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

Applicant

- and -

HUDSON'S BAY COMPANY

Respondent

RESPONDING MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF COMPETITION

PART I - OVERVIEW

1. These submissions are filed by the Commissioner of Competition (the "**Commissioner**") in response to a motion brought by the Respondent, Hudson's Bay Company ("**HBC**"), to compel answers to refusals given at the examination for discovery of the Commissioner's representative. The Commissioner should not be required to answer any of the questions in respect of which HBC seeks answers. As set out below:

    a. HBC seeks irrelevant information;

b. questions 3, 16, 26 and 27 seek information that is irrelevant and also subject to litigation privilege (as would HBC's other questions to the extent they seek information after June 17, 2016 when the Commissioner's purpose was preparing for this litigation); and

c. questions 13 and 14 are inappropriate questions seeking legal or economic opinions whose answers are irrelevant in any event.

2. Further, the relief sought by HBC is contrary to public policy, principles of proportionality and would chill law enforcement. Its motion should be dismissed, with costs.

PART II – THE FACTS

3. Appointed by the Governor-in-Council, the *Competition Act*[1] (the "**Act**") confers on the Commissioner a wide mandate of investigative responsibility to inquire into matters affecting the competitiveness of the Canadian economy. The Commissioner's investigative mandate includes the criminal provisions set out in Part VI of the Act, the deceptive marketing practices provisions set out in Part VII.1 of the Act, the civil reviewable matters provisions set out in Part VIII of the Act, and additional labelling legislation.

4. The Act provides the Commissioner with investigative tools that allow him to collect enormous quantities of documents and information in furtherance of these investigations. As provided for under the Act and under the *Criminal Code*,[2] the Commissioner may conduct searches, obtain production orders for records, request the provision of written responses to questions, require oral examinations, and engage in wiretapping.

5. The Commissioner can accordingly obtain documents and information from HBC's competitors that HBC could never know about absent what would very likely be serious criminal collusion.

[1] R.S.C., 1985, c. C-34, ss. 7 and 1.1.
[2] R.S.C., 1985, c. C-46.

6. In recognition of the mischief that would result from HBC receiving confidential competitor information (among other things), the Competition Tribunal (the "**Tribunal**") has issued and amended a Confidentiality Order in this proceeding that restricts HBC personnel from obtaining confidential competitor information. Pursuant to the Amended Confidentiality Order, Confidential Level C documents and information can only be seen by HBCs' outside counsel, its independent experts and its record review vendor.[3] Confidential Level C documents and information cannot even be seen by HBC's in-house counsel or client representatives instructing this litigation who have executed a confidentiality agreement in the form attached as Schedule A to the Amended Confidentiality Order.[4]

7. It is within this context that HBC brings its motion to compel answers to refusals given at the examination for discovery of the Commissioner's representative. During the examination, the Commissioner refused a number of questions pertaining to inquiries the Commissioner may have made into the practices of HBC's competitors. HBC has now brought forward a motion seeking answers to the questions the Commissioner refused. A chart setting out the basis for each refusal given at the examination of the Commissioner's representative is attached as **Schedule A**. In summary, HBC seeks the following:

    a. records, written returns and transcripts obtained pursuant to section 11 orders from an investigation into the now liquidated Sears Canada detailing the internal affairs of the company (questions 1 and 2);

    b. details concerning the Commissioner's litigation preparations (questions 3, 16, 26 and 27);

    c. information about the percentages of mattresses HBC's competitors sold at their regular prices (questions 4-7);

[3] Amended Confidentiality Order, dated May 8, 2018.
[4] *Ibid*., para. 7. See also the definition of "Designated Individuals".

d. information about HBC's competitors who may or may not have pricing discretion on the sales floor (questions 8-10);

e. information about how HBC's competitors structure their promotions (questions 11-12);

f. the Commissioner's opinion on any market power HBC may or may not have (questions 13-14);

g. information about investigation and enforcement relating to HBC's competitors (questions 15-18, 24, 28 and 30);

h. information about clearance sales HBC's competitors may or may not have had (questions 19-23 and 25); and

i. information about the margins and market share of HBC's competitors (questions 27 and 29).

8. The questions, in respect of which HBC seeks answers, involve requests to access confidential competitor information, including information gathered in the context of other investigations. Questions 3, 16, 26 and 27 also request documents and information the Commissioner obtained after the date of the commencement of litigation privilege and questions 13 and 14 also seek to elicit legal or economic opinions.

9. The Commissioner's position remains that these questions seek irrelevant information and that he is not required to provide legal or economic opinions or disclose information that is subject to litigation privilege.

10. In any event, HBC's motion should also be viewed in light of the admission by HBC that it ***knows*** that its competitors who use high-low pricing rarely, if ever make sales at regular prices. The Commissioner examined Christine Jelley for discovery as the representative of HBC. It was understood by all that Ms. Jelley's answers would bind the company.[5]

[5] Transcript of the Examination C. Jelley, August 23, 2018, p. 5, q. 4.

Among others, during the course of this examination, Ms. Jelley was asked the following questions and gave the following answers:

> 1224 Q. Next one is HBC00078694. Can I ask you something? In terms of getting that information from Sealy or Serta or Marshalls, are they confirming for you -- are they telling you -- how do I put it to you. ***Are they advising you that the promotional prices -- or that the competitors rarely sell at promotional price?***
>
> A. I don't believe that they've declared that in the way that you're suggesting.
>
> 1225 Q. ***Is that your understanding generally, that for most of these retailers that are using high low pricing strategies, that sales are rarely ever made at regular price? Is that a fair statement?***
>
> ***A. That's my understanding***.[6]
>
> [Emphasis added.]

PART III – SUBMISSIONS

I. The Law Relating to Refusals Given at Examinations for Discovery

11. The Commissioner adopts herein the law set out in paragraphs 26-27, 31-32 and 35-36 of his moving Memorandum of Fact and Law as setting out the principles for assessing the appropriateness of refusals given at an examination for discovery. HBC's requests must however be subject to additional scrutiny in view of: the Act, the substantive case law, and other deeply enshrined principles of Canadian law, discussed below.

II. HBC Seeks to Compel Production of Irrelevant Information

12. The reviewable conduct the Tribunal is to determine in this proceeding arises under paragraph 74.01(1)(a) and subsection 74.01(3) of the Act. The information HBC seeks is irrelevant to the Tribunal's determinations pursuant to these provisions and the associated case law.

A. HBC's Questions are Irrelevant to Paragraph 74.01(1)(a) of the Act

[6] Transcript of the Examination C. Jelley, August 24, 2018, p. 239, q. 1224-1225.

13. Paragraph 74.01(1)(a) of the Act states:

> A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
>
> > (a) makes a representation to the public that is false or misleading in a material respect;

14. In determining whether or not a representation is false or misleading in a material respect, section 74.05 of the Act requires the trier-of-fact to consider the "general impression" conveyed by a representation as well as its literal meaning. A representation is misleading in a material respect where it is of "much consequence or [is] important or pertinent or germane or essential to the matter".[7]

15. A competitor's conduct has no bearing on the issues in paragraph 14 or whether HBC contravened paragraph 74.01(1)(a) of the Act. The legislation requires the Tribunal to consider the general impression HBC's representations convey, as well as their literal meaning, and whether the impression conveyed by its representations, or the meaning, is false or misleading in a material respect. This exercise focuses solely on HBC's conduct, not the conduct of its competitors. There is simply no room, or reason, under the framework of the Act for these issues to be considered.

B. HBC's Questions are Irrelevant to the Ordinary Price Provisions of the Act

16. The ordinary price provisions of the Act also exclusively concern HBC's conduct. The law, relating to ordinary price claims, is set out in subsections 74.01(3) to (5) of the Act. Subsection 74.01(3) and its related provisions state:

> (3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

[7] *Canada (Commissioner of Competition) v. Sears Canada Inc*., 2005 Comp. Trib. 2 ("***Sears***") at paras. 333-336.

> (a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
>
> (b) has not offered the product at that price or a higher price in ***good faith*** for a substantial period of time recently before or immediately after the making of the representation, as the case may be.
>
> (4) 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 the 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.
>
> (5) Subsections (2) and (3) do 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.]

17. More specifically, in the *Sears* decision, Justice Dawson found that for the purposes of subsection 74.01(3) the phrase "good faith" is to be interpreted as follows:

> I conclude therefore that good faith is to be determined on a ***subjective basis***. ***In this case, the question to be asked is whether Sears truly believed that its regular prices were genuine and bona fide prices, set with the expectation that the market would validate those regular prices***. As noted by the Court in *Dorman*, *supra*, the ***reasonableness of a belief*** is a factor to be considered in determining whether a belief is honestly held. I therefore also accept that other external, objective factors such as whether the reference price was comparable to prices offered by other competitors, and whether sales occurred at the reference price, may provide evidence that is relevant to assessing whether ***Sears truly believed*** its regular prices were genuine and *bona fide*.[8]
>
> [Emphasis added.]

18. The *Sears* decision, which HBC completely ignores in its Memorandum of Fact and Law, makes clear that good faith for the purposes of paragraph 74.01(3)(b) is ***subjective***. The question, in this case, is therefore what ***HBC*** truly believed, specifically, whether it believed that its regular prices were genuine and *bona fide* prices, set with the expectation that the market would validate those regular prices.

[8] *Ibid*., at para. 239.

19. Confidential information that is internal to HBC's competitors is irrelevant because "good faith" is subjective. While external objective factors such as whether HBC's reference price was comparable to prices offered by its competitors and whether ***HBC's*** sales occur at its reference prices are relevant to informing good faith, such information must be either ***known or knowable to HBC*** to inform ***its subjective*** good faith. That is, competitor prices must have been known or at least available to HBC in the course of its business. Similarly, the question of whether sales occurred at a reference price must be known, or at least available to HBC in the course of its business. Absent collusion or the sharing of confidential competitor information, the only information HBC would have about the prices products actually sell at are ***its own*** transaction prices. The actual prices HBC's competitors sell their products at is simply not something HBC should know about except by inference and deduction from its own business information.

20. Accordingly, internal information the Commissioner may have collected in the course of investigations into HBC's competitors cannot be relevant to HBC's subjective faith because this information is beyond HBC's knowledge. Information about HBC's good faith should ordinarily be found in HBC's productions, not confidential competitor information that the Commissioner has seized or otherwise obtained during the course of investigations into other companies.

21. HBC's good faith is assessed at the time when it set its regular prices. Allowing HBC to obtain documents and information internal to its competitors (and after the fact) serves no purpose whatsoever; and would simply confuse the issue of what HBC knew or should have known with what it did not and could not have known. This is because, among other things, even if the Tribunal were to order the Commissioner to produce the documents and information of HBC's competitors (which it should not), the Confidentiality Order would prevent this information from being disclosed to anyone other than HBC's outside counsel, experts and document review vendors. Again, documents and information ***HBC*** does not and cannot know about cannot inform ***its*** subjective good faith. In this regard, it must be remembered that HBC seeks to obtain, via the Commissioner, confidential information

about the internal operations of its competitors when it has admitted – from its ***subjective*** perspective – high-low competitors ***rarely ever made sales at their regular prices***.[9]

C. HBC's Questions are Irrelevant to Assessing Administrative Monetary Penalties under paragraph 74.1(1)(c) of the Act

22. HBC misreads the Act when it contends that any competitor information in the possession of the Commissioner is relevant to assessing administrative monetary penalties under the Act. Subsection 74.1(5) is not a key that opens the door to all third-party information that the Commissioner gathered during the course of his various investigations into other companies. Parliament could have chosen to list "whether a competitor also engaged in similar reviewable conduct" as a relevant factor under subsection 74.1(5). However, in keeping with well-established principles of law,[10] it did not.

23. HBC's reliance on paragraph 74.1(5)(f) of the Act is misplaced. A plain reading of this provision makes it clear that not all third-party information is relevant to the assessment of an administrative monetary penalty, but rather only evidence that relates to the ***effect*** that ***deceptive conduct*** has on a market.[11] The effect of deceptive conduct is distinct from a company's general competitive position. Similarly, competition is harmed and the market is distorted when more than one competitor "breaks the law" or when a lone competitor contravenes the Act.

24. Tellingly, none of the refused questions are probative of the ***effect*** HBC's ***deceptive marketing practices*** would have on competition in the relevant market. HBC's questions

[9] Transcript of the Examination C. Jelley, August 24, 2018, p. 239, q. 1224-1225.
[10] *R. v. Miles of Music Ltd.* (1989), 74 O.R. (2d) 518 (C.A.) ("***Miles of Music***") at para. 59; *R. v. Jukes*, 2014 ONCJ 438 ("***Jukes***") at paras. 18-19; *Ontario (Ministry of the Attorney General) v. McLellan*, 2015 ONCJ 165 ("***McLellan***") at para. 55; and *R. v. Khan*, 2014 ONSC 5664 ("***Khan***") at para 155.
[11] HBC acknowledges this at paragraph 20 of its Memorandum of Fact and Law, the question to be addressed under this paragraph is "***the effect***, if any, ***of HBC's conduct*** on competition in the market" (emphasis added).

are instead nothing more than an attempt to elicit answers that it hopes will show others were doing the same as it. The answers HBC seeks are irrelevant and properly refused.[12]

III. No Basis for Interfering with Litigation Privilege

25. With respect to questions 3, 16, 26 and 27, the Commissioner's first position is that the answers to these questions are irrelevant. The answers are also subject to litigation privilege (as would HBC's other questions to the extent they seek information after June 17, 2016 when the Commissioner's purpose was preparing for this litigation). *Blank v. Canada (Department of Justice)*[13] affirms that "[t]he purpose of the litigation privilege … is to create a 'zone of privacy' in relation to pending or apprehended litigation". HBC with its questions seeks to intrude into this prohibited zone. As set out in *Blank:*[14]

> Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.
>
> …
>
> In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.

26. Answers to questions 3, 16, 26 and 27 are properly refused on this basis. Regarding questions 3, and 16, as this Tribunal held in *Director of Investigation and Research v Southam Inc.*,[15] the Commissioner (then Director) "is not required to prepare the respondents' case by identifying potential witnesses for them". Regarding question 26, while there is some disagreement between lower courts concerning whether the litigation privilege attaches to documents gathered or copied – *but not created* – for the purpose of

[12] *Miles of Music*, *supra* note 10 at para. 59; *Jukes*, *supra* note 10 at paras. 18-19; *McLellan*, *supra* note 10 at para. 55; *Khan*, *supra* note 10 at para. 155.
[13] [2006] 2 S.C.R. 319 ("***Blank***").
[14] *Ibid*., at paras. 27 and 32.
[15] (1991), 38 C.P.R. (3d) 68 (Comp. Trib.) ("***Southam***") at para. 26.

litigation, which the Supreme Court has not resolved, the Court in *Blank* has indicated "Extending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege". As McEachern C.J.B.C. set out in *Hodgkinson v. Simms*:[16]

> It is my conclusion that the law has always been, and in my view, should continue to be, that in circumstances such as these, where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection and to refuse production.

27. That principle is applicable here. The Commissioner should be entitled to maintain a zone of privacy, particularly in this case where the information sought by HBC is irrelevant.

IV. No Basis to for Compelling the Commissioner to Provide Legal or Economic Opinions

28. With respect to questions 13 and 14, the Commissioner's first position is again that HBC requests irrelevant information. These questions are also improper as they seek legal or economic opinions.

29. It is well-established that questions seeking legal or economic opinions need not be answered. Rothstein J. (as he then was) held as follows in *Canada (Director of Investigation & Research) v. Washington*:[17] "the party examining is entitled to specific material, relevant facts but not economic or legal opinions" and that "[q]uestions going to opinions need not be answered". The Tribunal made the same finding in *Southam*.[18]

V. The Relief Sought by HBC is Contrary to Public Policy and Principles of Proportionality

30. A fundamental principle, long recognized in Canadian law, is that unlawful actions do not become lawful when some other person does the same thing. Even in the criminal context

[16] (1988), 33 B.C.L.R. (2d) 129 (B.C. C.A.).
[17] (1996), 70 C.P.R. (3d) 317 (Comp. Trib.) at paras. 5 and 13.
[18] *supra* note 15 at para. 13.

where defence protections are at their absolute highest no such defence is available. As the Ontario Court of Appeal has stated: "It cannot be a defence to a speeding driver that the police did not prosecute all drivers who were speeding on the same highway at the same time". [19]

31. Yet, this is exactly what HBC requests on this motion. The information HBC seeks does not support a defence known at law. The following statements of the court in *R. v. Jukes*[20] are apposite:

> The appellant argued at trial that other neighbours in his area were also violating bylaws and therefore that the fact that he was charged and they weren't violates his s. 15 Charter right to equality.
>
> That's not the law. It's not the case that an individual cannot be charged with an offence unless all others committing similar acts are similarly charged.

32. In addition and with respect to questions 15-18, 24 and 28 and 30 which inquire into whether the Commissioner has taken action with respect to HBC's competitors, what is at issue before the Tribunal, in this case, is whether HBC engaged in reviewable conduct, not the conduct of the Commissioner's investigation.[21] The Tribunal should not second guess the decision of the Commissioner to proceed against HBC at this time rather than its competitors without conspicuous evidence of bad faith, improper motives or decisions so obviously wrong that shock the conscience of the community. As set out in by Justice L'Heureux-Dubé in *R. v. Power*:[22]

> … courts have a residual discretion to remedy an abuse of the court's process but only in the 'clearest of cases', which, in my view, amounts to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.

[19] *Miles of Music*, *supra* note 10 at para. 59.
[20] 2014 ONCJ 438 at paras. 18-19.
[21] *Southam*, *supra* note 15 at paras. 8 and 10.
[22] [1994] 1 S.C.R. 601 ("*Power*") at para. 16. *McLellan*, *supra* note 10 at para. 51 ("Courts are not allowed to second guess the decisions of prosecutors without conspicuous evidence of bad faith, improper motives or decisions so obviously wrong that shock the conscience of the community.") and *Khan*, *supra* note 10 at para 155.

33. The high standard to obtain disclosure of others in defence of a proceeding exists for good reason and should be applied in this case. HBC has not pled – let alone produced any evidence – that the Commissioner's decision to prosecute it is an abuse of process. Its request for competitor information should also be dismissed on this basis.

34. The same principles apply in the case of subsection 74.1(5) of the Act. Whether one of HBC's competitors may have also contravened the Act is not a relevant factor under subsection 74.1(5) of the Act. HBC's questions are nothing more than an attempt to elicit answers that it hopes will show others "were speeding on the same highway at the same time".[23] The answers it seeks are irrelevant and properly refused.[24]

35. Moreover, the resources required to identify, collect and produce in a deceptive marketing case the documents and information the Commissioner might have collected in the course of other investigations would place an inappropriate burden on the Commissioner. The systemic costs such requests impose and the resulting chill on law enforcement therefore require the Tribunal to impose a high threshold for defence requests for disclosure. This approach flows from decisions at the highest level. In *R. v. T. (V.),*[25] Justice L'Heureux-Dubé cited Powell J.'s caution in *Wayte v. United States,*[26] that the "broad discretion" given to the Government "rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review" and that:

> Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. ***Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy***. All these are substantial concerns that make the courts properly hesitant to examine the

[23] *Miles of Music, supra* note 10 at para. 59.
[24] *Miles of Music, supra* note 10 at para. 59; *Jukes, supra* note 10 at paras. 18-19; *McLellan, supra* note 10 at para. 55; *Khan, supra* note 10 at para. 155.
[25] [1992] 1 S.C.R. 749 at para. 18. See also *Power, supra* note 22 at paras. 15, 34, 38 and 40.
[26] 470 U.S. 598 (1985) at 607-8.

decision whether to prosecute.

[Emphasis added.]

36. The systemic costs HBC's requests impose would include not only the review and collection of documents from other investigations throughout the various enforcement branches of the Bureau – where the Commissioner may have obtained documents and information in a variety of contexts for a variety of purposes – but also in terms of the examinations for discovery in this litigation. To the extent HBC obtains its competitor information for the purposes of its defence (which the Commissioner submits it should not), the Commissioner should be entitled to examine HBC (or its counsel) for discovery regarding how it intends to make use of the information it receives. Otherwise, HBC would enjoy a right to trial by ambush and to manufacture a defence without providing discovery to the Commissioner. The Commissioner should be entitled to know the case he must meet rather than to guess at how HBC plans to use the documents and information he may have collected from other investigations, and if this motion were granted contrary to the Commissioner's submissions, HBC would see ***for the first time***.

PART IV – ORDER SOUGHT

37. In view of the foregoing, HBC's motion should be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED AT GATINEAU, QUÉBEC, this 14th day, November, 2018.

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Schedule A to the Responding Memorandum of Fact and Law of the Commissioner of Competition

Basis for Each Refusal Given at the Examination of the Commissioner's Representative

No.	Reference	Refusal	Commissioner's Response at the Examination	Rational Supporting the Commissioner's Response
1.	Q. 207, p. 52	To produce the documents the Commissioner received from Sears.	The question seeks irrelevant information.	Competitor conduct has no bearing on whether HBC contravened paragraph 74.01(1)(a) or subsection 74.01(3) of the Act. Additionally, as per Dawson J.in *Sears,* the determination of "good faith" is subjective; as such, this information must either be known or knowable to HBC in the course of its business at the time when it set its regular prices. As a principle of law, unlawful actions do not become lawful when some other person does the same thing; therefore whether one of HBC's competitors may have also contravened the Act is not a relevant factor in determining whether HBC engaged in the reviewable conduct.
2.	Q. 207, p. 52	To produce the transcripts from the section 11 examinations the Commissioner conducted of the Sears representatives.	Ibid.	Ibid.
3.	Q. 214, pp.54-55	To identify the people the Commissioner spoke with to get information about the role or involvement of mattress	The answer is subject to litigation privilege.	Ibid. Additionally, the Commissioner is entitled to a zone of privacy surrounding his preparations for litigation.

No.	Reference	Refusal	Commissioner's Response at the Examination	Rational Supporting the Commissioner's Response
		manufacturers in influencing retail pricing (after the date when the Commissioner is claiming litigation privilege).		
4.	Q. 227, p. 61	Whether the Commissioner knows what percentage of mattresses or sleep sets Sleep Country sells at their regular prices.	The question seeks irrelevant information.	Competitor conduct has no bearing on whether HBC contravened paragraph 74.01(1)(a) or subsection 74.01(3) of the Act. Additionally, as per Dawson J.in *Sears,* the determination of "good faith" is subjective; as such, this information must either be known or knowable to HBC in the course of its business at the time when it set its regular prices. As a principle of law, unlawful actions do not become lawful when some other person does the same thing; therefore whether one of HBC's competitors may have also contravened the Act is not a relevant factor in determining whether HBC engaged in the reviewable conduct.
5.	Q. 228, p. 61	Whether the Commissioner knows what percentage of mattresses or sleep sets The Brick sells at their regular prices.	Ibid.	Ibid.
6.	Q. 229, p. 61	Whether the Commissioner knows what percentage of mattresses or sleep sets Costco, Ikea and	Ibid.	Ibid.

No.	Reference	Refusal	Commissioner's Response at the Examination	Rational Supporting the Commissioner's Response
		Sears sell at their regular prices.		
7.	Q. 230, pp. 61-62	Whether the Commissioner knows what percentage of mattresses or sleep sets Leon's sells at their regular prices.	Ibid.	Ibid.
8.	Q. 231, p. 62	Whether the Commissioner knows of any other mattress retailer in Canada, besides Sleep Country, where the sales representatives have pricing discretion on the sales floor.	Ibid.	Ibid.
9.	Q. 232, p. 62	Whether the Commissioner has an understanding of the extent of the discretion that sales people at Sleep Country have on pricing.	Ibid.	Ibid.
10.	Q. 233, pp. 62-63	Whether the Commissioner has any information about Sleep Country's sales practice in particular, and with respect to the discretion, whether it's based on a formula and whether there's a variation in the	Ibid.	Ibid.

No.	Reference	Refusal	Commissioner's Response at the Examination	Rational Supporting the Commissioner's Response
		practice based on the model and the manufacturer of the mattress.		
11.	Q. 247, p. 69	To advise what information the Commissioner has from Sleep Country with respect to what the mechanics of its mix and match program are.	Ibid.	Ibid.
12.	Q. 250, p. 70	To advise how Sears' mix and match promotions work.	Ibid.	Ibid.
13.	Q. 333, p. 104	Whether the Commissioner accepts, for the purposes of this proceeding, that Hudson's Bay had and has no market power in respect of the sale of mattresses.	Ibid. The question also seeks opinion evidence.	Ibid. Questions seeking legal or economic opinions need not be answered. [*Canada (Director of Investigation & Research) v. Washington,* as well as *Southam*]
14.	Q. 336, p. 105	Whether the Commissioner would agree with the statement that Hudson's Bay is a price-taker or price-follower when it comes to mattresses.	The question seeks irrelevant information.	Ibid.
15.	Q. 557,	To advise whether the Commissioner has	Ibid.	Competitor conduct has no bearing on whether HBC contravened

No.	Reference	Refusal	Commissioner's Response at the Examination	Rational Supporting the Commissioner's Response
	p. 196	taken any enforcement steps whatsoever with respect to The Brick and their pricing of mattresses.		paragraph 74.01(1)(a) or subsection 74.01(3) of the Act. Additionally, as per Dawson J.in *Sears,* the determination of "good faith" is subjective; as such, this information must either be known or knowable to HBC in the course of its business at the time when it set its regular prices. As a principle of law, unlawful actions do not become lawful when some other person does the same thing; therefore whether one of HBC's competitors may have also contravened the Act is not a relevant factor in determining whether HBC engaged in the reviewable conduct.
16.	Q. 558, p. 197	To advise whether, in 2018, the Commissioner made any inquiries, voluntary or compelled, of The Brick with respect to its pricing or sales of mattresses.	Ibid.	Ibid. The answer is also subject to litigation privilege. The Commissioner is entitled to a zone of privacy surrounding his preparations for litigation.
17.	Q. 559, p. 197	To advise whether, since 2013, the Commissioner has made any inquiries, voluntary or compelled, of The Brick with respect to its pricing or sales of mattresses.	Ibid.	Competitor conduct has no bearing on whether HBC contravened paragraph 74.01(1)(a) or subsection 74.01(3) of the Act. Additionally, as per Dawson J.in *Sears,* the determination of "good faith" is subjective; as such, this information must either be known or knowable to HBC in the course of its business at the time when it set its regular prices. As a principle of law, unlawful actions do not become lawful when

No.	Reference	Refusal	Commissioner's Response at the Examination	Rational Supporting the Commissioner's Response
				some other person does the same thing; therefore whether one of HBC's competitors may have also contravened the Act is not a relevant factor in determining whether HBC engaged in the reviewable conduct.
18.	Q. 560, pp. 197-198	To advise why the Commissioner did not include The Brick in the section 11 inquiry with respect to mattresses or sleep sets.	Ibid.	Ibid.
19.	Q. 595, p. 215	Whether the Commissioner agrees that in the 2013 to 2014 timeframe Sears also made clearance representations.	Ibid.	Competitor conduct has no bearing on whether HBC contravened paragraph 74.01(1)(a) or subsection 74.01(3) of the Act. Additionally, as per Dawson J.in *Sears,* the determination of "good faith" is subjective; as such, this information must either be known or knowable to HBC in the course of its business at the time when it set its regular prices. As a principle of law, unlawful actions do not become lawful when some other person does the same thing; therefore whether one of HBC's competitors may have also contravened the Act is not a relevant factor in determining whether HBC engaged in the reviewable conduct.
20.	Q. 596, p. 215	Whether the Commissioner agrees that Sears continued to make use of the term clearance through	Ibid.	Ibid.

No.	Reference	Refusal	Commissioner's Response at the Examination	Rational Supporting the Commissioner's Response
		2017.		
21.	Q. 597, p. 216	Whether the Commissioner agrees that The Brick advertises sleep sets that are still being ordered new on clearance promotions to this day.	Ibid.	Ibid.
22.	Q. 598, p. 216	Whether the Commissioner is aware of the fact that The Brick has what they call clearance centres where mattresses can be purchased.	Ibid.	Ibid.
23.	Q. 601, pp. 216-217	Whether the Commissioner says that HBC's clearance promotions created a different impression from those of any other retailer.	Ibid.	Ibid.
24.	Q. 602, p. 217	Whether any type of enforcement action at all, letter communication or otherwise, has been taken with respect to any other retailer's use of clearance promotion practice such as HBC's.	Ibid.	Competitor conduct has no bearing on whether HBC contravened paragraph 74.01(1)(a) or subsection 74.01(3) of the Act. Additionally, as per Dawson J.in *Sears,* the determination of "good faith" is subjective; as such, this information must either be known or knowable to HBC in the course of its business at the time when it set its regular prices. As a principle of law, unlawful

No.	Reference	Refusal	Commissioner's Response at the Examination	Rational Supporting the Commissioner's Response
				actions do not become lawful when some other person does the same thing; therefore whether one of HBC's competitors may have also contravened the Act is not a relevant factor in determining whether HBC engaged in the reviewable conduct.
25.	Q. 603, p. 217	Whether, to the Commissioner's knowledge, any other retailer of mattresses has changed its usage of clearance representations other than HBC.	Ibid.	Competitor conduct has no bearing on whether HBC contravened paragraph 74.01(1)(a) or subsection 74.01(3) of the Act. Additionally, as per Dawson J.in *Sears,* the determination of "good faith" is subjective; as such, this information must either be known or knowable to HBC in the course of its business at the time when it set its regular prices. As a principle of law, unlawful actions do not become lawful when some other person does the same thing; therefore whether one of HBC's competitors may have also contravened the Act is not a relevant factor in determining whether HBC engaged in the reviewable conduct.
26.	CONF: Q. 7, pp. 7-8	Whether the Commissioner obtained any market research from Sleep Country after June 17, 2016.	The answer is subject to litigation privilege. The Commissioner is entitled to a zone of privacy surrounding his preparations for litigation.	Ibid. The answer is also subject to litigation privilege. The Commissioner is entitled to a zone of privacy surrounding his preparations for litigation.
27.	[redacted]	[redacted]	[redacted]	[redacted]

No.	Reference	Refusal	Commissioner's Response at the Examination	Rational Supporting the Commissioner's Response
		[redacted]		
28.	[redacted]	[redacted]	[redacted]	[redacted]
29.	CONF: Q. 257, p. 104	Whether, subsequent to August 6, 2013 and prior to June 17, 2016, the Commissioner obtained information about Sleep Country's market share on its own initiative.	Ibid.	Competitor conduct has no bearing on whether HBC contravened paragraph 74.01(1)(a) or subsection 74.01(3) of the Act. Additionally, as per Dawson J.in *Sears,* the determination of "good faith" is subjective; as such, this information must either be known or knowable to HBC in the course of its business at the time when it set its regular prices.

No.	Reference	Refusal	Commissioner's Response at the Examination	Rational Supporting the Commissioner's Response
				As a principle of law, unlawful actions do not become lawful when some other person does the same thing; therefore whether one of HBC's competitors may have also contravened the Act is not a relevant factor in determining whether HBC engaged in the reviewable conduct.
30.	CONF: Q. 337, p. 130	Whether, to the Commissioner's knowledge, Sleep Country continues to use the same practices as described to Mr. Zimmerman in the March 28, 2014 meeting for its clearance sales to date.	Ibid.	Competitor conduct has no bearing on whether HBC contravened paragraph 74.01(1)(a) or subsection 74.01(3) of the Act. Additionally, as per Dawson J.in *Sears,* the determination of "good faith" is subjective; as such, this information must either be known or knowable to HBC in the course of its business at the time when it set its regular prices. As a principle of law, unlawful actions do not become lawful when some other person does the same thing; therefore whether one of HBC's competitors may have also contravened the Act is not a relevant factor in determining whether HBC engaged in the reviewable conduct.