

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 inquiry commenced pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* with respect to certain marketing practices of the Respondent under paragraph 74.01(1)(b) of the *Competition Act*;

AND IN THE MATTER of a Consent Agreement pursuant to section 74.12 of the *Competition Act*.

BETWEEN:

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

**FILED / PRODUIT
REGISTERED / FILED**

November 13, 2014

CT-2014-006

Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

2

THE COMMISSIONER OF COMPETITION

Applicant

-and-

BAUER HOCKEY CORP.

Respondent

CONSENT AGREEMENT

WHEREAS the Commissioner of Competition ("Commissioner") is responsible for the administration and enforcement of the *Competition Act* ("Act");

AND WHEREAS the Respondent is a wholly-owned subsidiary of Performance Sports Group Ltd. (formerly Bauer Performance Sports Ltd.);

AND WHEREAS the Respondent is a designer, marketer and manufacturer of hockey equipment, including hockey helmets;

AND WHEREAS the Respondent developed and manufactured the Bauer RE-AKT hockey helmet ("Product"), which is available throughout Canada;

AND WHEREAS current hockey helmet testing standards in Canada established by the Canadian Standards Association ("CSA") are aimed at reducing the risk of catastrophic head injuries such as skull fractures, not at reducing the risk of non-catastrophic brain injuries such as concussions;

AND WHEREAS the Product is certified pursuant to those standards;

AND WHEREAS the Parties understand that CSA is considering the creation of a new standard to determine rotational shock absorbing capacity for hockey helmets;

AND WHEREAS the Parties are aware that, in recent years, there has been increased public concern about concussions in hockey;

AND WHEREAS experts state that concussions are mainly due to acceleration or deceleration of the brain caused by linear and rotational forces;

AND WHEREAS hockey helmets may not prevent concussions caused by these or other forces, and it remains unclear what role hockey helmets can play in protecting players from concussions;

AND WHEREAS since at least May 2012, the Respondent has promoted the Product to the public by making representations that the Commissioner has concluded create the general impression that the Product represents a revolution in helmet design that protects players from rotational impacts and thereby offers protection to players from brain injuries such as concussions ("Representations");

AND WHEREAS the Respondent has made the Representations in a variety of ways, including through the use of diagrams, illustrations, text and videos on its dedicated product website helmetrevolution.com and its corporate website www.bauer.com, as well as text on the Product packaging and in certain point-of-sale materials provided to Authorized Retailers;

AND WHEREAS the Respondent has already ceased making the Representations through certain of the foregoing channels and pursuant to this Agreement has agreed to discontinue making the Representations to the extent they continue to be made by any means whatsoever ("Remaining Representations");

AND WHEREAS the Commissioner has concluded that the Representations are performance claims within the meaning of paragraph 74.01(1)(b) the Act, and therefore must be supported by prior adequate and proper tests;

AND WHEREAS such testing must be reflective of the risk or harm that the product is designed to prevent or assist in preventing;

AND WHEREAS the Respondent commissioned testing by a third-party and conducted testing prior to the making of the Representations;

AND WHEREAS the Commissioner has concluded that such prior testing conducted by or on behalf of the Respondent was not adequate and proper to support the Representations in that it was not sufficient to establish that the Product offers protection to players from rotational forces or brain injuries such as concussions;

AND WHEREAS a relevant consideration for the Commissioner in his evaluation of the testing offered by Bauer is the absence of an established injury threshold for concussions;

AND WHEREAS it is the Commissioner's view that any representation that sports equipment will protect athletes from brain injuries such as concussions, including but not limited to representations that create the general impression that any equipment can manage the forces (such as rotational and linear forces) that cause concussions, must be based on a prior adequate and proper test, as required by paragraph 74.01(1)(b) of the Act;

AND WHEREAS for the purposes of this Agreement only, including execution, registration, enforcement, variation and rescission, the Respondent does not contest the Commissioner's conclusion, but does not agree with the conclusion, and nothing in this Agreement shall be taken as an admission by the Respondent thereof, nor shall it derogate from any rights or defences of the Respondent against third parties;

AND WHEREAS the Parties are satisfied that this matter can be resolved with the registration of this Consent Agreement which, upon registration, shall have the same force and effect as an order of the Competition Tribunal;

AND WHEREAS, in the time that the Product was offered for sale by the Respondent, sales of the Product represented less than 5% of the Respondent's total unit sales of hockey helmets in Canada;

AND WHEREAS the Commissioner has agreed to more favourable terms in this Agreement than would otherwise be the case because of the Respondent's full cooperation with the Commissioner's inquiry;

NOW THEREFORE in order to resolve the Commissioner's concerns, the Parties hereby agree as follows:

I. INTERPRETATION

1. For the purpose of the Agreement, the following definitions shall apply:

- (a) "**Act**" means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;
- (b) "**Affiliate**" means an affiliated corporation, partnership or sole proprietorship within the meaning of subsection 2(2) of the Act;
- (c) "**Agreement**" means this Consent Agreement entered into by the Respondent and the Commissioner pursuant to section 74.12 of the Act;
- (d) "**Authorized Retailer**" means any retailer authorized by Bauer to sell the Product in Canada;
- (e) "**Bauer**" means Bauer Hockey Corp., incorporated federally in Canada on 14 April 2008, its directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions and Affiliates controlled by Bauer, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;
- (f) "**Commissioner**" means the Commissioner of Competition appointed pursuant to section 7 of the Act;
- (g) "**Parties**" means the Commissioner and the Respondent;
- (h) "**Person**" means any individual, corporation, partnership, firm, association, trust, unincorporated organization or other entity;
- (i) "**Product**" means the Bauer RE-AKT hockey helmet;
- (j) "**Respondent**" means Bauer Hockey Corp.;
- (k) "**Respondent Personnel**" means all current and future senior management of the Respondent and all other employees of Bauer who are materially involved in the formulation and/or implementation of advertising or marketing policies with respect to the Product or any other ice hockey helmet designed, manufactured or marketed by the Respondent; and

- (l) "**Tribunal**" means the Competition Tribunal.

II. COMPLIANCE WITH PARAGRAPH 74.01(1)(B) OF THE *COMPETITION ACT*

2. Within 30 days of executing this Agreement, the Respondent shall discontinue, take down, conceal or remove the Remaining Representations that it has made or is making to the public, including all Representations displayed on the packaging for the Product that is within its own inventory.

3. Within 30 days of executing this Agreement, the Respondent shall: (i) request Authorized Retailers to remove all Representations, including videos and point-of-sale materials, and obtain written confirmation within 10 days of such request that it has been complied with; (ii) take all reasonable measures to ensure that the sales staff of all Authorized Retailers are advised not to make the Representations; and (iii) in good faith and on a best efforts basis, remove or conceal all Representations displayed on the packaging for the Product offered for sale to the public by Authorized Retailers, and shall, within 5 business days after the end of the referenced 30-day period, provide a report to the Commissioner's authorized representative setting out the actions it took to comply with this paragraph (iii).

4. Bauer shall not make or cause to be made any representations to the public that create the general impression that the Product or any other ice hockey helmet designed, manufactured or marketed by the Respondent offers protection from brain injuries such as concussions, including but not limited to representations that create the general impression that any such helmet can manage the forces that cause concussions, unless such representation is based on adequate and proper testing, as required by paragraph 74.01(1)(b) of the Act.

III. PAYMENTS

PAYMENT IN LIEU OF AN ADMINISTRATIVE MONETARY PENALTY

5. The Respondent shall make a donation of sports equipment having a total retail value of \$500,000 within five (5) years following the registration of the Agreement to JumpStart or another registered Canadian charity approved by the Commissioner that is dedicated to removing financial barriers to youth participation in sport ("Charity"). Each installment of the donation shall be a minimum of approximately \$100,000 in retail value. The first instalment of the donation will be made within 60 days of the registration of this Agreement. Subsequent installments shall be made each year thereafter on or before the anniversary date of the registration of the Agreement, until the donation is made in full. This amount will be in addition to any charitable donations previously committed to, planned or otherwise contemplated by the Respondent.

COSTS

6. Within 10 days of the execution of this Agreement, the Respondent shall pay the Competition Bureau forty thousand dollars (\$40,000) for costs and disbursements incurred by the Competition Bureau during the course of its investigation into this matter.

IV. CORPORATE COMPLIANCE PROGRAM

7. Within 60 days of the registration of this Agreement, the Respondent shall enhance, and thereafter maintain, a Corporate Compliance Program ("Compliance Program"), the goal of which will be to promote the compliance of the Respondent with the Act generally, and paragraph

74.01(1)(b) of the Act specifically. The Compliance Program shall be framed and implemented in a manner consistent with the Commissioner's bulletin titled "Corporate Compliance Programs", as published (as of the date of execution of this Agreement) on the Competition Bureau's website at www.competitionbureau.gc.ca.

V. COMPLIANCE REPORTING AND MONITORING

8. The Respondent shall provide the Commissioner or the Commissioner's authorized representative:

- (a) written confirmation that all Respondent Personnel have received a copy of this Agreement, as required by paragraph 11, within 21 days after the registration of this Agreement; and
- (b) written confirmation that a donation has been made to the Charity, as required by paragraph 5, including an accounting of the donation, on the first five (5) anniversaries of the registration of this Agreement.

9. The Respondent shall provide to the Commissioner or the Commissioner's authorized representative, within 30 days following receipt of a written request from the Commissioner or his authorized representative, such information, in such form as the Commissioner requests, for the purposes of monitoring compliance with this Agreement.

VI. AGREEMENT TO COOPERATE

10. The Respondent agrees to the following:

- (a) to provide complete, timely and ongoing reasonable cooperation, at the Respondent's own expense, with the Commissioner or the Commissioner's authorized representative in connection with any investigation into unsubstantiated claims related to rotational forces and/or concussions by other manufacturers of hockey equipment ("Concussion Claims Investigation");
- (b) to provide disclosure to the Commissioner or the Commissioner's authorized representative in relation to any Concussions Claims Investigation, including but not limited to all non-privileged information and records in the Respondent's possession or control, wherever located, that in any manner relate to a Concussion Claims Investigation; and
- (c) to make the Respondent Personnel reasonably available to the Commissioner or his authorized representative for interviews, depositions and other occasions to provide evidence in relation to any Concussions Claims Investigation whether under oath or not.

VII. GENERAL

11. During the term of this Agreement, (i) the Respondent shall provide a copy of this Agreement to all Respondent Personnel within 14 days after the date of registration of this Agreement, and (ii) all future Respondent Personnel will be provided with a copy of this Agreement within 14 days after his or her commencement of employment. Within 14 days after being provided with a copy of this Agreement, the Respondent shall secure from each such person

a signed and dated statement acknowledging that he or she read and understood this Agreement and paragraph 74.01(1)(b) of the Act.

12. Notices, reports and other communications required or permitted pursuant to any of the terms of this Agreement shall be in writing and shall be considered to be given if dispatched by personal delivery, registered mail or facsimile transmission to the Parties at the following addresses:

(a) The Commissioner

Commissioner of Competition
Competition Bureau
Place du Portage, Phase I
50 Victoria Street, 21st Floor
Gatineau QC KIA OC9

Attention: Deputy Commissioner of Competition (Fair Business Practices Branch)

Telephone: 819-997-1208

Facsimile: 819-953-3835

With a copy to:

Executive Director, Competition Bureau Legal Services
Department of Justice
Place du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau QC KIA OC9

Telephone: 819-994-7714

Facsimile: 819-953-9267

(b) The Respondent

Bauer Hockey Corp.
905, chemin De La Rivière-du-Nord
Saint-Jérôme QC J7Y 5G2

Attention: Michael Wall

Telephone: 603- 610-5805

Facsimile: 603-292-1505

With a copy to:

Anita Banicevic
Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto ON M5V 3J7

Telephone: 416-863-5523

Facsimile: 416-863-0871

13. This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, and all of which taken together shall constitute one and the same instrument. In the event of any discrepancy between the English and French versions of this Agreement, the English version shall prevail.

14. The computation of time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. 1-21. For the purpose of this Agreement, the definition of "holiday" in the *Interpretation Act* shall include Saturday. For the purpose of determining time periods, the date of this Agreement is the last date on which it is executed by a Party.

15. The Parties consent to the immediate registration of this Agreement with the Tribunal.

16. This Agreement shall be binding upon the Respondent and the Respondent Personnel as defined herein for a period of five (5) years following the date of registration of this Agreement.

17. In the event of a dispute as to the interpretation or application of this Agreement, any of the Parties shall be at liberty to apply to the Tribunal for an order or directions. The Parties agree that the Tribunal has jurisdiction to make such order as is required to give effect to this Agreement.

BAUER HOCKEY CORP.

DATED at Exeter, New Hampshire, USA, this 10th day of November, 2014

[Original signed by Michael Wall]

Name: Michael Wall

Title: Vice President, General Counsel & Corporate Secretary

COMMISSIONER OF COMPETITION

DATED at Gatineau, in the Province of Québec, this 12th day of November, 2014.

[Original signed by John Pecman]

Name: John Pecman

Title: Commissioner of Competition