

**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**

**Applicant**

- and -

**HUDSON'S BAY COMPANY**

**Respondent**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  <b>FILED / PRODUIT</b> Date: November 21, 2017 CT-2017-008 Bianca Zamor for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 21

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

1. The Respondent, Hudson's Bay Company ("**HBC**") submits this Response 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. 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**"). 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 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**”).

3. In response to an October 24, 2017 letter from the Commissioner’s counsel which expressed “concern” over the scope of HBC’s document production in respect of the time period after the issuance of the Section 11 Order, HBC’s counsel advised by email dated October 31, 2017 that HBC had considered the matter and was “in the process of seeking to collect some additional documents and we anticipate making some supplementary production in due course.”<sup>1</sup>

4. Nevertheless, the Commissioner proceeded to serve the Motion, which seeks, among other things, 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 “deliver the omitted documents to the Commissioner with ten days of this motion.”<sup>2</sup> 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.”<sup>3</sup>

5. 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

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<sup>1</sup> Email from Eliot Kolers to Alexander Gay dated October 31, 2017, attached as Exhibit F to the Affidavit of Beth Alexander, sworn November 10, 2017 (“**Alexander Affidavit**”), Commissioner’s Motion Record (“**MR**”) Tab 2, Ex. F. p. 100

<sup>2</sup> Notice of Motion dated November 10, 2017, MR Tab 1, p.1, para 1(a)

<sup>3</sup> Alexander Affidavit, MR Tab 2, p.8, para 14

in deceptive marketing practices as it relates to a wide range of products.”<sup>4</sup> That assertion is untenable and attempts to distort the Commissioner’s pleadings in this proceeding beyond recognition. There is only one product sold by HBC at issue in this case - mattresses (or “sleep sets”). Moreover, 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.

6. 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.<sup>5</sup> The Commissioner’s apparent expectation that HBC identify, list and produce thousands of additional documents in this proceeding (even apart from the time frame in which the Commissioner expects this to be accomplished) would be unduly burdensome to HBC and antithetical to the principle of proportionality in discovery.

7. Accordingly, the Motion should be dismissed, with costs to HBC.

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<sup>4</sup> Alexander Affidavit, MR Tab 2, p.6, para 3

<sup>5</sup> Affidavit of Lucy Esposito, sworn November 21, 2017 (“Esposito Affidavit”), para. 6.

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

8. 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*."<sup>6</sup>

9. 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.

### A. HBC's purported violation of section 74.01(3) of the *Act*

10. 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).<sup>7</sup>

11. 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**").<sup>8</sup>

12. 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

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<sup>6</sup> Application, MR Tab 2A, p.12, para 1(a)

<sup>7</sup> Application, MR Tab 2A, p.14, heading III

Specified Sleep Sets.”<sup>9</sup> 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.<sup>10</sup>

13. 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.

14. Plainly, the Commissioner’s claim under section 74.01(3) of the *Act* does not engage the Disputed Time Period, which does not begin until several months after the last of the “ordinary price” representations impugned by the Commissioner in Part III of the Application.

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<sup>8</sup> Application, MR Tab 2A, p.16, para 26

<sup>9</sup> Application, MR Tab 2A, p.17, para 28 et seq.

<sup>10</sup> Application, MR Tab 2A, pp.18-24, paras 28-36

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

15. 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."<sup>11</sup>

16. 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.<sup>12</sup> Moreover, paragraphs 74 and 87 of the Application expressly acknowledge that HBC "stopped making clearance representations" starting with "Boxing Week 2014 promotional materials", before the start of the Disputed Time Period.<sup>13</sup>

17. 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.<sup>14</sup>

18. Thus, while the Application contains the bald assertion that "HBC continues to offer sleep sets using both of these types of deceptive marketing practices,"<sup>15</sup> there is not a single factual allegation in the Application which supports that contention; the conduct impugned

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<sup>11</sup> Application, MR Tab 2A, p.37, heading IV

<sup>12</sup> Application, MR Tab 2A, pp.39-42, paras 78-85

<sup>13</sup> Application, MR Tab 2A, p.38, para 74 & p.43, para 87

<sup>14</sup> Application, MR Tab 2A, pp.44-46, paras 91-95

<sup>15</sup> Application, MR Tab 2A, p.14, para 8

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.

19. Accordingly, the matters at issue in this proceeding do not relate to the Disputed Time Period.

### **III. THE COMMISSIONER'S MOTION IS INCONSISTENT WITH THE PRINCIPLE OF PROPORTIONALITY**

20. In addition, 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, if any, of such documents and thus is inconsistent with the principle of proportionality in discovery.

21. 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.<sup>16</sup> 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).<sup>17</sup> 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.<sup>18</sup> In

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<sup>16</sup> Esposito Affidavit, para 3.

<sup>17</sup> Esposito Affidavit, para 6.

<sup>18</sup> Esposito Affidavit, para 4.

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.<sup>19</sup> The Commissioner's apparent expectation that HBC identify, list and produce potentially "tens of thousands" of additional documents in this proceeding would involve comparable additional expenses for HBC – expenditures which would not be justified in respect of documents in the Disputed Time Period given the matters at issue in this proceeding.

22. Moreover, 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 the 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, which covered a time period of less than two years (March 1, 2013 to January 30, 2015).<sup>20</sup> The process that HBC undertook to gather and review the approximately 10,000 additional documents (generally relating to the same time period) which are also listed on Schedule 1 to HBC's AOD in this proceeding took approximately four more months to complete.<sup>21</sup> To collect and review potentially "tens of thousands" of additional documents from the Disputed Time Period, a period of nearly three years, would reasonably require at least several months. To accomplish such an undertaking "within ten days" is simply impossible from a practical perspective.

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<sup>19</sup> Esposito Affidavit, para 5.

<sup>20</sup> Esposito Affidavit, para 7.

<sup>21</sup> Esposito Affidavit, para 8.



23. The well-established principle of proportionality in discovery 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.

24. As noted above, in response to the Commissioner's expressed "concern" about the temporal scope of HBC's AOD and document productions in this proceeding, HBC advised that it was gathering some additional documents and anticipated making some supplementary production, likely in December 2017. The Commissioner's broad-brush Motion, however, seeks to require HBC to produce potentially "tens of thousands" of additional documents from the Disputed Time Period, without any specificity as to the types of documents being sought by the Commissioner or any claim (let alone a substantiated one) that the additional documents would contain information "crucial" to 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 have little, if any, relevance to the matters at issue in this proceeding.

25. Under these circumstances, the Order requested by the Commissioner on this Motion would impose a grossly disproportionate burden on HBC and would be antithetical to the Tribunal's mandate to "deal with all matters as informally and expeditiously as the circumstances and considerations of fairness permit."<sup>22</sup>

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<sup>22</sup> *Competition Tribunal Rules*, SOR/2008-141, Rule 2(1)

**IV. CONCLUSION**

26. 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.

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

28. *Competition Act*, R.S.C. 1985, c. C-34, as amended, Sections 74.01, 74.03 and 74.1

29. *Competition Tribunal Rules*, SOR/2008-141, Rules 2(1) and 60.

30. Such further and other grounds as counsel may submit and the Tribunal accept.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Motion:

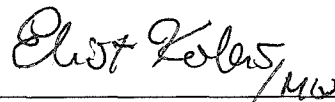
31. The Affidavit of Lucy Esposito, sworn November 21, 2017;

32. The pleadings and prior proceedings herein; and

33. Such further and other evidence as counsel may submit and the Tribunal consider.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** at Toronto,

this 21st day of November, 2017.



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