khadr*")

to information relevant under Rule 222(2).²⁵ It is not permissible for a party to engage in a “fishing expedition” on discovery.²⁶

28. In addition, even where documents sought on discovery may technically be relevant under the *Rules*, it is well settled that the Tribunal may decline to order their production in a particular case based upon the principle of proportionality. The principle of proportionality requires that the costs, burden and delay that may be imposed on the responding party by, or result from, demands for (additional) production must be balanced against, *inter alia*, the specificity of the discovery request, the likelihood of the request leading to discovery of crucial information, and the relative benefit to the parties of obtaining the information demanded.²⁷

1. DOCUMENTS IN THE DISPUTED TIME PERIOD ARE NOT RELEVANT

29. The Commissioner’s request for a further affidavit of documents from HBC covering the Dispute Time Period fails the threshold test of relevance.

30. The Commissioner’s Application asserts two claims against HBC in this proceeding: (1) a claim that HBC has contravened section 74.01(3) of the *Act*; and (2) a claim that HBC has contravened section 74.01(1)(a) of the *Act*.

31. As described above, the Commissioner’s claim under section 74.01(3) of the *Act* is based upon allegations in the Application concerning HBC’s purported “ordinary price

²⁵ *Ibid.* (citing *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287 (CanLII), [2008] F.C.J. No. 1372, HBC BOA Tab 2, (hereinafter, “*Eli Lilly*”))

²⁶ *Eli Lilly*, supra note 25, at paras. 61-62; *Abdelrazik v. Canada*, 2015 FC 548 (CanLII), HBC BOA Tab 3, at paras 26, 34-37

²⁷ *Canada (Commissioner of Competition) v. Reliance Comfort Limited Partnership*, [2014] C.C.T.D. No. 9, 2014 Comp. Trib. 9, HBC BOA Tab 4, at paras. 24-30 (citing *Hryniak v. Mauldin*, 2014 SCC 7 and *Warman v. National Post Co.*, 2010 ONSC 3670, at para. 82) (hereinafter, “*Reliance*”)

claims” in promotional flyers advertising four Specified Sleep Sets at six different time periods over the course of the lifecycle of those four sleep sets, from July 2013 through October 2014 (the “**Lifecycle Period**”). In its Response to the Application, HBC denies that its representations in the Lifecycle Period in respect of the four Specified Sleep Sets contravened the *Act*. Plainly, documents concerning HBC’s marketing of mattresses in the Disputed Time Period, which begins several months after the Lifecycle Period ends, are not “necessary and relevant” for trial of the Commissioner’s claim against HBC under section 74.01(3) of the *Act*.

32. As also described above, the Commissioner’s claim against HBC under section 74.01(1)(a) of the *Act* is based on (1) HBC’s used of the word “clearance” in respect of certain sleep sets in advertised flyers which ran from 10 to 16 January 2014 and 14 to 27 February 2014; and (2) HBC’s use of the word “end of line” in respect of two sleep sets advertised in flyers that ran from 9 to 15 January 2015, all of which pre-date the beginning of the Disputed Time Period. Indeed, the Commissioner’s Application acknowledges that HBC stopped using the term “clearance” in advertising for sleep sets beginning with its Boxing Week 2014 promotions – before the Disputed Time Period even began. Clearly, documents in the Disputed Time Period do not relate to, and will not assist in the trial of, the Commissioner’s claim against HBC under section 74.01(1)(a) of the *Act* in this proceeding.

2. THE COMMISSIONER’S REQUEST IS INCONSISTENT WITH THE PRINCIPLE OF PROPORTIONALITY

33. In addition, even if documents in the Disputed Time Period were relevant to the disputed issues between the parties in this proceeding, which is denied, the Commissioner’s attempt to require that HBC gather, review, and produce potentially “tens of thousands” of

additional documents from the Disputed Time Period in this proceeding “within ten days” would impose a burden on HBC that is grossly disproportionate to the relevance of such documents and thus is inconsistent with the principle of proportionality in discovery.

34. On the one hand, the Commissioner’s broad-brush request that HBC list and produce potentially “tens of thousands” of documents from the Disputed Time Period in the Motion lacks any specificity as to the types of documents being sought by the Commissioner, and is unaccompanied by any claim (let alone a substantiated one) in the Motion materials that the additional documents would contain information of significant value to the resolution (trial) of this proceeding. Indeed, given that the allegations in the Application relate to purported conduct that took place prior to the Disputed Time Period, documents from the Disputed Time Period are unlikely to have information “crucial” to the issues in this proceeding.

35. On the other hand, compliance with the Commissioner’s request would impose a very considerable burden on HBC. As noted above, HBC (conservatively) estimates that it has already expended in excess of 6,500 person hours and US\$425,000 in gathering, reviewing and producing the 37,000 documents listed in Schedule 1 to its AOD, which relate a time period of approximately two years (ending on January 30, 2015).²⁸ The Commissioner’s apparent expectation that HBC identify, list and produce potentially “tens of thousands” of additional documents in this proceeding for the Disputed Time Period (a period at least three years) would involve comparable additional expenses for HBC.

36. In addition, the Commissioner’s demand that HBC list and produce documents for the Disputed Time Period “within ten days” is unreasonable and entirely unrealistic. With the

assistance of its third-party document review service provider, it took HBC three months to identify, collect and process the approximately 27,000 documents produced in response to the Section 11 Order.²⁹ After this proceeding was commenced, it took HBC approximately four months to gather, review and process the approximately 10,000 additional documents which are also listed on Schedule 1 to HBC's AOD.³⁰ To collect and review potentially "tens of thousands" of additional documents from the lengthy Disputed Time Period, HBC would reasonably require at least several months. Thus, realistically, compliance with the Commissioner's request would require a delay in, and a new Schedule Order for, this matter.

37. Furthermore, as noted above, in correspondence between counsel prior to the commencement of this Motion, HBC advised that it was in the process of collecting some documents from the Disputed Time Period and anticipated making some supplementary production, likely by mid-December 2017, well before examinations for discovery are currently scheduled to take place in this proceeding.³¹ Thus, the Commissioner will have the opportunity to review HBC's supplementary document production and to pursue any further (targeted) requests for additional documents from the Disputed Time Period during the examination for discovery process. That more efficient, expeditious manner of proceeding within the parameters of the existing Scheduling Order simply underscores the grossly disproportionate nature of the Commissioner's broad-brush Motion and provides additional reasons for its dismissal.³²

²⁸ Esposito Affidavit, para 6

²⁹ Esposito Affidavit, para 7.

³⁰ Esposito Affidavit, para 8.

³¹ Email from Eliot Kolers to Alexander Gay dated October 31, 2017, Alexander Affidavit, Ex. F, MR Tab 2F, p. 100.

³² See *Reliance*, supra note 27, HBC BOA Tab 4, at paras 25-42 (rejecting requests for further review and production of documents that would involve "significant costs" and a "considerable amount of time" as "not being proportional" and being

V. CONCLUSION

38. HBC requests an Order dismissing the Commissioner's Motion, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Toronto,

this 28th day of November, 2017.



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SCHEDULE A
List of Authorities

1. *Khadr v. Canada*, 2010 FC 564
2. *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287 (CanLII), [2008] F.C.J. No. 1372
3. *Abdelrazik v. Canada*, 2015 FC 548 (CanLII)
4. *Canada (Commissioner of Competition) v. Reliance Comfort Limited Partnership*, [2014] C.C.T.D. No. 9, 2014 Comp. Trib. 9

SCHEDULE B
Legislation

Competition Tribunal Rules, SOR/2008-141

Questions as to practice or procedure

34 (1) If, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the Federal Courts Rules may be followed.

Tribunal may direct

(2) If a person is uncertain as to the practice or procedure to be followed, the Tribunal may give directions about how to proceed.

Affidavit of documents

60 (1) The applicant and each respondent who has filed a response shall, within the time prescribed at a case management conference, serve an affidavit of documents on each other party.

Content

- (2) An affidavit of documents shall include
- (a) 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;
 - (b) any claim that a document is confidential or contains confidential information;
 - (c) any claim that a document is privileged; and
 - (d) a statement of the grounds for each claim of privilege.

Federal Courts Rules, SOR/98-106

Definition of document

222 (1) In rules 223 to 232 and 295, **document** includes an audio recording, a video recording, a film, a photograph, a chart, a graph, a map, a plan, a survey and a book of account, as well as data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device.

Interpretation

(2) For the purposes of rules 223 to 232 and 295, a document of a party is relevant if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case.

Time for service of affidavit of documents

223 (1) Every party shall serve an affidavit of documents on every other party within 30 days after the close of pleadings.

Contents

- (2) An affidavit of documents shall be in Form 223 and shall contain
- (a) separate lists and descriptions of all relevant documents that
 - (i) are in the possession, power or control of the party and for which no privilege is claimed,
 - (ii) are or were in the possession, power or control of the party and for which privilege is claimed,
 - (iii) were but are no longer in the possession, power or control of the party and for which no privilege is claimed, and
 - (iv) the party believes are in the possession, power or control of a person who is not a party to the action;
 - (b) a statement of the grounds for each claim of privilege in respect of a document;
 - (c) a description of how the party lost possession, power or control of any document and its current location, as far as the party can determine;
 - (d) the identity of each person referred to in subparagraph (a)(iv), including the person's name and address, if known;
 - (e) a statement that the party is not aware of any relevant document, other than those that are listed in the affidavit or are or were in the possession, power or control of another party to the action; and
 - (f) an indication of the time and place at which the documents referred to in subparagraph (a)(i) may be inspected.

Document within party's power or control

(3) For the purposes of subsection (2), a document shall be considered to be within a party's power or control if

- (a) the party is entitled to obtain the original document or a copy of it; and
- (b) no adverse party is so entitled.

Bundle of documents

(4) A party may treat a bundle of documents as a single document for the purposes of an affidavit of documents if

- (a) the documents are all of the same nature; and
- (b) the bundle is described in sufficient detail to enable another party to clearly ascertain its contents.

Competition Tribunal Act, R.S.C., 1985, c. 19 (2nd Supp.)

Court of record

9 (1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.

Proceedings

(2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.