

THE COMPETITION TRIBUNAL

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

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

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

HUDSON'S BAY COMPANY

Respondent

CONSENT AGREEMENT

WHEREAS the Commissioner is responsible for the administration and enforcement of the Act;

AND WHEREAS the Respondent Hudson's Bay Company is a large retailer of consumer products from banners including The Bay, Home Outfitters and Hudson's Bay Home;

AND WHEREAS the Respondent used a marketing strategy for Sleep Sets known as "high-low" whereby it frequently marketed Sleep Sets at substantially reduced prices in relation to Reference Prices;

AND WHEREAS the Respondent regularly made representations to the public promoting Sleep Sets at substantial discounts in relation to the Reference Prices;

AND WHEREAS the representations were made to the public by various means including flyers, websites, and retail stores across Canada;

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AND WHEREAS the Respondent has not sold a substantial volume of certain Sleep Sets at the Reference Price (or a higher price) within a reasonable period of time before making the representations to the public;

AND WHEREAS the Commissioner has concluded that the Respondent did not offer certain Sleep Sets at the Reference Price (or a higher price) in Good Faith for a substantial period of time recently before making the representations to the public;

AND WHEREAS the Commissioner concluded that the Respondent expected to sell very few sleep sets at Reference Prices;

AND WHEREAS the Commissioner has concluded that when making Reference Price claims that the Respondent offered certain Sleep Sets to the public at promotional prices approximately half of the time and, in some occasions, more than half of the time;

AND WHEREAS the Commissioner has concluded that the Respondent has engaged in reviewable conduct contrary to subsection 74.01(3) of the Act with regard to the promotion and sale of certain Sleep Sets;

AND WHEREAS the Commissioner has concluded that the Respondent also made representations promoting Inventory Clearance Sales of certain Sleep Sets, which conveyed the general impression that the Respondent was selling its remaining Sleep Sets from on hand inventory;

AND WHEREAS the Respondent did not actually have significant on hand inventory of the Sleep Sets, and instead used an On-Demand delivery model whereby it ordered inventory of the Sleep Sets during the promoted Inventory Clearance Sales each time one was purchased by a customer;

AND WHEREAS the Commissioner has concluded that the Respondent's representations, promoting Inventory Clearance Sales of certain Sleep Sets, were false or misleading in a material respect;

AND WHEREAS the Commissioner has concluded that the Respondent has engaged in reviewable conduct contrary to paragraph 74.01(1)(a) of the Act with regard to Inventory Clearance Sales of certain Sleep Sets;

AND WHEREAS the Respondent made the representations to the public promoting Inventory Clearance Sales of certain Sleep Sets by various means including by flyers, websites, and retail stores across Canada;

AND WHEREAS the Commissioner has concluded for greater certainty that certain of the Respondent's practices with respect to Inventory Clearance Sales were contrary to its advertising compliance manual;

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AND WHEREAS the Commissioner has been advised by the Respondent that it will update its advertising compliance manual as it pertains to the meaning of Good Faith;

AND WHEREAS the Commissioner has been advised by the Respondent that the Respondent is aware of and has read the Commissioner's Bulletin entitled "Corporate Compliance Programs" as published on the Competition Bureau's website at www.competitionbureau.gc.ca on the Execution Date;

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

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

AND WHEREAS the Respondent is committed to compliance with the Act generally, and section 74.01 specifically;

AND WHEREAS IT IS AGREED AND UNDERSTOOD that upon registration of this Agreement, these proceedings shall be terminated as against the Respondent pursuant to subsection 74.12(4) of the Act; and

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

I. INTERPRETATION

1. For the purpose of the Agreement, the following definitions shall apply:
 - a. "Act" means the *Competition Act*, R.S.C. 1985, c. C-34;
 - b. "Agreement" means this Consent Agreement entered into by the Parties pursuant to section 74.12 of the Act;
 - c. "Commissioner" means the Commissioner of Competition appointed pursuant to section 7 of the Act, and his or her authorized representatives;
 - d. "Compliance Program" has the meaning set out in section 6 of this Agreement;
 - e. "Days" means calendar days;
 - f. "Execution Date" means the date on which the Agreement has been signed by both Parties;

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- g. “**Good Faith**” means an honest belief that the Respondent’s Reference Prices are genuine *bona fide* prices set with an honest expectation that they will be validated by the market;
- h. “**Interpretation Act**” means the *Interpretation Act*, R.S.C. 1985, c. I-21;
- i. “**Inventory Clearance Sale**” means “clearance” or other similar kinds of representations to the public which create the general impression that a Product’s price has been permanently reduced with the objective of selling any remaining in-stock merchandise;
- j. “**Major Appliances**” means refrigerators, dishwashers, stoves/ranges, washing machines and dryers;
- k. “**On-Demand**” means a delivery model where the retailer does not hold a Product in inventory (other than floor models and previously returned Products), and orders a new Product from a manufacturer or supplier only when a consumer makes a purchase;
- l. “**Parties**” means the Commissioner and the Respondent collectively, and “**Party**” means any one of them;
- m. “**Person**” means any individual, corporation, partnership, firm, association, trust, unincorporated organization, or other entity;
- n. “**Pricing Personnel**” means all current and future Respondent’s employees and Respondent’s Senior Management who are materially involved in or responsible for the formulation of prices and/or the formulation or implementation of advertising, marketing or pricing policies for Products supplied in Canada;
- o. “**Product**” has the meaning in subsection 2(1) of the Act;
- p. “**Reference Price**” means a price for a Product, without any price reduction applied to it, used when making advertised savings or discount claims, including the Respondent’s claimed regular price or a competitor’s price;
- q. “**Record**” has the meaning in subsection 2(1) of the Act;
- r. “**Respondent**” means Hudson’s Bay Company, a corporation amalgamated and continued pursuant to the laws of Canada, and its successors and assigns;
- s. “**Senior Management**” means all current and future senior management of the Respondent who are located in Canada;
- t. “**Sleep Sets**” means any mattress set made up of a mattress and box spring;

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- u. **“Tribunal”** means the Competition Tribunal established by the Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.).

II. COMPLIANCE WITH SECTIONS 74.01(1)(a) AND 74.01(3) OF THE ACT

- 2. Within 120 Days after the Execution Date, the Respondent shall comply with paragraph 74.01(1)(a) and subsection 74.01(3) of the Act with respect to Sleep Sets and Major Appliances.

III. PAYMENTS

- 3. The Respondent shall pay an administrative monetary penalty in the amount of \$4,000,000 dollars.
- 4. The Respondent shall pay costs in the amount of \$500,000 dollars incurred by the Commissioner during the course of his investigation into this matter.
- 5. The payments referred to in sections 3 and 4 shall be made within 7 business days of the Execution Date by the Respondent, by certified cheque or by wire transfer payable to the Receiver General for Canada.

IV. CORPORATE COMPLIANCE PROGRAM

- 6. Within 270 Days after the Execution Date, the Respondent shall establish, and thereafter maintain, a corporate compliance program, the goal of which will be to promote the compliance of the Respondent with the Act generally, and paragraph 74.01(1)(a) and subsection 74.01(3) of the Act specifically.
- 7. Within 21 Days after the establishment of the Compliance Program, each member of the Respondent’s Senior Management shall acknowledge his or her commitment to the Compliance Program by signing a commitment letter in the form set out in Appendix “A” of this Agreement. Any individual that becomes a member of Respondent’s Senior Management, during the term of this Agreement, shall sign a commitment letter in the form set out in Appendix “A” of this Agreement, within 21 Days of becoming a member of Respondent’s Senior Management.

V. COMPLIANCE REPORTING

- 8. The Respondent shall provide the Commissioner or his authorized representative written confirmation that each of the Respondent’s Pricing Personnel has received a copy of this Agreement within 21 Days after the Execution Date.
- 9. The Respondent shall provide to the Commissioner or his authorized representative, within 30 Days following receipt of a written request from the Commissioner, such Records and

information, in such form as the Commissioner reasonably requests, for the purposes of monitoring compliance with this Agreement.

VI. GENERAL

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

(a) The Commissioner:

Commissioner of Competition
Competition Bureau Canada
Place du Portage, Phase 1
50 Victoria Street, 21st Floor
Gatineau, Quebec K1A 0C9

Attention: Senior Deputy Commissioner of Competition, Cartels and Deceptive
Marketing Practices Branch

Facsimile: 819-953-4792

With a copy to:

Executive Director and Senior General Counsel
Competition Bureau Legal Services
Department of Justice
Place du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau, Quebec K1A 0C9

Facsimile: 819-953-9267

(b) The Respondent:

Hudson's Bay Company
698 Lawrence Ave. W.
North York, Ontario M6A 3A5

Attention: Legal Department

With a copy to:

Paul Collins and Eliot Kolers
Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street
Toronto, Ontario M5L 1B9

11. This Agreement shall be binding for a period of 10 years following its registration with the Tribunal.
12. The Parties consent to the immediate registration of this Agreement with the Tribunal.
13. The Commissioner may, in his sole discretion and after informing the Respondent in writing, extend any of the time frames in Parts II, III, IV and V of this Agreement.
14. Nothing in this Agreement precludes the Respondent or the Commissioner from bringing an application under section 74.13 of the Act. The Respondent will not, for the purposes of this Agreement, including execution, registration, enforcement, variation or rescission, contest the Commissioner's conclusions.
15. The Respondent shall not make any public statement that creates the general impression that it disagrees with the Commissioner's conclusions.
16. The Respondent attorns to the jurisdiction of the Tribunal for the purposes of this Agreement and any proceeding initiated by the Commissioner relating to this Agreement for variation or rescission.
17. In the event of a dispute as to the interpretation or application of this Agreement, any of the Parties shall be at liberty to apply to the Tribunal for an order or direction. The Parties agree that the Tribunal has jurisdiction to make such order as is required to give effect to this Agreement.
18. This Agreement may be executed in counterparts, each of which shall be an original instrument, and all of which taken together shall constitute one and the same instrument. In the event of any discrepancy between the English and French versions of this Agreement, the English version shall prevail.

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19. The computation of time periods contemplated by this Agreement shall be in accordance with the Interpretation Act. For the purpose of this Agreement, the definition of “holiday” in the Interpretation Act shall include Saturday. For the purposes of determining time periods, the date of this Agreement is the last date on which it is executed by a Party.

The undersigned hereby agree to the filing of this Agreement with the Tribunal for registration.

DATED at Brampton, in the Province of Ontario this 6th day of May, 2019.

[Original signed by Kerry Mader]
Hudson’s Bay Company
Kerry Mader/Chief Business Operation Officer
I have authority to bind the corporation.

DATED at Gatineau, in the Province of Quebec, this 6th day of May, 2019.

[Original signed by Matthew Boswell]
Commissioner of Competition
Matthew Boswell
Commissioner of Competition

APPENDIX "A" – COMMITMENT BY SENIOR MANAGEMENT

RE: Commitment to Establishment and Maintenance of Compliance Programs

Further to section 7 of the Consent Agreement between the Commissioner of Competition and Hudson's Bay Company ("HBC") dated [DATE], I hereby commit to the successful implementation of HBC's Compliance Program for the purpose of promoting compliance with the *Competition Act*, R.S.C. 1985 c. C-34 (the "Act"), including the deceptive marketing practices provisions in Part VII. 1 of the Act and specifically paragraph 74.01(1)(a) and subsection 74.01(3) of the Act. I will take an active and visible role in the establishment and maintenance of the Compliance Program.

Sincerely,

[Name and title]