

THE COMPETITION TRIBUNAL

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

IN THE MATTER OF an application for orders pursuant to section 74.1 of the *Competition Act* for conduct reviewable pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the *Competition Act*.

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

HUDSON'S BAY COMPANY

Respondent

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

Date: April 24, 2017

CT-2017-008

Andrée Bernier for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

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REPLY OF THE COMMISSIONER OF COMPETITION

1. The Commissioner of Competition (the “**Commissioner**”) offers this Reply in respect of the Response filed by Hudson’s Bay Company (“**HBC**”) dated April 10, 2017 (the “**Response**”).
2. The sleep set sample and the representations relied on in the Notice of Application are representative of HBC’s overall business practices. The suggestion that the Commissioner selected sleep sets and representations only favourable to his case before the Competition Tribunal (the “**Tribunal**”) or that other products offered for sale by HBC are not a cause for concern is untrue.

I. ADMISSIONS/DENIALS

3. The Commissioner repeats and relies on the allegations in the Notice of Application and, except as hereinafter expressly admitted, denies each of the allegations in the Response.

II. HBC'S DECEPTIVE ORDINARY PRICE REPRESENTATIONS

A. HBC did not exhibit good faith in setting regular prices

4. HBC contends that its regular prices for the sleep sets identified by the Commissioner in his Notice of Application (the "**Specified Sleep Sets**") were set in relation to and were in line with the regular prices of sleep sets offered by HBC's main retail competitors. This contention is an over-statement and is not supported by the facts.
5. The high-low pricing strategy employed by HBC is used by some, but not all, HBC competitors. A number of HBC competitors instead rely on an everyday low price strategy ("**EDLP**"), which tends to result in significantly lower regular prices. These EDLP prices have been ignored by HBC when setting its regular prices. HBC's assertion that the regular prices of the Specified Sleep Sets are "manifestly actual prices offered in good faith" therefore does not take into account a significant portion of HBC's major competitors – namely its EDLP competitors.
6. As set out in the jurisprudence, good faith requires HBC to have honestly believed its regular prices for the sleep sets were genuine and *bona fide*, set with the expectation that the market would validate those regular prices.
7. HBC's singular reliance on its competitors' regular prices to validate its own regular prices renders "good faith" meaningless. HBC simply relied on the regular prices of its competitors, without any regard to whether the market actually validated its regular prices after they were set. Ultimately, the market, as represented by consumers, did not purchase the Specified Sleep Sets at HBC's regular prices and therefore did not validate HBC's regular prices.
8. HBC does not conduct an in-depth analysis of the regular prices at which sleep sets are offered for sale by competitors when setting its own regular prices. To the extent that HBC claims to rely

on guidance from sleep set manufacturers, this “guidance” is informal at best and does not absolve HBC of the need to independently verify it. The process of setting regular prices for sleep sets at HBC is best described as an undisciplined, cursory and random exercise where all efforts are focused on setting the promotional price and not the regular price of the sleep sets. The regular prices of the sleep sets are only important for the purpose of creating a save story of at least 50% off. As HBC admits in its Response, it “generally does not change the regular price of a sleep set, until the set is being discontinued.”

9. The volume of sales is used for multiple purposes under the *Competition Act* (the “**Act**”). It speaks to both the volume test as indicated in paragraph 74.01(3)(a) (the “**Volume Test**”) and the time test in paragraph 74.03(3)(b) of the Act (the “**Time Test**”). The volume of sales (a) informs whether HBC sold a substantial volume of the Specified Sleep Sets in line with the Volume Test and (b) is also an objective indicator of HBC’s good faith belief that the market would validate the regular price of the Specified Sleep Sets under the Time Test. The volume of sales of the Specified Sleep Sets sold by HBC at regular price is almost non-existent.
10. The Competition Bureau’s Ordinary Price Claim Guidelines (the “**Guidelines**”) provide guidance to the public with respect to the approach taken by the Commissioner when enforcing the ordinary price claims provisions of Act. HBC failed to mention that there are a number of other factors, beyond the two identified in its Response, that should also be considered when assessing good faith. Good faith is not a static concept. The assessment of good faith is contextual, taking into account a number of factors.
11. In paragraph 37 of the Response, HBC states that it establishes the regular price of sleep sets by offering them at that price for a period of four weeks prior to offering them at a promotional price. The fact that it offers them for sale during this period at the regular price is without legal significance to establishing a good faith belief.

B. HBC did not comply with the frequency element of the Time Test

12. HBC misunderstands the frequency element of the Time Test provided for in paragraph 74.01(3)(b) of the Act and suggests an approach to the frequency calculation that is not supported by the clear language of the Act.

13. In paragraph 62 of the Response, HBC posits that the same evaluation period should be used for both the Volume and Time Tests. However, paragraphs 74.01(3)(a) and (b) of the Act are worded differently and import different time considerations. The words “recently before” found in paragraph 74.01(3)(b) are not found in paragraph 74.01(3)(a) of the Act. In line with existing jurisprudence, “recently before” requires a “reasonable temporal proximity” to the making of the representations. It is the temporal proximity to the representations that necessitates a shorter timeframe when calculating frequency. The six month period cited by the Commissioner is anchored in the relevant jurisprudence.
14. HBC’s suggestion that the frequency element of the Time Test has been misapplied by the Commissioner is not supported by the wording of the Act. Subsection 74.01(3) of the Act requires retailers to assess how long a product has been offered for sale at, or above, its regular price in comparison to the amount of time it has been offered for sale at any lower prices. This is done in an effort to ensure the use of legitimate regular prices when promoting significant discounts off those prices. This concept is further enshrined in subsection 74.01(4) of the Act, which explicitly links the frequency calculation to the language used in a representation:

For greater certainty, whether the period of time to be considered in paragraphs 2(a) and (b) and (3)(a) and (b) is before or after the making of a representation depends on whether the representation relates to

- (a) the price at which products have been or are supplied; or
- (b) the price at which products will be supplied

As such, it is only appropriate to conduct a frequency analysis on a rolling basis, immediately before or after a representation is made.

C. The Representations made by HBC are false or misleading in a material respect

15. HBC cannot rely on the affirmative defence in subsection 74.01(5) of the Act. Subsection 74.01(5) states that subsection 74.01(3) does “not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect” [emphasis added]. HBC has failed to demonstrate that, irrespective of any potential deception, its price representations were not material to consumers.

16. In fact, in paragraph 72 of its Response, HBC admits that price is a material consideration for consumers:

Moreover, the retail marketplace for mattresses in Canada was highly competitive, and consumers were in a position to evaluate and compare the mattresses offered by Hudson's Bay and its competitors based on the two criteria for mattresses they valued most: comfort and price. [emphasis added]

Subsection 74.01(5) of the Act is therefore not applicable in the circumstances.

III. HBC'S CLEARANCE AND END OF LINE REPRESENTATIONS

17. HBC's use of the terms "clearance" and "end of line" is false or misleading. The terms are used to create the illusion of scarcity to attract consumers to purchase sleep sets. On occasion, even after the so called clearance promotions, HBC continued to order factory fresh sleep sets and offer them for sale at the regular price. Only after HBC had maximized sales with the misleading clearance promotions did it have a true clearance and actually sold off remaining on-hand inventory.

IV. HBC FAILED TO EXERCISE DUE DILIGENCE

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.

V. REMEDY

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.

DATED AT Gatineau, Quebec, this 21st day of April 2017.

“John Pecman”

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Commissioner of Competition

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