

PUBLIC

CT-2017-008

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

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

Date: November 14, 2018
CT-2017-008

Andrée Bernier for / pour
REGISTRAR / REGISTRAIRE

- and -

HUDSON'S BAY COMPANY

Respondent

OTTAWA, ONT.

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**RESPONDING MEMORANDUM OF FACT AND LAW OF HUDSON'S BAY
COMPANY**

(Commissioner's Refusals Motion returnable November 20, 2018)

November 14, 2018

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1. The Respondent, Hudson's Bay Company ("HBC"), submits this factum in response to the refusals motion brought by the Commissioner of Competition (the "**Commissioner**"), which seeks to compel answers to certain questions refused by HBC on the examination for discovery of its representative, Ms. Christine Jelley, held August 22-23, 2018 in this proceeding (the "**Jelley Examination**").

OVERVIEW

2. In accordance with the Tribunal's (amended) scheduling order, on October 15, 2018 HBC answered all 38 of its undertakings on the Jelley Examination. At that time, HBC also answered more than 100 additional questions that it had taken under advisement or refused on the record during the Jelley Examination. HBC further advised the Commissioner that it was refusing or maintaining its initial refusals on a number of other questions. With respect to a relatively small number of questions taken under advisement, HBC stated to the Commissioner on October 15, 2018 that its answers were to follow – and as of the date of this factum HBC has now provided all but three of those answers.

3. As set out on HBC's responding chart attached as Annex "A" to this factum, only a handful of questions refused by HBC are really at issue on this motion. Each of those refusals clearly is proper and should be upheld by the Tribunal.

4. The Commissioner's principal submission in support of his refusals motion is essentially that (i) HBC's (amended) Response relies on its "compliance program"; (ii) HBC's "compliance program" applies to "ALL products HBC offers" (capitalization by the Commissioner); and therefore (iii) the Commissioner was entitled to ask questions on discovery concerning HBC's

“compliance program and policies, both as it relates to sleep sets and, more broadly, to all products.”¹

5. Nowhere in his factum does the Commissioner even advert to the fact (i) he made the same submissions to the Tribunal in support of his prior motion for a further or better affidavit of documents from HBC or that (ii) the Tribunal clearly, expressly and unequivocally rejected the Commissioner’s position in its decision on that motion. Indeed, the Tribunal held (among other things) that “documents relating to HBC’s post-2015 compliance practices and policies for the products other than sleep sets [...] are not relevant” and that the Commissioner’s attempt to expand discovery beyond “sleep sets would constitute a fishing expedition.”²

6. Not having appealed or amended his pleading in a manner relating to the “all products” issue, the Commissioner is bound by the prior ruling and his re-hash of the same argument on this refusals motion should not be countenanced by the Tribunal.

7. Furthermore, as the Tribunal has already recognized, the Commissioner’s argument that all “compliance questions” are relevant to this proceeding is illogical, ill-founded, contradicted by the pleadings, and contrary to the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”).

8. In any event, despite the Commissioner’s reliance on “compliance” issues in support of his contention that the disputed questions are relevant, several of those questions do not actually engage the advertising compliance program on which HBC has relied in support of its due diligence defence to this Application.

¹Memorandum of Fact and Law of the Commissioner of Competition at para 8.

²*The Commissioner of Competition v Hudson’s Bay Company*, 2017 Comp Trib 19 at para 30.

9. The Commissioner also submits that HBC has “unilaterally waived the application of the Tribunal Rules which require that it answer relevant questions posed at the examination for discovery.”³ HBC has not in fact “waived” anything. On the contrary, HBC has objected to each of the disputed questions on this refusals motion on the basis of its irrelevance. To the extent HBC has also referred to “proportionality” in making some of its refusals, it is relying upon the settled legal principle that the Tribunal may consider the patent over breadth of discovery questions as a basis for finding questions to be improper and upholding refusals to answer them.

10. The Commissioner’s motion should be dismissed, with costs to HBC.

PART I - STATEMENT OF FACTS

A. The Questions in Dispute on this Motion

11. During the two-day Jelley Examination, HBC gave undertakings to answer 38 questions. HBC further took 131 questions under advisement and refused 19 questions on the record.

12. The (amended) scheduling order in this proceeding provides that October 15, 2018 was the “[d]eadline for fulfilling answers to discovery undertakings.” In accordance with that order, HBC served its answers to all 38 of its undertakings on October 15, 2018. On that date, HBC also served its answers to more than 100 other questions that it had either taken under advisement or initially refused on the Jelley Examination.

13. The Commissioner notes in his factum that HBC further advised on October 15, 2018 that its answer to 19 questions taken under advisement remained “to follow”, because HBC was

³ Memorandum of Fact and Law of the Commissioner of Competition at para 30.

making ongoing inquiries and was considering its position with respect to those questions. There is simply no basis for the Commissioner's assertion that HBC's response in this respect was "contrary to the Amended Scheduling Order,"⁴ because HBC had not undertaken to answer any of those questions (and had in fact answered all of its actual undertakings on time). The Commissioner was entitled to treat those 19 questions as having been refused for purposes of a refusals motion – the filing date for which was still at that time more than two weeks away under the scheduling order.

14. As the Commissioner acknowledges in his factum, on October 29, 2018, before the deadline for filing refusals motions, HBC provided answers to many of those 19 questions (refusing one of them). On November 14, 2018, HBC provided answers to five more of the questions which had been classified as having an answer "to follow". In addition, HBC is presently working to provide answers to the remaining three "to follow" questions and one additional question on the Commissioner's refusals chart (at Annex B of his factum) prior to the return date of this motion.

15. It is HBC's position that although the Commissioner's chart (at Annex B of his factum) lists 14 questions, there are only five questions refused by HBC that actually are at issue on this motion. At Annex A to this factum, HBC has set out its position in response to each of those five questions and, for completeness, the other 10 questions on the Commissioner's (Annex B) chart.

16. The Commissioner's chart (at Annex B to his factum) omits HBC's answers to several undertakings, under advisements or initial refusals that HBC considers to be relevant to the

⁴ Memorandum of Fact and Law of the Commissioner of Competition at para 12.

consideration of the disputed questions at issue on this refusals motion. Accordingly, as part of the chart found at Annex A to this factum, HBC has also included its answers to those questions.

17. As discussed (in turn) in the next two sections below, the Commissioner's position with respect to the questions in dispute on this motion (i) distorts HBC's pleading (in two significant respects); and (ii) disregards the Tribunal's decision on the Commissioner's document production motion in this proceeding, which squarely rejected the very same submissions being made by the Commissioner again in support of this refusals motion.

B. HBC's Due Diligence Defence

18. At paragraph 21 of his factum, the Commissioner quotes from paragraphs 11 and 46 of HBC's (amended) Response, in which HBC has pleaded that it has "a strict and comprehensive advertising compliance program" with an advertising compliance manual, and that it "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".⁵

19. On the basis of this pleading, the Commissioner asserts that "the compliance program is relied on by HBC to demonstrate it has exercised due diligence in preventing reviewable conduct from occurring."⁶ The Commissioner contends that HBC's pleading thus makes relevant all questions concerning "its compliance program and policies both as it relates to sleep sets and,

⁵ Memorandum of Fact and Law of the Commissioner of Competition at para 21.

⁶ Memorandum of Fact and Law of the Commissioner of Competition at para 10.

more broadly, to all products”⁷ and also that “[a]ny failing in this respect is relevant and necessary” to an adjudication of the issues in this proceeding.⁸

20. The Commissioner’s suggestion that HBC has put in issue its “compliance program” with respect to all products HBC offers for sale patently distorts HBC’s pleading. On the contrary, HBC relies on its advertising compliance program to invoke the “due diligence” defence provided in subsection 74.1(3) of the *Act*, which provides that no “order may be made against a person under paragraph 1(b), (c), or (d) if the person establishes that the person exercised due diligence to prevent **the reviewable conduct from occurring**” (emphasis added).

21. In his factum as quoted in paragraph 19 above, the Commissioner tellingly omits the word “the” from the proper formulation of the phrase “the reviewable conduct” to which HBC’s due diligence, as pleaded, actually applies. As discussed in the next section below, the Tribunal has already determined that the Commissioner has not alleged any reviewable conduct by HBC other than with respect to sleep sets. The fact that HBC’s due diligence defence applies (as pleaded and in accordance with the *Act*) only to the reviewable conduct in respect of sleep sets alleged in this Application, rather than any conceivable reviewable conduct (as suggested by the Commissioner’s erroneous formulation) is fatal to the Commissioner’s argument on this refusals motion that HBC’s compliance program with respect to any and all products HBC offers actually is in issue in this case.

22. It is also important to note that HBC relies on only its **advertising** compliance program in support of its due diligence defence to the reviewable conduct alleged by the Commissioner in this proceeding. In his factum on this motion, the Commissioner also frequently omits the word

⁷ Memorandum of Fact and Law of the Commissioner of Competition at para 8.

⁸ Memorandum of Fact and Law of the Commissioner of Competition at para 10.

“advertising” from his “compliance program” formulation, in another apparent attempt to expand the scope of discovery far beyond the pleadings and due diligence defence actually raised by HBC in this case.

23. For example, as discussed further in HBC’s submissions in Part III below, one of the disputed questions on this motion concerns [REDACTED].

24. Although the scope of HBC’s advertising compliance program was already clear from HBC’s pleading, HBC’s responses to certain other questions asked on the Jelley Examination (included on the chart attached as Annex A to this factum) are also informative on the scope of the program. In particular, [REDACTED].

25. With respect to its “specific advertising compliance manual and training program”, HBC has stated [REDACTED].

26. Thus, the Commissioner’s assertions concerning the relevance of the disputed questions distort the scope of HBC’s advertising compliance program and the nature of the reliance HBC places on it for purposes of its due diligence defence to the Application.

C. Tribunal’s Decision on Commissioner’s Document Production Motion

27. As noted above, the Commissioner’s position on this motion also ignores the Tribunal’s decision on his motion for a further and better affidavit of documents from HBC in this proceeding.

28. On that motion the Commissioner sought production of various categories of documents which had not been produced by HBC in response to the Commissioner’s (initial) Application.

As set out in the annex to his factum on that production motion, the documents sought by the Commissioner were classified into six categories, which included the Category “F” request for:

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 [collectively, the “**Compliance Documents**”].⁹

29. The Commissioner contended that the parties’ pleadings supported his request for production of the Compliance Documents, and in his factum relied specifically on (i) the allegation that the policies in HBC’s advertising compliance manual “apply not only to promotions of sleep sets, but to ALL products HBC offers for sale” and (ii) the allegation that “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’ (Commissioner’s emphasis).¹⁰ That is, the Commissioner made exactly the same arguments in support of his production request as he now makes in his factum with respect to the purported relevance of questions concerning HBC’s compliance policies on this refusals motion.

30. In its decision on the motion, the Tribunal squarely rejected the Commissioner’s position:

[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

⁹ *The Commissioner of Competition v Hudson’s Bay Company*, 2017 Comp Trib 19 at Annex A, page 5.

¹⁰ *Ibid.*

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**¹¹. [Emphasis Added]

31. In his factum on this motion, the Commissioner states that “[a]ll questions relating to HBC’s compliance efforts inform the remedy” the Commissioner is seeking, which is “a prohibition order for the reviewable conduct in issue and substantially similar reviewable conduct.”¹² In his lone reference to the prior motion(s) before the Tribunal, the Commissioner states that a “motion was brought to clarify this point and an amendment to the pleading was permitted by the Tribunal.”¹³

32. What the Commissioner omits to say in his factum is that (i) as initially pleaded, the Commissioner sought a prohibition order in respect of “substantially similar reviewable conduct” at the time the document production motion was brought; (ii) the Tribunal squarely rejected the very same arguments he is making on this refusals motion in support of his request for production of the Compliance Documents; and (iii) none of the amendments to the Application made by the Commissioner has any bearing on, let alone alters, the Tribunal’s conclusion that the “Commissioner’s application is about sleep sets and not, more generally, all of HBC’s promotional practices and commercial conduct.”¹⁴

¹¹ *Ibid* at paras 17-22.

¹² Memorandum of Fact and Law of the Commissioner of Competition at para 18.

¹³ *Ibid*.

¹⁴ Indeed, the only amendments made by the Commissioner to any of the paragraphs in his pleadings on which he relied to support his contention that the Category “F” Compliance Documents were relevant simply involved the

33. The Tribunal's prior decision is binding on the Commissioner and his attempt to circumvent that ruling on this motion should be rejected.

PART II - STATEMENT OF ISSUES

34. The issue presented on the Commissioner's motion is whether HBC's refusal to answer the five disputed questions should be upheld. The answer as to each of them is "yes".

PART III - SUBMISSIONS

A. Relevance

35. HBC and the Commissioner appear to be in agreement on the "test" for relevance of a question asked on an examination for discovery, as in their respective moving factums on their refusals motions both parties rely on the formulation provided by the Federal Court of Appeal in *Canada v. Lehigh Cement Ltd.*, 2011 FCA 120 (CanLII). As noted above, the Tribunal has already conclusively rejected the Commissioner's position that the pleadings and the Tribunal's remedial power under section 74.1 of the *Act* make all Compliance Documents (and thus all "compliance questions" asked by the Commissioner on discovery) relevant to this proceeding.

B. Proportionality – Over Breadth

36. At paragraphs 30-37 of his factum, the Commissioner argues, in reliance on the Tribunal's decision in *Commissioner of Competition v. Live Nation Entertainment, Inc.*,¹⁵ that the "principles of proportionality cannot be unilaterally engaged"¹⁶ and that "dispensation from the discovery obligations under the Tribunal Rules may only be given by this Tribunal upon

addition of the phrase "this conduct is ongoing", which manifestly does not extend the scope of the pleading beyond sleep sets.

¹⁵ *The Commissioner of Competition v. Live Nation Entertainment, Inc et al*, 2018 Comp Trib 17.

¹⁶ Memorandum of Fact and Law of the Commissioner of Competition at para 30.

some supportable justification for which none has been provided by HBC.”¹⁷

¹⁷ Memorandum of Fact and Law of the Commissioner of Competition at para 35.

37. As an initial matter, the *Live Nation* case, which involved a motion for further and better affidavits of documents (“AODs”) brought by the Commissioner against eight respondents, five of which had provided AODs which listed no documents (in flagrant violation of Tribunal *Rule* 60(1)), plainly has no application at all to the Commissioner’s refusals motion in this case, which has been brought after HBC has answered all of its 38 undertakings and more than 100 other questions initially taken under advisement or refused on the Jelley Examination.

38. In addition, there is no simply no basis for the Commissioner’s contention that “HBC has unilaterally waived the application of the Tribunal Rules [...] which require that it answer relevant questions posed at the examination for discovery.”¹⁸ HBC has objected to each of the disputed questions on the grounds of (ir)relevance and its position is that lack of relevance alone is sufficient grounds for sustaining HBC’s objections to each of those questions.

39. The Commissioner’s submissions at paragraph 30-37 of his factum appear to have been precipitated by the fact that, with respect to some of the disputed questions, HBC has also objected on grounds of “proportionality”. In making this objection, HBC was not, as the Commissioner implies, intending to try to avoid answering the questions on the grounds that to do so would constitute “hard work.”¹⁹ Indeed, the Commissioner’s suggestion in this regard is, to say the least, ironic, since HBC has already expended considerable time and resources in providing written answers to more than 150 questions on the Jelley Examination, many of which required “hard work” to answer.

40. The nature of HBC’s “proportionality” objection in respect of the disputed questions could be said to relate only to factor “a” of the “eight-factor test proportionality test for e-

¹⁸ Memorandum of Fact and Law of the Commissioner of Competition at para 30.

¹⁹ Memorandum of Fact and Law of the Commissioner of Competition at para 36.

discovery” articulated by Master Short in *Warman v. National Post Co.*,²⁰ which is cited by the Commissioner at paragraph 31 of his factum: “the specificity of the discovery requests” (or lack thereof). Having said that, in making this objection, HBC was not intending to invoke Master Short’s “eight-part test” which was developed in the context of e-discovery production disputes and is essentially inapposite to this refusals motion.

41. HBC’s “proportionality” objection is based on the fact that certain of the disputed questions are patently overbroad and for that reason are inappropriate, objectionable, and need not be answered. This objection is distinct from a claim that answering the questions would be unduly burdensome or onerous. Indeed, the Tribunal has recognized that no evidence of burden need be led for it to conclude that questions asked on an examination for discovery were overly broad and thus properly refused.²¹


C. HBC’s Refusals should be Upheld

42. [REDACTED]

PART IV - ORDER SOUGHT

43. HBC requests an order dismissing the Commissioner’s motion, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of November, 2018.



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²⁰ 2010 ONSC 3670 at para 82.

²¹ *The Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 16.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Lehigh Cement Ltd v R*, 2011 FCA 120.
2. *The Commissioner of Competition v Live Nation Entertainment Inc*, 2018 Comp Trib 17.
3. *The Commissioner of Competition v Hudson's Bay Company*, 2017 Comp Trib 19.
4. *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16.
5. *Warman v National Post Co*, 2010 ONSC 3670.

SCHEDULE "B"
RELEVANT STATUTES

Competition Act, RSC 1985, c C-34.

74.1 Determination of reviewable conduct and judicial order

(1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;

Décision et ordonnance

(1) Le tribunal qui conclut, à la suite d'une demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen visé à la présente partie peut ordonner à celle-ci :

a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;

b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :

(i) l'énoncé des éléments du comportement susceptible d'examen,

(ii) la période et le secteur géographique auxquels le comportement est afférent,

(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;

c) de payer, selon les modalités qu'il peut préciser, une sanction

(c) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding

(i) in the case of an individual, \$750,000 and, for each subsequent order, \$1,000,000, or

(ii) in the case of a corporation, \$10,000,000 and, for each subsequent order, \$15,000,000; and

(d) in the case of conduct that is reviewable under paragraph 74.01(1)(a), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate.

Duration of order

(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.

Saving

(3) No order may be made against a person under paragraph (1)(b), (c) or (d) if the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

administrative pécuniaire maximale :

(i) dans le cas d'une personne physique, de 750 000 \$ pour la première ordonnance et de 1 000 000 \$ pour toute ordonnance subséquente,

(ii) dans le cas d'une personne morale, de 10 000 000 \$ pour la première ordonnance et de 15 000 000 \$ pour toute ordonnance subséquente;

d) s'agissant du comportement visé à l'alinéa 74.01(1)a), de payer aux personnes auxquelles les produits visés par le comportement ont été vendus — sauf les grossistes, détaillants ou autres distributeurs, dans la mesure où ils ont revendu ou distribué les produits — une somme — ne pouvant excéder la somme totale payée au contrevenant pour ces produits — devant être répartie entre elles de la manière qu'il estime indiquée.

Durée d'application

(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.

Disculpation

(3) L'ordonnance prévue aux alinéas (1)b), c) ou d) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher le comportement reproché.

Purpose of order

(4) The terms of an order made against a person under paragraph (1)(b), (c) or (d) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

Aggravating or mitigating factors

(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

- (a) the reach of the conduct within the relevant geographic market;
- (b) the frequency and duration of the conduct;
- (c) the vulnerability of the class of persons likely to be adversely affected by the conduct;
- (d) the materiality of any representation;
- (e) the likelihood of self-correction in the relevant geographic market;
- (f) the effect on competition in the relevant market;
- (g) the gross revenue from sales affected by the conduct;
- (h) the financial position of the person against whom the order is made;
- (i) the history of compliance with this Act by the person against

But de l'ordonnance

(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b), c) ou d) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non pas à le punir.

Circonstances aggravantes ou atténuantes

(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

- a) la portée du comportement sur le marché géographique pertinent;
- b) la fréquence et la durée du comportement;
- c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;
- d) l'importance des indications;
- e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;
- f) l'effet sur la concurrence dans le marché pertinent;
- g) le revenu brut provenant des ventes sur lesquelles le comportement a eu une incidence;
- h) la situation financière de la personne

whom the order is made;

(j) any decision of the court in relation to an application for an order under paragraph (1)(d);

(k) any other amounts paid or ordered to be paid by the person against whom the order is made as a refund or as restitution or other compensation in respect of the conduct; and

(l) any other relevant factor.

Meaning of subsequent order

(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

(a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;

(b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;

(c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read

visée par l'ordonnance;

i) le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;

j) toute décision du tribunal à l'égard d'une demande d'ordonnance présentée au titre de l'alinéa (1)d);

k) toute somme déjà payée par la personne visée par l'ordonnance ou à payer par elle en vertu d'une ordonnance, à titre de remboursement, de restitution ou de toute autre forme de dédommagement à l'égard du comportement;

l) tout autre élément pertinent.

Sens de l'ordonnance subséquente

(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02, 74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants :

a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;

b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée

immediately before the coming into force of this Part; or

(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part.

Amounts already paid

(7) In determining an amount to be paid under paragraph (1)(d), the court shall take into account any other amounts paid or ordered to be paid by the person against whom the order is made as a refund or as restitution or other compensation in respect of the products.

Implementation of the order

(8) The court may specify in an order made under paragraph (1)(d) any terms that it considers necessary for the order's implementation, including terms

(a) specifying how the payment is to be administered;

(b) respecting the appointment of an administrator to administer the payment and specifying the terms of administration;

(c) requiring the person against whom the order is made to pay the administrative costs related to the payment as well as the fees to be paid to an administrator;

(d) requiring that potential claimants be notified in the time

en vigueur de la présente partie, qui correspond à la disposition de la présente partie;

c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;

d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie.

Sommes déjà payées

(7) Dans la détermination de la somme à payer au titre de l'alinéa (1)d), le tribunal tient compte de toute somme déjà payée par le contrevenant ou à payer par lui en vertu d'une ordonnance, à titre de remboursement, de restitution ou de toute autre forme de dédommagement à l'égard des produits.

Exécution de l'ordonnance

(8) Le tribunal peut, dans l'ordonnance rendue au titre de l'alinéa (1)d), préciser les conditions qu'il estime nécessaires à son exécution, notamment :

a) prévoir comment la somme à payer

and manner specified by the court;

(e) specifying the time and manner for making claims;

(f) specifying the conditions for the eligibility of claimants, including conditions relating to the return of the products to the person against whom the order is made; and

(g) providing for the manner in which, and the terms on which, any amount of the payment that remains unclaimed or undistributed is to be dealt with.

Variation of terms

(9) On application by the Commissioner or the person against whom the order is made, the court may vary any term that is specified under subsection (8).

1999, c. 2, s. 22; 2009, c. 2, s. 424.

doit être administrée;

b) nommer un administrateur chargé d'administrer cette somme et préciser les modalités d'administration;

c) mettre à la charge du contrevenant les frais d'administration de la somme ainsi que les honoraires de l'administrateur;

d) exiger que les réclamants éventuels soient avisés selon les modalités de forme et de temps qu'il précise;

e) préciser les modalités de forme et de temps quant à la présentation de toute réclamation;

f) établir les critères d'admissibilité des réclamants, notamment toute exigence relative au retour des produits au contrevenant;

g) prévoir la manière dont la somme éventuellement non réclamée ou non distribuée doit être traitée et les conditions afférentes.

Modification des conditions

(9) Le tribunal peut, sur demande du commissaire ou de la personne visée par l'ordonnance, modifier les conditions qu'il a précisées en vertu du paragraphe (8).

1999, ch. 2, art. 22; 2009, ch. 2, art. 424.

Competition Tribunal Rules (SOR/2008-141)

60 Affidavit of documents

(1) The applicant and each respondent who has filed a response shall, within the time prescribed at a case management conference, serve an affidavit of documents on each other party.

Affidavit de documents

(1) Le demandeur et chaque défendeur qui a déposé une réponse signifient aux autres parties un affidavit de documents dans le délai imparti lors de la conférence de gestion de l'instance.

ANNEX "A"

[REDACTED]