

Competition Tribunal



Tribunal de la concurrence

Reference: *The Commissioner of Competition v Hudson's Bay Company*, 2017 Comp Trib 19
File No.: CT-2017-008
Registry Document No.: 30

IN THE MATTER OF the *Competition Act*, RSC, 1985, c C-34 as amended:

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)



Dates of hearing: December 1st, 2017
Before Judicial Member: J. Gagné
Date of Order and Reasons: December 7, 2017

ORDER AND REASONS FOR ORDER

I. Nature of the Matter

[1] On May 26, 2017, the Tribunal issued a Scheduling Order directing both parties to provide the other with an affidavit of documents by September 29, 2017. While Hudson's Bay Company [HBC] did provide the Commissioner of Competition with an affidavit of documents by this date, it only included material from March 1, 2013 to February 9, 2015, totalling 37,000 documents. The affidavit of documents did not include any material from February 2015 until the present [Disputed Time Period], despite the Commissioner's Notice of Application alleging that HBC continues to engage in reviewable conduct contrary to the *Competition Act*, RSC 1985, c C-34 [Act].

[2] The Commissioner seeks an order from the Tribunal directing HBC to comply with the Scheduling Order by producing a further and better affidavit of documents inclusive of the Disputed Time Period, failing which the Commissioner asks that HBC's Response to the Commissioner's Notice of Application be struck in its entirety. The motion was heard by the Tribunal on December 1st, 2017 and since it soon became obvious that neither party had a firm position on the outcome of the Commissioner's motion, they were given until the end of the day on December 4 to resolve it in whole or in part. By letter from the Commissioner's counsel dated December 4, 2017, the Tribunal was informed that HBC would be producing the following documents by December 13, 2017, but that this supplementary production remains insufficient for the Commissioner:

- Sleep Sets Compliance Grids for February 2015 through January 2017 (two documents). These documents are the annual tracking documents used by HBC's sleep sets "buyer" to track the number of days (and which days) each sleep set collection is offered at regular and promotional prices. They also indicate HBC's promotion schedule for sleep sets. These documents fall within Category D of the Commissioner's chart attached as Annex A to his Memorandum of Fact and Law on the motion.
- Compliance Manual (one document). This document has been updated once since February 2015 and will be produced. It applies to sleep sets as well as to other products. It falls within Categories D and F of the Commissioner's Annex A chart.
- National flyers advertising "End of Line" sleep sets during the period February 2015 through the date of the Notice of Application. These documents respond to Category E of the Commissioner's Annex A chart.

[3] The Commissioner's Annex A is attached to these reasons.

II. The Notice of Application

[4] On February 22, 2017, the Commissioner brought a Notice of Application pursuant to section 74.1 of the Act alleging that HBC has previously engaged in and continues to engage in two unique types of reviewable conduct contrary to paragraph 74.01(1)(a) and subsection 74.01(3) of the Act.

[5] First, in contravention of subsection 74.01(3) of the Act, the Commissioner alleges that 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. This alleged contravention is said to have occurred from July 19, 2013 to October 30, 2014 and there are six sleep set advertisements identified in the Notice of Application as distinct instances where HBC made such deceptive representations.

[6] Second, in contravention of paragraph 74.01(1)(a) of the Act, the Commissioner alleges that HBC engages in deceptive marketing practices by offering its sleep sets as part of inventory “clearance” or “end of line” promotions. The Commissioner contends that a “clearance” or “end of line” sale implies that the price has been permanently lowered, with the object of selling any remaining on-hand inventory. Despite such advertisements, the Commissioner alleges that HBC continues to replenish from manufacturers by ordering new sleep sets during these sales.

[7] The allegedly deceptive use of the term “clearance” is said to have occurred between March 1, 2013 and December 26, 2014, while the allegedly deceptive use of the term “end of line” is identified as current HBC practice, dating back to the end of December 2014. In his Notice of Application, the Commissioner provides examples of this deceptive use of the term “clearance” occurring between (i) January 10 and 16, 2014 and (ii) February 14 and 27, 2014. Despite alleging that the use of the term “end of line” is ongoing, the Commissioner only provides two examples of this alleged contravention, both occurring between January 9 and 15, 2015.

[8] The Commissioner is seeking various forms of relief including “a declaration that [HBC] is engaging or has engaged in reviewable conduct, contrary to paragraph 74.01(1)(a) and subsection 74.01(3) of the Act” and “an order prohibiting HBC from engaging in the reviewable conduct or substantially similar reviewable conduct for any product supplied by HBC in Canada, for a period of ten years from the date of such order.”

III. Document Production

[9] Prior to the start of this proceeding and following 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 [Section 11 Order]. HBC produced 27,000 documents in response to the Section 11 Order.

[10] During the course of this proceeding, a case management conference was held on May 25, 2017, following which the Tribunal issued the Scheduling Order. Among numerous pre-hearing steps, the Scheduling Order directed both parties to exchange affidavits of documents and to produce the documents listed therein by September 29, 2017. The parties agreed to list but to not reproduce the documents already provided in response to the Section 11 Order in their respective affidavits of documents.

[11] HBC did provide the Commissioner with an affidavit of documents by September 29, 2017, though it only listed material from March 1, 2013 to February 9, 2015, totalling 37,000 documents. 10,000 documents were newly produced, extending only ten days beyond the issuance of the 2015 Section 11 Order. The affidavit of documents did not include any material after February 9, 2015.

[12] Between October 24, 2017 and November 6, 2017, counsel for the parties corresponded via email, with counsel for the Commissioner seeking an explanation for the lack of material after February 9, 2015. On October 31, 2017, counsel for HBC wrote “it may be appropriate to make supplementary production” and “[a]ssuming that HBC will make some supplementary production, we are hoping to be able to do so by mid-December.” On November 6, 2017, counsel for the Commissioner replied, seeking a firm commitment from HBC counsel to produce more up-to-date documents and a deadline for doing so, without which counsel for the Commissioner would seek a motion to compel further production.

IV. Issues

[13] I believe that this motion raises the following issues:

- A. *Are the documents in the Disputed Time Period relevant to the matters at issue in this proceeding?***
- B. *If documents in the Disputed Time Period are relevant, is the Commissioner’s request consistent with the principle of proportionality in discovery?***
- C. *If documents in the Disputed Time Period are relevant, is the Commissioner entitled to a remedy in respect of HBC’s non-compliance with the Scheduling Order?***

V. Analysis

- A. *Are the documents in the Disputed Time Period relevant to the matters at issue in this proceeding?***

[14] I believe that only those documents relating to HBC's purported false or misleading representations in "end of line" promotions from the Disputed Time Period are relevant to the matters at issue in this proceeding. To be more specific and with reference to Annex A, I believe that only documents in Category E (documents relating to HBC's continued use of "end of line" representations with respect to sleep sets) are relevant.

(1) Documents Relating to HBC's Promotional Practices and Commercial Conduct

[15] I agree with HBC that a reading of the Commissioner's Notice of Application conveys that HBC's alleged contraventions of the Act relate to two unique types of reviewable conduct having to do with sleep sets. In the overview of the Notice of Application, the Commissioner writes, "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" (at para 2). The Commissioner also writes, "HBC also engages in deceptive marketing practices when offering its sleep sets as part of inventory "clearance" or "end of line" promotions" (at para 7).

[16] Contrary to what the Commissioner argues, a plain reading of the Notice of Application does not convey to the reader that HBC is engaging in these alleged contraventions for any product other than sleep sets. In three paragraphs in the Notice of Application, the Commissioner alludes to HBC's alleged use of deceptive marketing practices for products other than sleep sets. First and foremost, paragraph 8 states: "HBC has been making these types of representations throughout Canada to promote the sale of various products since at least March 2013 until now" [my emphasis]. Second, paragraph 108 states: "The types of representations used to promote sleep sets are used extensively by HBC to promote other products". Third, paragraph 111 states: "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". These would be the "catchall" allegations that would render documents pertaining to all products sold by HBC relevant to this proceeding, rather than the specific sleep sets clearly identified in the Notice of Application.

[17] There are references to marketing for other products in the Notice of Application and the Commissioner's Reply (see paras 3, 107, 108 and 110 of the Notice of Application and para 19 of the Reply). However, those references discuss elements of HBC's marketing practices that do not contravene the Act. For example, paragraph 3 of the Notice of Application indicates that, "HBC markets many of the products it sells using a "high-low" pricing strategy." Paragraph 108 states: "All of these divisions, as well as many others, use OSP [ordinary selling price] representations to promote the sale of HBC products." High-low pricing strategies and OSP representations are not in and of themselves deceptive. They can become deceptive when regular prices are grossly inflated and then substantial discounts off of such deceptive regular prices are advertised, as the Commissioner alleges that HBC did for sleep sets.

[18] Additionally, paragraphs 107 and 110 of the Notice of Application and paragraph 19 of the Commissioner's Reply indicate that HBC's compliance policies apply to all products.

However, the Commissioner cannot allege that because HBC's compliance policies may have failed to prevent the materialization of deceptive marketing representations for sleep sets that consequently, all products that HBC sells are under suspicion of being marketed deceptively and may be brought before the Tribunal under the umbrella of this application. There is no logic to that proposition and more importantly, the Commissioner offers no evidence or specific examples of other products in his Notice of Application.

[19] I agree with HBC that the Commissioner's application is about sleep sets and not, more generally, all of HBC's promotional practices and commercial conduct. The scant three references that the Commissioner makes within his 115-paragraph Notice of Application to "other products" are not sufficient to make the Commissioner's application expand to products other than the sleep sets at issue. Had the Commissioner sought to include more of HBC's products and practices within his application, he could easily have done so. In fact, at the hearing, the Tribunal asked the Commissioner's counsel if, from the 37,000 documents received so far, any information led him to believe that HBC used the alleged deceptive practices with respect to any other product, and if such information justified amending the Notice of Application. He answered in the negative.

[20] The Commissioner cannot use section 74.1 of the Act to argue that because he is entitled to a remedy involving "substantially similar reviewable conduct" if successful in this proceeding, then he is also entitled to discovery regarding "substantially similar reviewable conduct." If at the eventual hearing of this application, the Commissioner successfully establishes that HBC has engaged in and is engaging in conduct contrary to the Act, then he may argue for an order prohibiting substantially similar reviewable conduct.

[21] Moreover, as argued by HBC, "[t]he Commissioner raised no issue with the scope of HBC's Schedule 1 production insofar as it related to the period prior to the issuance of the Section 11 Order." That is to say that the 27,000 documents HBC provided to the Commissioner under the Section 11 Order include documents relating to sleep sets, and not its promotional practices and commercial conduct more generally. Rightfully, the Commissioner took no issue with that.

[22] Thus, referring back to Annex A, documents in Category 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, etc.) are not relevant. Expanding discovery beyond documents related to sleep sets would constitute a fishing expedition.

(2) Documents from the Disputed Time Period relating to (i) HBC's Purported Deceptive Ordinary Price Representations and (ii) HBC's Purported False or Misleading Representations in Clearance and End of Line Promotions

[23] As previously stated, I believe that documents from the Disputed Time Period are relevant to the matters at issue in this proceeding, but only those relating to HBC's purported

false or misleading representations in “end of line” promotions (in other words, documents relating to HBC’s alleged contravention of paragraph 74.01(1)(a) of the Act).

[24] Documents from the Disputed Time Period having to do with HBC’s purported deceptive ordinary price representations and its purported false or misleading representations in “clearance” promotions are, in my view, not relevant.

[25] A plain reading of the Commissioner’s Notice of Application indicates that HBC’s purported deceptive ordinary price representations are limited to six specific sleep set advertisements from July 19, 2013 to October 30, 2014 – well before the Disputed Time Period. This conduct occurred in the past and is not ongoing due to the language that the Commissioner uses, specifically when compared to the language that is used for the second type of reviewable conduct identified in the Notice of Application.

[26] The Commissioner uses the past tense to refer to this first type of reviewable conduct, whereas he uses the present tense to refer to the second type of reviewable conduct. For example, at paragraph 2 of the Notice of Application: “HBC has engaged in deceptive marketing practices by offering sleep sets at grossly inflated regular prices...” as compared to paragraph 7: “HBC also engages in deceptive marketing practices when offering its sleep sets as part of inventory “clearance” or “end of line” promotions”.

[27] At paragraph 26, the Commissioner writes: “From the various sleep sets offered by HBC, the Commissioner identified the following for review under subsection 74.01(3) of the Act.” Additionally, the Commissioner includes as Heading B at page 30 of the Notice of Application, “Examples of HBC’s False or Misleading Clearance Representations”, and as Heading D at page 35, “Examples of HBC’s False or Misleading End of Line Representations.” These different turns of phrase suggest that the Commissioner reviewed all of HBC’s sleep set advertisements up until the present and was only able to identify six specific advertisements making allegedly deceptive ordinary price representations in contravention of subsection 74.01(3) of the Act. The six advertisements are not presented as “examples” – rather, they are presented as the only instances of this kind of deceptive marketing practice.

[28] In contrast, the Commissioner’s use of the present tense and the word “examples” for the second type of reviewable conduct suggests that HBC’s use of purportedly false or misleading end of line representations is still ongoing (since the Commissioner clearly sets out that HBC stopped using clearance representations for the purpose of promoting sleep sets in December 2014).

[29] Given the language that the Commissioner uses in his Notice of Application, I agree that HBC’s first type of impugned conduct (purported deceptive ordinary price representations) took place prior to the Disputed Time Period (from July 19, 2013 to October 30, 2014). I also agree that HBC’s second type of impugned conduct involving “clearance” representations took place prior to the Disputed Time Period (from at least March 1, 2013 to December 26, 2014).

[30] However, I do not agree that HBC's second type of impugned conduct involving "end of line" representations took place exclusively prior to the Disputed Time Period. I believe that the Notice of Application makes clear that such conduct is ongoing. In fact, this continuity is not clearly denied in HBC's response. During the hearing, I asked counsel for HBC if they deny that the use of end of line representations in sleep set promotions is ongoing, so to potentially render the filing of more contemporaneous documents irrelevant. I did not receive a clear answer.

[31] Consequently, and subject to HBC's undertaking to file the documents listed in paragraph 2, documents in Categories A, B, C and D of Annex A are not relevant. By reference to the Notice of Application, only documents in Category E (documents relating to HBC's continued use of "end of line" representations with respect to sleep sets) are relevant.

B. *If documents in the Disputed Time Period are relevant, is the Commissioner's request consistent with the principle of proportionality in discovery?*

[32] Given my conclusion that documents relating to HBC's continued use of end of line representations with respect to sleep sets are relevant, I believe the Commissioner's request in respect of those documents to be consistent with the principle of proportionality.

[33] HBC has known since February 22, 2017, when it was served with the Commissioner's Notice of Application, that the Commissioner believes its impugned conduct involving end of line representations to be ongoing. Therefore, the obligation to produce these relevant documents is not an "additional production" request. It's a production that HBC should have included in its affidavit of documents by September 29, 2017, as required by the Scheduling Order.

[34] HBC had four months to make this production and failed to do so. Its production of 10,000 additional documents covering a mere ten days beyond what it already provided for the Section 11 Order, simply because the examples of "end of line" representations cited in the Notice of Application stop in February 2015, is not acceptable.

[35] Moreover, given the more limited category of relevant documents that I believe HBC should still produce, the time, expense and effort required to do so should be significantly lower than what HBC initially expected.

C. *If documents in the Disputed Time Period are relevant, is the Commissioner entitled to a remedy in respect of HBC's non-compliance with the Scheduling Order?*

[36] In light of the above, HBC is deficient in its documentary production obligations under the Scheduling Order and the *Competition Tribunal Rules*, SOR/2008-141. HBC should still produce relevant documents from the Disputed Time Period involving its "end of line" representations with respect to sleep sets.

[37] In terms of deadline, I think it is perfectly reasonable to require HBC to provide these additional documents, along with those listed in paragraph 2 of these reasons, by December 20, 2017.

[38] Should HBC fail to make supplementary production within that deadline, the Commissioner would be entitled to some remedy. However, striking out HBC's Response in its entirety is way too drastic as, contrary to the Commissioner's contention, HBC is not substantially non-compliant with the Scheduling Order.

[39] Considering the mitigated outcome of the Commissioner's motion, each party will bear its own costs.

VI. Conclusion

[40] The documents in the Disputed Time Period are relevant insofar as they relate to HBC's continued use of "end of line" representations with respect to sleep sets. By failing to produce these documents, HBC is deficient in its documentary production obligations under the Scheduling Order and the *Competition Tribunal Rules*. HBC is required to produce these documents, along with the ones listed in paragraph 2 of these reasons, on or before December 20, 2017. No costs are granted.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[41] The Commissioner of Competition's motion is granted in part.

[42] Hudson's Bay Company is to file a further Affidavit of Documents inclusive of the period from February 2015 until now, listing the following documents, and to deliver the following documents to the Commissioner of Competition, on or before December 20, 2017:

- a) Sleep Sets Compliance Grids for February 2015 through January 2017 (two documents). These documents are the annual tracking documents used by HBC's sleep sets "buyer" to track the number of days (and which days) each sleep set collection is offered at regular and promotional prices. They also indicate HBC's promotion schedule for sleep sets. These documents fall within Category D of Annex A.
- b) Compliance Manual (one document). This document has been updated once since February 2015 and will be produced. It applies to sleep sets as well as to other products. It falls within Categories D and F of Annex A.
- c) National flyers advertising "End of Line" sleep sets during the period February 2015 through the date of the Notice of Application. These documents respond to Category E of Annex A.

d) Documents relating to HBC's continued use of end of line representations with respect to sleep sets. These documents respond to Category E of Annex A.

[43] The rest of the Scheduling Order of May 26, 2017 remains unchanged.

[44] No costs are granted.

DATED at Ottawa, this 7th day of December 2017.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Jocelyne Gagné

ANNEX "A"

CATEGORIES OF DOCUMENTS	LINK TO PLEADINGS	SAMPLE DOCUMENTS FROM HBC'S AFFIDAVIT OF DOCUMENTS
<p>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.</p> <p>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).</p> <p>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.</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"> • Setting regular and promotional price: <ul style="list-style-type: none"> ◦ HBC00023315 • Establishing regular price (flooring at regular price prior to any promotions): <ul style="list-style-type: none"> ◦ HBC00035526 • Monitoring and changing the price: <ul style="list-style-type: none"> ◦ HBC00039850 • Monitoring or review of competitors prices: <ul style="list-style-type: none"> ◦ HBC00026876 • Influence of manufacturers on prices: <ul style="list-style-type: none"> ◦ HBC00026987 <p><u>B - MARKETING</u></p> <ul style="list-style-type: none"> • Planning/Approvals: <ul style="list-style-type: none"> ◦ HBC00032825 ◦ HBC00028492 • Promotional Event Calendars: <ul style="list-style-type: none"> ◦ HBC00013682 (tab-Marketing Calendar 2013) • Market analysis, research and studies: <ul style="list-style-type: none"> ◦ HBC00034775 ◦ HBC00006106 ◦ HBC00009235 • Marketing costs: <ul style="list-style-type: none"> ◦ HBC00031195 <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"> • Margin analysis: <ul style="list-style-type: none"> ◦ HBC00039406 • Profitability: <ul style="list-style-type: none"> ◦ HBC00021515 • Revenues: <ul style="list-style-type: none"> ◦ HBC00003022 • Growth strategies / Strategic planning: <ul style="list-style-type: none"> ◦ HBC00012016 ◦ HBC00002812 • Internal sales estimates and forecasts: <ul style="list-style-type: none"> ◦ HBC00013682 (tab-Sales Forecast) ◦ HBC00002784 • Actual volume of sales: <ul style="list-style-type: none"> ◦ HBC00038061 ◦ HBC00030439
<p>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</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"> • Volume sold at regular price: <ul style="list-style-type: none"> ◦ HBC00022023 • Compliance Sales Grids: <ul style="list-style-type: none"> ◦ HBC00036295 • Compliance policies, procedures, manuals and training: <ul style="list-style-type: none"> ◦ MMFG00012_00000453 • Practical application of compliance: <ul style="list-style-type: none"> ◦ HBC00017477

CATEGORIES OF DOCUMENTS	LINK TO PLEADINGS	SAMPLE DOCUMENTS FROM HBC'S AFFIDAVIT OF DOCUMENTS
<p>compliance; changes or modifications in compliance structure and reporting.</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"> • Internal reporting / management monitoring and verification: <ul style="list-style-type: none"> ○ HBC00019319 • Modifications in compliance structure: <ul style="list-style-type: none"> ○ HBC00020740

CATEGORIES OF DOCUMENTS	LINK TO PLEADINGS	SAMPLE DOCUMENTS FROM HBC'S AFFIDAVIT OF DOCUMENTS
<p>E. Documents relating to HBC's continued use of "end of line" representations with respect to sleep sets.</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"> • End of Line: <ul style="list-style-type: none"> ○ HBC00026573 ○ HBC00027401 ○ HBC00038954

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

COUNSEL:

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