

CT-2017-008

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:

COMMISSIONER OF COMPETITION

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT Date: November 9, 2018 CT-2017-008 Bianca Zamor for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	#85

Applicant**- and -****HUDSON'S BAY COMPANY****Respondent**

**MEMORANDUM OF FACT AND LAW
OF THE COMMISSIONER OF COMPETITION**

PART I - OVERVIEW

1. These submissions are filed by the Commissioner of Competition ("**Commissioner**") in support of a motion for an Order requiring the Respondent, Hudson's Bay Company ("**HBC**"), to provide answers to certain questions refused on the examination for discovery

of HBC's representative (the "**Disputed Questions**") (see list attached as **Annex B**). Each of the Disputed Questions is relevant and directed at eliciting factual information from HBC which is necessary to litigate this case.

2. The Commissioner began this proceeding by Notice of Application, dated February 22, 2017. It is alleged HBC engaged in and continues to engage in reviewable conduct contrary to paragraph 74.01(1)(a) and subsection 74.01(3) of the *Competition Act* (the "**Act**").
3. The Commissioner's representative conducted examinations for discovery of HBC's representative, Ms. Christine Jelley, on August 23 and 24, 2018. In total, HBC has maintained its refusal or not provided complete answers to 49 questions (see list attached as **Annex A**). Of those, the Commissioner disputes only 14 questions that were refused, only partially answered or to which HBC answered "to follow" or "making enquiries".
4. Of the 14 Disputed Questions, eight are questions to which HBC answered "to follow" or it is "making enquiries".¹ These questions can be categorized as either relating to the specific factual pleadings made by HBC (i.e. questions related to Total Guard and HBC's cancellation and returns policy); the Time Test (as set out in paragraph 74.01(3)(b) of the Act); cross-shopping by consumers; or, HBC's marketing of sleep sets.
5. Six of the Disputed Questions are questions related to HBC's compliance efforts and related to its use of reference price promotional representations for most products it offers for sale. HBC has adopted a circumscribed approach to information it is prepared to disclose related to these particular questions.
6. In its Amended Response, HBC argues it has exercised due diligence in preventing the alleged reviewable conduct from occurring by having a strict and comprehensive compliance program in place at all relevant times. HBC relies on the effectiveness of its

¹ Note that in Annex B, number 14 was mistakenly identified HBC's response as "To Follow". In fact by email dated October 29, HBC stated that its response is "Refused on the basis of relevance". Similarly HBC's response is also misidentified in Annex A (number 49) as "To Follow" – it should also be "Refused on the basis of relevance".

corporate compliance program to establish it exercised due diligence in preventing reviewable conduct from occurring. As such, HBC has made its corporate compliance program relevant to these proceedings.

7. The Commissioner has specifically challenged HBC's assertion that it exercised due diligence given the failure of the compliance program to prevent the examples of the alleged conduct in the Amended Application, as well as alleged ongoing conduct.
8. HBC's compliance program and policies which apply to ALL products HBC offers. The Commissioner has posed questions as it relates to its compliance program and policies, both as it relates to sleep sets and, more broadly, to all products.
9. While the Amended Application focuses on sleep sets, the type of promotional practices underlying HBC's reviewable conduct are widespread and used by HBC for numerous other products beyond sleep sets. The Commissioner is entitled under the Act to seek a remedy for both the alleged reviewable conduct regarding sleep sets as well as a remedy for substantially similar reviewable conduct as it relates to other products. All questions relating to HBC's compliance efforts inform the remedy.
10. HBC's compliance architecture purports to ensure HBC satisfies either the "volume test" or the "time test" provided for under the ordinary selling price provisions of the Act on all products it offers. More broadly, the compliance program is relied on by HBC to demonstrate it has exercised due diligence in preventing reviewable conduct from occurring. Any failing in this respect is relevant and necessary.

PART II - THE FACTS

11. Examination of HBC's representative was held on August 23 and 24, 2018. During the course of the examination, HBC refused to answer a number of questions and took a number of questions under advisement.

12. On October 3, 2018, HBC confirmed by letter that for 12 questions it maintained the refusal given at discovery. On October 15, HBC delivered answers to an additional 154 undertakings, under advisements and refusals. However, contrary to the Amended Scheduling Order, HBC failed to provide answers to an additional 19 outstanding questions. Instead for these 19 questions, HBC provided a response of either “To Follow” or provided a partial answer and stated it was “making enquiries”.
13. Answers to 11 of the 19 outstanding questions were provided late in the afternoon on October 29, one day before this Refusals Motion was required to be filed with the Competition Tribunal (the “**Tribunal**”). Answers have still not been provided for eight questions. This even though HBC had two weeks longer than the Commissioner to fulfill answers to discovery undertakings by virtue of the fact its representative was discovered before the Commissioner’s representative.
14. In total, HBC has maintained its refusal or not provided answers to 49 questions (see list attached as **Annex A**). Of those, the Commissioner disputes only 14 questions that were refused, only partially answered or to which HBC answered “to follow” or “making enquiries”. A list of the refusals which are disputed as part of this motion (i.e. the Disputed Questions) are found at Annex B of this Memorandum of Fact and Law.
15. In its Amended Response, HBC argued it had exercised due diligence in preventing the alleged reviewable conduct from occurring. Specifically, HBC stated in paragraph 91 that it, “has, and at all relevant times had, a strict comprehensive advertising compliance program” and “HBC’s compliance program demonstrates that it has a ‘clear, continuous and unequivocal commitment to compliance’ and exercised due diligence to prevent contraventions of section 74.01 of the Act from occurring”.
16. The Commissioner’s position, as stated at paragraph 18 of the Amended Reply, is that HBC’s compliance architecture is not a sufficient exercise of due diligence to prevent reviewable conduct from occurring. Specifically, “HBC’s failure to adhere to an effective compliance program is illustrative of a corporate culture focused more on sales than on compliance”.

17. An objective of Part VII.1 of the Act is to remedy the harm caused by deceptive marketing practices for the benefit of consumers and the Canadian economy.
18. The remedy sought by the Commissioner is broader than simply sleep sets. The Commissioner is seeking a prohibition order for the reviewable conduct in issue and substantially similar reviewable conduct. A motion was brought by the Commissioner to clarify this point and an amendment to the pleading was permitted by the Tribunal.
19. The Amended Application makes clear the remedy sought by the Commissioner is in respect of any product sold by HBC. Paragraph 1 of the Amended Application reads as follows:

The Commissioner makes this application pursuant to section 74.1 of the Act for:

...

(b) 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; (emphasis added)

20. HBC's compliance program applies broadly to all products sold, not just sleep sets. The compliance program and policies dictate how products can be marketed by HBC in an effort to achieve compliance with the Act.
21. By way of illustration, Paragraph 11 of the Amended Response reads as follows:

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.

Paragraph 46 of the Amended Response reads as follows:

As the Compliance Manual states, HBC "regards compliance with advertising laws as being of fundamental importance," such that failure to comply with the rules "may result in disciplinary action, up to and including dismissal." HBC requires all of its employees in Hudson's Bay's marketing and buying groups to take an online course on advertising compliance annually (and to pass that test with a perfect score), and to attend a session with HBC's legal counsel on advertising law.

Paragraph 47 of the Amended Response reads as follows:

HBC's Compliance Manual provides that Hudson's Bay's regular prices must be set in "good faith"; the regular price "should be a price at which we reasonably believe that sales of the item may occur; or it must be a price which is comparable to that offered by a competitor." With respect to sales events, in which "the regular price is temporarily lowered," the Compliance Manual provides, among other things, that: an item can only be put 'on sale' if it has been (or will be) available for at least four weeks; the maximum length of a single sales event is 10 weeks; a regular price item may be on sale up to 45% of the days it is available; and Hudson's Bay buyers should (and do) use a Hudson's Bay form to plan and track the number of days on sale.

22. Given the evidence thus far and the content of the pleadings, the Commissioner is entitled to inquire into how HBC's compliance program and policies have been operationalized and whether there are any failings of that program and those policies.

PART III – ISSUES

23. Should HBC be required to provide answers to the Disputed Questions?

PART IV - SUBMISSIONS

Responses to the Disputed Questions are relevant and necessary to fully adjudicate the issues in the Pleadings

24. The Disputed Questions are relevant to the issues raised in the Amended Application and will lead to a train of inquiry that will advance the Commissioner's case before the Tribunal. HBC has argued in the Amended Response that its compliance program is evidence it exercised due diligence to prevent the reviewable conduct from occurring. Both the Commissioner and HBC have placed HBC's alleged "clear, continuous and unequivocal commitment to compliance", as detailed by HBC at Paragraph 91 of the Amended Response, in issue. In addition, the operationalization of HBC's compliance program and policies and any failings in that respect inform the remedy to be fashioned by this Tribunal. An order prohibiting substantially similar reviewable conduct for products

other than sleep sets is being sought by the Commissioner and opposed by HBC. As a result, HBC must be made to answer the Disputed Questions.

25. The purpose of discovery is to obtain admissions to facilitate proof of all the matters which are at issue between the parties, and to allow the parties to inform themselves prior to trial of the nature of the other party's positions so as to define the issues.²
26. In determining the propriety of a particular question posed at an examination for discovery, the test is whether it is reasonable to conclude that the answer to the question might fairly lead to a train of inquiry that might either advance the party's case or damage that of its opponent. Such questions may seek to elicit admissions as to relevant facts, information about the existence of relevant documents, or seek production of relevant documents that have not been produced.³
27. In determining whether a question should be answered, a generous and flexible standard of relevance is applied. The pleading will inform whether the question should be answered. If the question may fairly lead the examining party to a train of inquiry which may directly or indirectly advance its case, or damage that of its adversary, it is a proper question for discovery and, as a result, must be answered:

*It is fair to say, therefore, that the Court will apply a generous and flexible standard of relevance in determining whether a question should be answered. A fair amount of latitude will be allowed on discovery provided that a question is relevant to issues raised by the pleadings. The standard of relevance on discovery is lower than at trial and doubt as to the propriety of the question will be resolved in favour of disclosure.*⁴

28. As clearly provided for in the Amended Application, the Commissioner is requesting a remedy that addresses the reviewable conduct, both as it relates to sleep sets and to other

² *Canada v. Lehigh Cement Ltd.*, 2011 FCA 120 at para. 30; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2007 FC 236 at para. 17.

³ *Canada v. Lehigh Cement Ltd.*, supra note 3 at para. 34; *Bristol-Myers Squibb Co. v. Apotex Inc.*, 2007 FCA 379 at para. 30; *Merck & Co. v. Apotex Inc.*, 2003 FCA 438 at para. 10.

⁴ *Apotex Inc. v. Sanofi-Aventis Canada Inc.*, 2011 FC 52 at para. 19; *Monit International Inc. v. Canada* (1999), 175 FTR 258 at para. 10 (FCTD).

products. While sleep sets are the focal point of this case, the remedy must correct HBC's corporate behavior as a whole.

29. HBC's compliance program and policies apply to all products HBC offers for sale. HBC has stated at paragraphs 11 and 91 of the Amended Response that at all relevant times, it had a strict and comprehensive advertising program – a claim which the Commissioner disputes as evidenced by the example of the failure of the compliance program to prevent the alleged breaches of the Act. The operationalization of the compliance program and policies and any failing in respect thereof are clearly relevant. Not only is the information relevant, but necessary in fashioning a remedy.

Principles of Proportionality cannot be Unilaterally Engaged

30. While HBC has refused to provide answers to some of the Disputed Questions on the basis it would violate proportionality principles, it offers no explanation or evidence in support of the burden it would suffer. HBC has unilaterally waived the application of the Tribunal Rules⁵ (the “**Tribunal Rules**”) which require that it answer relevant questions posed at the examination for discovery.
31. In the context of electronic discovery, Master Short of the Ontario Superior Court of Justice in *Warman v. National Post Co.*, adopted an eight-factor proportionality test for e-discovery that has been widely applied by all levels of courts and across varying jurisdictions, including this Tribunal. Evidence must therefore be provided in support of each of these factors before a court will consider dispensing with production obligations. The eight factors are as follows:
- a) the specificity of the discovery requests;
 - b) the likelihood of discovering critical information;
 - c) the availability of such information from other sources;
 - d) the purposes for which the responding party maintains the requested data;
 - e) the relative benefit to the parties of obtaining the information;

⁵ *Competition Tribunal Rules*, SOR/2008-141, at rule 64.

- f) the total cost associated with production;
 - g) the relative ability of each party to control costs and its incentive to do so; and
 - h) the resources available to each party.⁶
32. The principle of proportionality is recognized in the *Sedona Canada Principles Addressing Electronic Discovery* (the “**Sedona Principles**”) a document that has been widely accepted by all courts across the country, including the Tribunal. The *Sedona Principles* describes proportionality as a balancing exercise where a number of factors are weighed against each other:

*In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.*⁷

33. In deciding whether the principles of proportionality militate against a production request, the Tribunal should be guided by the case law as well as subsection 9(2) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19, which provides that all proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.
34. In this case, HBC refuses to provide answers to questions on the grounds of proportionality. No explanation or evidence is provided in support of this bald refusal. It has refused, for example, to provide records of certification for certain employees in the mattress department as having read and understood HBC’s Advertising Compliance Manual (see Annex B, question 2). However, there is evidence the compliance program requires employees take compliance training on an annual basis.

⁶ *Warman v. National Post Co.*, 2010 ONSC 3670, at para. 82.

⁷ *The Commissioner of Competition v. Reliance Comfort Limited Partnership*, 2014 Comp Trib 9, at para. 28, citing *The Sedona Canada Principles Addressing Electronic Delivery*.

35. As stated by Justice Phelan in the recent case of *The Commissioner of Competition v. Live Nation Entertainment, Inc et al*, a party does not get to unilaterally waive the Tribunal Rules. Dispensation from the discovery obligations under the Tribunal Rules may only be given by this Tribunal, and upon some supportable justification for which none has been provided by HBC in this case:

*A party's unilateral view of the operation of the principle of proportionality is not a waiver of the Rules. Where a party wishes to depart from a rule on the basis of proportionality, they are required to seek the concurrence of the judicial member responsible for case management of the matter. Ex post facto variation of the operation of a rule should be a rare exception and I am not prepared to grant such variation.*⁸ (emphasis added)

36. HBC does not escape a legal obligation simply because the production of records would require hard work from either HBC officials or the third-party service provider. This very point was made by Justice Phelan in *The Commissioner of Competition v. Live Nation Entertainment, Inc et al* where he stated:

*The Respondents have an obligation to make reasonable efforts to obtain and determine relevancy (see *Eli Lilly and Co v Apotex Inc*, 2000 CarswellNat 185, 94 ACWS (3d) 1193 at para 6). The principle of proportionality does not eliminate hard work.*⁹ (emphasis added)

37. In order to defeat the request for information of the Commissioner, HBC must lead evidence in respect of the eight-factor test provided by Master Short in *Warman v. National Post Co.* (*supra*) which it has failed to do. A bald refusal is not enough. HBC is required to provide evidence in respect of the eight factors and if authorized by this Tribunal, only then can HBC be freed of the obligation to provide answers to questions relevant to the proceeding.

PART V – ORDER SOUGHT

38. In light of the foregoing, the Commissioner seeks:

⁸ *The Commissioner of Competition v. Live Nation Entertainment, Inc et al*, 2018 Comp Trib 17, at para. 20.

⁹ *Ibid*, at para. 34.

- a) An Order compelling the Respondent, HBC, to provide to the Commissioner answers to the Disputed Questions as listed in Annex B, all within a period of (10) ten days following the hearing of this motion;
- b) At the discretion of the Commissioner, an Order compelling the attendance of the representative of HBC, Christine Jelley, to re-attend an examination for discovery, at the expense of HBC, and provide answers to further questions that the Commissioner may pose, stemming from the answers that this Tribunal may compel pursuant to this said Motion;
- c) The Commissioner's costs of this motion; and
- d) Such further and other relief as this Tribunal deems just and reasonable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED AT GATINEAU, QUÉBEC, this 9th day, November, 2018.



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ANNEX A

Redacted - Confidential Level B

ANNEX B

Redacted - Confidential Level B