

FILED / PRODUIT

Date: November 9, 2018

CT-2017-008

Bianca Zamor for / pour
REGISTRAR / REGISTRAIRE

PUBLIC

OTTAWA, ONT.

#94

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

- and -

HUDSON'S BAY COMPANY

Respondent

**MEMORANDUM OF FACT AND LAW OF THE RESPONDENT (MOVING PARTY)
(Refusals Motion returnable November 20, 2018)**

November 9, 2018

STIKEMAN ELLIOTT LLP
5300 Commerce Court West
199 Bay Street
Toronto, Ontario
M5L 1B9

Eliot N. Kolers LSO# 38304R
Phone: (416) 869-5637
Email: ekolers@stikeman.com

Mark E. Walli LSO# 53266L
Phone: (416) 869-5577
Email: mwalli@stikeman.com

Patricia Joseph LSO# 75535Q
Phone: (416) 869-5642
Email: pjoseph@stikeman.com
Fax: (416) 947-0866

Counsel for the Respondent

TO: **Attorney General of Canada**
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

Alexander Gay
Phone: (819) 994-3068
Email: alex.gay@canada.ca

Derek Leschinsky
Phone: (819) 956-2842
Email: Derek.Leschinsky@canada.ca

Katherine Rydel
Phone: (819) 997-2837
Email: katherine.rydel@canada.ca

Counsel for the Commissioner of Competition

AND TO: **The Registrar**
Competition Tribunal
Thomas D'Arcy McGee Building 1
90 Sparks Street, Suite 600
Ottawa, ON K1P 5A4

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

- and -

HUDSON’S BAY COMPANY

Respondent

**MEMORANDUM OF FACT AND LAW OF THE RESPONDENT (MOVING PARTY)
(Refusals motion returnable November 20, 2018)**

TABLE OF CONTENTS

	PAGE
OVERVIEW	1
PART I - STATEMENT OF FACTS	3
A. Statutory Framework for the Commissioner’s Claims.....	3
B. The Bureau’s Ordinary Price Guidelines	6
PART II - STATEMENT OF ISSUES	7
PART III - SUBMISSIONS.....	7
A. Scope of Examinations for Discovery.....	7
i. Relevance.....	8
ii. Litigation Privilege	9
B. The Refused Questions should be Answered.....	11
i. The Questions are plainly Relevant to Matters in Issue	11
(1) Refusals 1-2 and 15-18	Error! Bookmark not defined.
(2) Refusals 4-10, 13-14, 26-27, and 29	Error! Bookmark not defined.
(3) Refusals 11-12, 19-25, 28 and 30	Error! Bookmark not defined.
ii. The Information sought is not Privileged	11

PART IV - ORDER SOUGHT11
SCHEDULE "A" LIST OF AUTHORITIES12

1. The Respondent, Hudson’s Bay Company (“**HBC**”), submits this factum in support of its motion for an Order requiring the Applicant, the Commissioner of Competition (the “**Commissioner**”), to answer the questions asked during the Examination for Discovery of the Commissioner’s representative, Adam Zimmerman, held September 6-7, 2018 (the “**Zimmerman Examination**”) which are set out in the chart at Schedule “A” to HBC’s Notice of Motion (the “**Refusals Chart**”) forthwith, and directing that Mr. Zimmerman re-attend for follow-up examination by HBC at the Commissioner’s expense.

OVERVIEW

2. In this Application, the Commissioner asserts that HBC has engaged in reviewable conduct under section 74 of the *Competition Act*, R.S.C. 1985, c. C-34 (“**Act**”) in advertising sleep sets (mattresses) it has offered for sale in Canada.

3. The Commissioner has impugned HBC’s (former) “high-low” pricing strategy for mattresses, whereby HBC periodically offered promotional prices on mattresses that were deeply discounted from HBC’s regular prices for them, contending that this strategy contravened section 74.01(3) of the *Act*, because HBC allegedly did not offer the mattresses in good faith at the regular price for a substantial period of time before making the promotional pricing representations.

4. The Commissioner also alleges that HBC’s use of the words “clearance” and (later) “end of line” in certain promotional advertising for mattresses contravened section 74.01(1) of the *Act*, because those terms purportedly each imply “that the price has been permanently lowered with the object of *selling any remaining on-hand inventory*” whereas HBC continued “to replenish from manufacturers by ordering new, factory fresh mattresses during these sales” (emphasis added).¹

5. The relief sought by the Commissioner in this proceeding includes a prohibition order and administrative monetary penalties against HBC pursuant to section 74.1 of the *Act*.

6. In its Response, HBC denies that it has contravened the *Act*. Among other things, HBC pleads that the Commissioner’s attack on HBC’s (former) high-low marketing strategy for

¹ Amended Notice of Application of the Commissioner at para 7.

mattresses is based on an inherently flawed interpretation of the meaning of “good faith” in paragraph 74.01(3)(b) of the *Act*, one which is in conflict with the Ordinary Price Guidelines published by the Competition Bureau (the “**Bureau**”) on the subject. HBC states that its regular prices for mattresses were real prices offered in good faith, having been set “in relation to and [being] in line with the regular prices of Hudson Bay’s main, and much larger, retail competitors in the sale of mattresses in Canada.” HBC further pleads that its ordinary price representations for mattresses were not “false or misleading in a material respect” when viewed in the context of the “competitive nature of advertising and pricing for mattresses in Canada in which most of Hudson’s Bay’s major competitors follow[ed] similar ‘high-low’ pricing strategies”.²

7. HBC also denies that its use of the terms “clearance” or “end of line” contravened the *Act*. It asserts that neither term, when used in respect of mattress sales, creates the general impression of selling only out of existing inventory contended for by the Commissioner, and further pleads that, in any event, those representations were not false or misleading in any material respect, when HBC’s advertising is viewed in its competitive context - that is, in relation to the advertising and marketing strategies adopted by HBC’s significantly larger competitors in the sale of mattresses in Canada.

8. Having defined these issues in their pleadings, the parties made their document productions and conducted their respective examinations for discovery. This motion concerns the Commissioner’s refusal to answer 30 proper questions asked by HBC during the Zimmerman Examination, as set out in the Refusals Chart.³

9. The lion’s share of these refusals involve HBC’s requests for disclosure of documents, information, and knowledge that the Commissioner has or may have obtained concerning the advertising, pricing, and marketing practices of HBC’s competitors in the sale of mattresses in Canada. All of this information plainly is relevant to the disputed issues in this proceeding, as defined by the pleadings and summarized above.

² Amended Response of HBC at paras 3-5.

³ The Commissioner refused many more than these 30 questions on the Zimmerman Examination but HBC has limited this motion to just these 30 questions which it considers material to its ability to fully and fairly respond to the Commissioner’s allegations.

10. Indeed, the Commissioner's refusal to answer these questions on the purported grounds that they are irrelevant: (i) attempts to write HBC's Response to the Commissioner's Application out of existence; (ii) conflicts with the position on relevance taken by the Bureau in its own Ordinary Price Guidelines; and (iii) flies in the face of the statutory framework for the Commissioner's claims and requested relief against HBC in this proceeding under section 74 of the *Act*, all of which require consideration of the competitive context in which the impugned conduct occurred. The Commissioner's attempt to have its claims against HBC adjudicated in a competitive vacuum is contrary to the *Act*, is prejudicial to HBC, denies the Tribunal the factual/contextual framework for the adjudication of the matter, and must be rejected.

11. In addition, the Commissioner has refused a few of the questions on the Refusals Chart on the purported grounds that the information sought is protected by litigation privilege. His position appears to be that, after the date he claims that litigation against HBC was reasonably anticipated (June 17, 2016), litigation privilege applies to prevent disclosure of any factual information [REDACTED].

12. HBC's motion should be granted, with costs.

PART I - STATEMENT OF FACTS

13. A brief review of the provisions of the *Act* applicable to the claims asserted and relief sought by the Commissioner in this proceeding, and the Bureau's own Ordinary Price Guidelines in respect of those provisions, confirms that the competitive context in which HBC's impugned conduct occurred is highly relevant to, and must be considered in determining, the issues raised by the Commissioner in this proceeding.

A. Statutory Framework for the Commissioner's Claims

14. The Commissioner's claims in respect of HBC's use of the terms "clearance" and "end of line" in certain promotions for sleep sets are brought under subsection 74.01 (1) (a) of the *Act*, which provides, in relevant part, that 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** [...]. [emphasis added]

15. The Commissioner's challenge to HBC's former high-low pricing strategy for mattresses is brought under subsection 74.01(3) of the *Act*, which provides that:

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,

(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. [emphasis added]

16. The Commissioner's request for relief against HBC in respect of the purported contraventions of subsections 74.01(1)(a) and 74.01(3) is governed by section 74.1 of the *Act*, which provides that:

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;

(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.

17. Moreover, the Commissioner's request that an administrative monetary penalty ("AMP") be ordered against HBC engages subsection 74.1 (5) of the *Act*, which provides that:

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 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. [emphasis added].

B. The Bureau's Ordinary Price Guidelines

18. As summarized in the Overview, one of the central disputed issues framed by the parties' pleadings in this proceeding is whether HBC did or did not offer its sleep sets at the regular price "in good faith" within the meaning of subsection 74.01(3)(b) of the *Act*.

19. Although they do not have the force of law, the Bureau has published Ordinary Price Guidelines which, among other things, set out the factors it considers to be relevant when assessing whether a seller has offered its products "in good faith" for purposes of subsection 74.01(3)(b), as follows:

4.2.2 Ordinary price claims relating to offered prices (*time test*)

4.2.2.1 In good faith

In assessing if a product was offered for sale in good faith, some of the factors that the Bureau would likely consider include whether:

(a) the product was openly available in appropriate volumes;

(b) the reference price was based on sound pricing principles and/or was reasonable in light of competition in the relevant market during the time period in question;

(c) the reference price was a price that the supplier fully expected the market to validate, whether or not the market did validate this price; and/or

(d) the reference price was a price at which genuine sales had occurred, or it was a price comparable to that offered by competitors.⁴

⁴ Competition Bureau Canada, *Enforcement Guidelines – Ordinary Price Claims: Subsections 74.01(2) and 74.01(3) of the Competition Act* (Ottawa: Competition Bureau, 2009) at 6-7.

20. The foregoing provisions of the *Act* and the Bureau's guidelines on them make it clear that the conduct impugned by the Commissioner in this proceeding cannot be adjudicated in a competitive vacuum. Rather, HBC's conduct in respect of advertising, pricing, and selling sleep sets must be considered in light of the practices of its competitors in order to assess whether the *Act* was contravened, including as to the determination of whether any representation by HBC was "false or misleading in a material respect" and whether HBC offered its regular prices for mattresses "in good faith". In addition, the effect, if any, of HBC's conduct on competition in the market must be determined before any AMP could be awarded by the Tribunal.

21. As discussed further below, this legal framework for the disputed issues in this proceeding is fatal to the Commissioner's position that the questions on the Refusals Chart are not relevant.

PART II - STATEMENT OF ISSUES

22. The issue raised on this motion is whether the Commissioner should be ordered to answer the questions on the Refusals Chart, which requires consideration of whether:

- (a) the questions are relevant; and
- (b) answers to some of the questions are not required because the information sought is protected by the litigation privilege

PART III - SUBMISSIONS

A. Scope of Examinations for Discovery

23. Section 64 of the *Competition Tribunal Rules* (SOR/2008-141) (the "*Rules*") provides:

(1) Examination for discovery shall occur as of right.

(2) The Tribunal may, in case management, make rulings to deal with the timing, duration, scope and form of the discovery as well as the appropriate person to be discovered.

24. In an examination for discovery, a witness should answer all questions relevant to the inquiry unless the question is properly objected to on the enumerated grounds noted under Rule 242 (1) of the *Federal Courts Rules* (SOR/98-106)⁵:

A person may object to a question asked in an examination for discovery on the ground that

(a) the answer is privileged;

(b) the question is not relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party;

(c) the question is unreasonable or unnecessary; or

(d) it would be unduly onerous to require the person to make the inquiries referred to in rule 241.⁶

i. Relevance

25. In *Merck & Co. v Apotex Inc.*, Strayer J.A., stated that:

A person who is a party to a civil action is entitled to ask any question on discovery that is relevant to the issue: that is a matter of justice to him, subject of course to the discretionary power of the prothonotary or a judge to disallow the question where it is abusive[.]⁷

26. In *Lehigh Cement Ltd. v R*, the Federal Court of Appeal noted the broad scope of relevance on examinations for discovery:

The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute.⁸

27. As discussed below, the Commissioner's contention that the questions on the Refusals Chart are irrelevant is untenable under these established principles.

⁵ The Tribunal may have regard to Section 242 (1) of the *Federal Courts Rules* pursuant to Rule 34(1) of the *Competition Tribunal Rules*.

⁶ See also *Merck & Co v Apotex Inc*, 2003 FCA 438 at para 13.

⁷ *Ibid* at para 13.

⁸ *Lehigh Cement Ltd. v R*, 2011 FCA 120 at para 34.

ii. Litigation Privilege

28. The Commissioner has also invoked litigation privilege as a purported grounds for objecting to certain questions on the Refusals Chart, at least insofar as they relate to facts/information the Commissioner may have learned/obtained after June 17, 2016 – the date on which the Commissioner suggests that this proceeding against HBC became reasonably anticipated (note that it is over 7 months before the date the Notice of Application was issued).

29. It is well settled that litigation privilege creates a “zone of privacy” in pending litigation to ensure the efficacy of the adversarial process⁹. It attaches to documents that are created for the dominant purpose of prosecuting or defending reasonably contemplated litigation and protects such documents from compulsory production for inspection to other parties in litigation.

30. It is also well settled that the zone of privacy created by litigation privilege is limited. Significantly, underlying facts contained or reflected in a privileged document are not themselves privileged.¹⁰ As the Court stated in *Susan Hosiery Ltd v Canada (Minister of National Revenue)*:

...whether we are thinking of a letter to a lawyer for the purpose of obtaining a legal opinion or of a statement of facts in a particular form requested by a lawyer for use in litigation, the letter or statement itself is privileged but the facts contained therein or the documents from which those facts were drawn are not privileged from discovery if, apart from the facts having been reflected in the privileged documents, they would have been subject to discovery. For example, the financial facts of a business would not fall within the privilege merely because they had been set out in a particular way as requested by a solicitor for purposes of litigation, but the statement so prepared would be privileged.¹¹ [emphasis added]

31. Applying this principle in *Pearson v. Inco Ltd.*, the Ontario Superior Court of Justice ordered the disclosure of relevant facts contained in notes prepared by a summer student

⁹ *Blank v Canada*, 2006 SCC 39 at paras 27 and 34.

¹⁰ Robert W Hubbard, Susan Magotiaux & Susan Duncan, *The Law of Privilege in Canada*, vol 1 (Toronto: Thomson Reuters, 2018) at §12.10.

¹¹ *Susan Hosiery Ltd v Minister of National Revenue*, [1969] CTC 353, 69 DTC 5278 (Ex Ct Can) at para 10, emphasis added.

employed by class counsel. The notes themselves were protected by litigation privilege, but the underlying facts within the notes were not.¹²

32. In *Canada (Director of Investigation & Research) v. Washington*, the Tribunal recognized these limits on the scope of litigation privilege:

The law is clear that factual information must be provided and is not protected by privilege even if facts were obtained through an investigation conducted by counsel.¹³

33. In *Washington*, the Tribunal ordered one of the respondents to answer questions which had been asked on examination for discovery for "... factual information relating to the issues arising from the pleadings or for the names and addresses of persons who have provided specific, material factual information [to the respondent] with respect to issues in the case, whether the information be positive or negative [.]"¹⁴ The Tribunal declared that "The Director is entitled to ask factual questions arising from the pleadings."¹⁵

34. Recently, in *Vancouver Airport Authority v. Commissioner of Competition*, the Federal Court of Appeal held that "Competition Tribunal proceedings are subject to procedural fairness obligations at the highest level, akin to court proceedings," which require the Commissioner to disclose "evidence that is relevant to issues in the proceedings".¹⁶ [REDACTED].

35. These principles are fatal to the Commissioner's assertion of litigation privilege over certain questions on the Refusals Chart, as discussed below.

¹² *Pearson v Inco Ltd*, [2008] OJ No 3589 (Sup Ct) at para 21; See also *Stevens v Canada (Prime Minister)*, [1998] FCJ No 794, 161 DLR (4th) 85 (FCA) at para 25 ("[t]he general rationale for not protecting matters of fact ... is the detrimental effect it would have on litigation").

¹³ *Canada (Director of Investigation & Research) v Washington*, 70 CPR (3d) 317 (CT).

¹⁴ *Ibid* at para 12.

¹⁵ *Ibid* at para 13.

¹⁶ *Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24 at paras 30 and 113 ("VAA").

B. The Refused Questions should be Answered

- i. The Questions are plainly Relevant to Matters in Issue**
- ii. The Information sought is not Privileged**

PART IV - ORDER SOUGHT

36. HBC seeks an Order compelling the Commissioner to answer the questions set out in Schedule "A" to HBC's notice of motion, forthwith, and directing the Commissioner's representative, Mr. Zimmerman, to re-attend for follow-up examination, at the expense of the Commissioner, with costs of this motion to HBC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of November, 2018.

Eliot Kolers

Eliot N. Kolers /MEW

STIKEMAN ELLIOTT LLP
5300 Commerce Court West
199 Bay Street
Toronto, Ontario
M5L 1B9

Eliot N. Kolers LSO# 38304R
Phone: (416) 869-5637
Email: ekolers@stikeman.com

Mark E. Walli LSO# 53266L
Phone: (416) 869-5577
Email: mwalli@stikeman.com

Patricia Joseph LSO# 75535Q
Phone: (416) 869-5642
Email: pjoseph@stikeman.com
Fax: (416) 947-0866

Counsel for the Respondent

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Blank v Canada (Department of Justice)*, 2006 SCC 39.
2. *Canada (Director of Investigation & Research) v Washington*, 70 CPR (3d) 317 (CT).
3. Competition Bureau Canada, *Enforcement Guidelines – Ordinary Price Claims: Subsections 74.01(2) and 74.01(3) of the Competition Act* (Ottawa: Competition Bureau, 2009).
4. *Lehigh Cement Ltd v R*, 2011 FCA 120.
5. *Merck & Co v Apotex Inc*, 2003 FCA 438.
6. *Pearson v Inco Ltd*, [2008] OJ No 3589, 169 ACWS (3d) 524 (Sup Ct).
7. Robert W Hubbard, Susan Magotiaux & Susan Duncan, *The Law of Privilege in Canada*, vol 1 (Toronto: Thomson Reuters, 2018).
8. *Susan Hosiery Ltd v Minister of National Revenue*, [1969] CTC 353, 69 DTC 5278 (Ex Ct Can).
9. *Stevens v Canada (Prime Minister)*, [1998] FCJ No 794, 161 DLR (4th) 85 (FCA).
10. *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24.

**SCHEDULE “B”
RELEVANT STATUTES**

Competition Act, RSC 1985, c C-34.

74.01 Misrepresentations to public

(1) 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;

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or

(c) makes a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if the form of purported warranty or guarantee or promise is materially misleading or if there is

Indications trompeuses

(1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :

a) ou bien des indications fausses ou trompeuses sur un point important;

b) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, dont la preuve incombe à la personne qui donne les indications;

c) ou bien des indications sous une forme qui fait croire qu'il s'agit :

(i) soit d'une garantie de produit,

(ii) soit d'une promesse de remplacer, entretenir ou réparer tout ou partie d'un article ou de fournir de nouveau ou continuer à fournir un service jusqu'à l'obtention du résultat spécifié,

si cette forme de prétendue garantie ou promesse est trompeuse d'une façon importante ou s'il n'y a aucun espoir raisonnable qu'elle sera respectée.

no reasonable prospect that it will be carried out.

Ordinary price: suppliers generally

(2) Subject to subsection (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 concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product,

(a) have 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) have 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.

Ordinary price: supplier's own

(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

Prix habituel : fournisseurs en général

(2) Sous réserve du paragraphe (3), est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel un ou des produits similaires ont été, sont ou seront habituellement fournis, si, compte tenu de la nature du produit, l'ensemble des fournisseurs du marché géographique pertinent n'ont pas, à la fois :

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;

b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

Prix habituel : fournisseur particulier

(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au

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,

(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.

References to time in subsections (2) and (3)

(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.

Saving

(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

prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois :

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;

b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

Périodes visées aux paragraphes (2) et (3)

(4) Il est entendu que la période à prendre en compte pour l'application des alinéas (2)a) et b) et (3)a) et b) est antérieure ou postérieure à la communication des indications selon que les indications sont liées au prix auquel les produits ont été ou sont fournis ou au prix auquel ils seront fournis.

Réserve

(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

(6) [Abrogé, 2009, ch. 2, art. 422]

1999, ch. 2, art. 22; 2009, ch. 2, art. 422.

respect.

(6) [Repealed, 2009, c. 2, s. 422]

1999, c. 2, s. 22; 2009, c. 2, s. 422.

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

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

medium employed;

(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

peut préciser, une sanction 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.

reviewable conduct from occurring.

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

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
-

this Act by the person against 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

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

under paragraph 52(1)(a) as it read 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

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

claimants be notified in the time 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)

64 Examination for discovery

(1) Examination for discovery shall occur as of right.

Power of the Tribunal

(2) The Tribunal may, in case management, make rulings to deal with the timing, duration, scope and form of the discovery as well as the appropriate person to be discovered.

Interrogatoire préalable

(1) L'interrogatoire préalable est un droit des parties.

Pouvoirs du Tribunal

(2) Le Tribunal peut, dans le cadre de la gestion d'instance, rendre des décisions sur le moment, la durée, la portée et la forme des interrogatoires préalables, ainsi que sur les personnes qu'il convient d'interroger.

Federal Courts Rules (SOR/98-106)

242 Objections permitted

(1) A person may object to a question asked in an examination for discovery on the ground that

- (a) the answer is privileged;
- (b) the question is not relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party;
- (c) the question is unreasonable or unnecessary; or
- (d) it would be unduly onerous to require the person to make the inquiries referred to in rule 241.

Objections not permitted

(2) A person other than a person examined under rule 238 may not object to a question asked in an examination for

Objection permise

(1) Une personne peut soulever une objection au sujet de toute question posée lors d'un interrogatoire préalable au motif que, selon le cas :

- a) la réponse est protégée par un privilège de non-divulgateion;
- b) la question ne se rapporte pas à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire ou par la partie qui l'interroge;
- c) la question est déraisonnable ou inutile;
- d) il serait trop onéreux de se renseigner auprès d'une personne visée à la règle 241.

Objection interdite

discovery on the ground that

(a) the answer would be evidence or hearsay;

(b) the question constitutes cross-examination.

(2) À l'exception d'une personne interrogée aux termes de la règle 238, nul ne peut s'opposer à une question posée lors d'un interrogatoire préalable au motif que, selon le cas :

a) la réponse constituerait un élément de preuve ou du ouï-dire;

b) la question constitue un contre-interrogatoire.
