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:**


COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

**FILED / PRODUIT**
Date: March 6, 2019
CT- 2017-008

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**THE COMMISSIONER OF COMPETITION**

**Applicant**

\- and -

**HUDSON'S BAY COMPANY**

**Respondent**

**BOOK OF AUTHORITIES OF THE RESPONDENT, HUDSON'S BAY COMPANY**
**(Commissioner of Competition's Motion for Leave to File Supplemental Witness Statement and to Lift HBC Confidentiality Claims)**
**(returnable March 12, 2019)**


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| I N D E X | |
|---|---|
| **Jurisprudence** | |
| 1 | *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24 |
| 2 | *Créations Magiques (CM) Inc. v. Madispro Inc.*, 2005 FC 281 |
| 3 | *Apotex Inc. v. Sanofi-Aventis Canada Inc.*, 2010 FC 481 |
| 4 | *Potskin v. Canada (Minister of Indian Affairs & Northern Development*), 2011 FC 457 |
| **Other Documents** | |
| 5 | Memorandum of Fact and Law of the Commissioner of Competition dated November 28, 2017 |
| 6 | Responding Memorandum of Fact and Law of the Commissioner of Competition dated November 14, 2018 |

# TAB 1

2018 CAF 24, 2018 FCA 24
Federal Court of Appeal

Vancouver Airport Authority v. Commissioner of Competition

2018 CarswellNat 3820, 2018 CarswellNat 98, 2018 CAF 24,
2018 FCA 24, 288 A.C.W.S. (3d) 232, 420 D.L.R. (4th) 163

**VANCOUVER AIRPORT AUTHORITY (Appellant) and COMMISSIONER OF COMPETITION (Respondent)**

David Stratas, Richard Boivin, J.B. Laskin JJ.A.

Heard: October 17, 2017
Judgment: January 24, 2018
Docket: A-149-17

Proceedings: reversing *Commissioner of Competition v. Vancouver Airport Authority* (2017), 2017 Trib. conc. 6, 2017 CarswellNat 8271, 2017 Comp. Trib. 6, 2017 CarswellNat 1725, Denis Gascon Chair (Competition Trib.)

Counsel: Calvin S. Goldman, Q.C., Julie Rosenthal, Ryan Cookson, for Appellant
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Subject: Civil Practice and Procedure; Corporate and Commercial; Evidence

APPEAL by airport authority from Competition Tribunal's decision reported at *Commissioner of Competition v. Vancouver Airport Authority* (2017), 2017 Comp. Trib. 6, 2017 CarswellNat 1725, 2017 Trib. conc. 6, 2017 CarswellNat 8271 (Competition Trib.), dismissing its motion for disclosure.

***David Stratas J.A.*:**

1 The Vancouver Airport Authority appeals from the order dated April 24, 2017 of the Competition Tribunal (*per* Gascon J.): 2017 Comp. Trib. 6 (Competition Trib.).

2 In the Competition Tribunal, the Commissioner of Competition has brought competition proceedings against the Airport Authority for alleged abuse of dominant position. In proceedings such as these, parties whose conduct is impugned are entitled to pre-hearing disclosure. The Commissioner has disclosed many documents to the Airport Authority. But he has refused to produce roughly 1,200 documents. He says that these documents are covered by a class privilege that protects the confidentiality interests of those who have given him documents and information during his investigations.

3 In response, the Airport Authority brought a motion seeking disclosure of the documents. Before the Competition Tribunal, it submitted that the alleged class privilege does not exist and so the documents should be disclosed.

4 In well-expressed, clear and comprehensive reasons, the Competition Tribunal found that the alleged class privilege exists. Key to its reasons is its application of earlier authorities of this Court that it believed confirmed the existence of a class privilege. By order dated April 24, 2017, the Competition Tribunal dismissed the Airport Authority's motion for disclosure.

5 The Airport Authority appeals from that dismissal. The appeal turns on whether the alleged class privilege exists. I find that it does not. The earlier authorities of this Court that the Competition Tribunal invoked in support of its

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decision do not apply. In any event, they have been overtaken by later Supreme Court jurisprudence. This jurisprudence is against recognizing a class privilege in this case.

6 Therefore, I would allow the appeal, quash the order of the Competition Tribunal and remit the motion to it for redetermination.

**A. Background**

7 The Commissioner of Competition has applied to the Competition Tribunal for relief against the Airport Authority under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34. The relief stems from the Airport Authority's decision to allow only two in-flight caterers to operate at the Vancouver International Airport.

8 In his application, the Commissioner alleges that the Airport Authority controls the market for "galley handling" at the airport, the Airport Authority acted with an anti-competitive purpose when deciding to permit only two in-flight caterers to operate at the airport, and a "substantial prevention or lessening of competition" has resulted, causing "higher prices, dampened innovation and lower service quality."

9 The Airport Authority denies the Commissioner's allegations and defends against the relief sought. It asserts that it has been acting throughout to discharge its public interest mandate as a non-profit entity, including enhancing the airport's ability to attract and retain flights, thereby generating economic development for Vancouver and, more broadly, for British Columbia and the rest of Canada. The Airport Authority adds that it determined, legitimately, that allowing additional caterers to operate at the airport would imperil the viability of the two already operating at the airport. It also alleges that it does not substantially or completely control the market for galley handling at the airport, it did not have an anti-competitive purpose, and its decision to restrict the number of caterers at the airport did not lessen competition or cause deleterious effects.

10 In his investigation, the Commissioner of Competition obtained a number of orders under section 11 of the Act. These required four in-flight catering firms, two operating at the airport and two who want to operate at the airport, to produce to the Commissioner a broad array of documents.

11 The Commissioner of Competition delivered an affidavit of documents in the proceeding. That affidavit disclosed that the Commissioner had roughly 11,500 relevant documents in his possession, power or control. But he was willing to produce fewer than 2,000. Most of these were the Airport Authority's own documents.

12 Almost all of the remaining documents, roughly 9,500, were withheld in whole or in part on the basis of an alleged public interest class privilege. These documents comprise much of the case the Commissioner has against the Airport Authority.

13 The Airport Authority brought a motion for disclosure of the 9,500 documents. On the day the motion was to be heard, the Commissioner delivered an amended affidavit of documents. In that affidavit, he waived privilege over roughly 8,300 documents. This is 86% of the documents originally said to be covered by a class privilege. Roughly 1,200 documents — 12% of the documents originally withheld — remained withheld exclusively on the basis of a public interest class privilege.

14 The motion for disclosure went forward and concerned these 1,200 documents. The Commissioner continued to assert that these remaining documents were covered by a class privilege and could not be disclosed. The Commissioner argued that this class privilege covered all "records created or obtained by the Commissioner, [his] employees, servants, agents or solicitors or obtained from third parties during the Commissioner's investigations."

15 The Airport Authority urged the Competition Tribunal to reject the Commissioner's assertion of a class privilege. In its view, the Competition Tribunal should instead determine on a case-by-case or document-by-document basis whether a public interest privilege exists concerning any of the 1,200 documents.

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16 In its decision, the Competition Tribunal disagreed with the Airport Authority and dismissed its motion for disclosure. It upheld the existence of the alleged class privilege and, thus, none of the 1,200 documents needed to be disclosed. Given this, it did not need to examine whether any of the individual documents were subject to public interest privilege on a case-by-case or a document-by-document basis.

17 The Airport Authority appeals from the dismissal of its motion for disclosure to this Court. The appeal is under subsection 13(1) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.).

**B. Standard of review**

18 In appeals to this Court from the Competition Tribunal, legal questions are to be reviewed for correctness: *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 (S.C.C.) at paras. 34 and 39; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] 3 F.C. 185 (Fed. C.A.).

19 In this appeal, the central question before us is what is legally required for a court to recognize a class privilege. This is a legal question to be reviewed for correctness. In my view, for the reasons that follow, the Competition Tribunal erred in answering this question. Alternatively, in recognizing a class privilege in the circumstances of this case and based on this evidentiary record, the Competition Tribunal proceeded on the basis of an error in law or in legal principle. Its decision cannot stand.

**C. Preliminary considerations**

20 The submissions to us, truly excellent as they were, touched on many different concepts, some aspects of which were complex. These included the admissibility of evidence, pre-hearing disclosure obligations, and, more generally, procedural fairness obligations. The complexity was magnified by the fact that these concepts potentially have different content in court proceedings and administrative proceedings. At the outset, it is worth describing these concepts, how they operate and interrelate, and where they fit in the whole scheme of things.

***(1) The admissibility of evidence***

21 In court proceedings, the "fundamental 'first principle'" is that "all relevant evidence" going to the truth of the matter before the court "is admissible until proven otherwise": *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.) at p. 288, [1991] 6 W.W.R. 673 (S.C.C.) [hereinafter *Gruenke*] at p. 688 and see, *e.g.*, *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161, 400 D.L.R. (4th) 723 (F.C.A.) at paras. 79-82.

22 There are exceptions to this first principle: sometimes relevant evidence is inadmissible. For example, hearsay is ordinarily inadmissible. Another exception is public interest privilege: evidence covered by a legally recognized public interest privilege is inadmissible.

23 As in court proceedings, administrative proceedings are often directed at getting at the truth of the matter. What happened? Who did what? How was it done? Why? With what effects? As a general rule, within the limits of materiality and proportionality, administrative decision-makers want to receive all possible evidence bearing on these questions. They too are on a quest for the truth of the matters before them and they often formulate their evidentiary rules with that in mind. This is certainly true for the administrative decision-maker here, the Competition Tribunal.

24 And just like courts, many administrative decision-makers recognize exceptions to general rules of admissibility.

25 The law of evidence before administrative decision-makers is not necessarily the same as that in court proceedings. An administrative decision-maker's power to admit or exclude evidence is governed exclusively by its empowering legislation and any policies consistent with that legislation: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 (S.C.C.) at para. 16; on how to interpret legislation that empowers administrators, see *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609

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(S.C.C.), *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 (S.C.C.), *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) and *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.). The empowering legislation, properly interpreted, might allow an administrative decision-maker to admit material that courts would ordinarily reject as inadmissible.

26 This being said, privileges designed to protect fundamental confidentiality interests such as legal professional privilege have the same force in administrative proceedings as in court proceedings. Any administrative decisions or legislation governing administrative decision-makers that weakens or undercuts the privileges may be, respectively, unreasonable or infringe the protection of privacy interests in section 8 of the Charter: *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 (S.C.C.); *R. v. Lavallee, Rackel & Heintz*, 2002 SCC 61, [2002] 3 S.C.R. 209 (S.C.C.).

27 In the case before us, the Competition Tribunal recognizes, and all before us accept, that evidence covered by a legally recognized public interest privilege is inadmissible.

***(2) Pre-hearing disclosure obligations: an aspect of procedural fairness***

28 Administrative proceedings must be procedurally fair. The level of procedural fairness that must be given varies according to a number of factors: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 (S.C.C.) at paras. 23-28.

29 Before us are administrative proceedings that are adjudicative in nature. Usually in such proceedings, the requirements of procedural fairness are high: *Baker* at para. 23; *Bell Canada v. C.T.E.A.*, 2003 SCC 36, [2003] 1 S.C.R. 884 (S.C.C.). This is particularly so where the proceedings have the potential to significantly affect a party's interests: *Baker* at para. 25; *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.) at p. 1113, (1980), 110 D.L.R. (3d) 311 (S.C.C.) at p. 322; *R. v. Higher Education Funding Council* (1993), [1994] 1 All E.R. 651 (Eng. Q.B.) at p. 667. The Competition Tribunal correctly found that "a high degree of procedural protection is needed in Tribunal proceedings because of its court-like process" and "[t]he Tribunal resides very close to, if not at, the 'judicial end of the spectrum', where the functions and processes more closely resemble courts and attract the highest level of procedural fairness" (at para. 169).

30 The procedural fairness obligations require the Commissioner of Competition to disclose to the Airport Authority evidence that is relevant to issues in the proceedings. This is necessary for the Airport Authority to know the case it has to meet and to fairly defend itself against the allegations. Often — as the Commissioner has recognized in this case by releasing roughly 8,300 documents from his investigatory file — this includes exculpatory material or other material resting in the investigatory file that could assist the party whose conduct is impugned in testing the evidence called by the Commissioner or in building its own case: see, *e.g.*, in other contexts, *Shooters Sports Bar Inc. v. Ontario (Alcohol & Gaming Commission)* (2008), 238 O.A.C. 9, 168 A.C.W.S. (3d) 580 (Ont. Div. Ct.); *Markandey v. Ontario (Board of Ophthalmic Dispensers)*, [1994] O.J. No. 484 (Ont. Gen. Div.) at para. 43; *Thompson v. Chiropractors' Assn. (Saskatchewan)*, [1996] 3 W.W.R. 675, 36 Admin. L.R. (2d) 273 (Sask. Q.B.) at paras. 3-6; *Shambleau v. Ontario (Securities Commission)* (2003), 26 O.S.C.B. 1629, [2003] O.J. No. 4089 (Ont. Div. Ct.) at para. 6; *Fauth, Re*, 2017 ABASC 3 (Alta. Securities Comm.); *Law Society of Upper Canada v. Savone*, 2015 ONLSTA 26 (L.S. Trib. App. Div.) at para. 23, aff'd 2016 ONSC 3378, [2016] O.J. No. 2988 (Ont. Div. Ct.). In some cases, there may be limits on the obligation to disclose based on materiality, proportionality, applicable legislative standards and the nature of the proceedings: *Ciba-Geigy Canada Ltd., Re*, [1994] 3 F.C. 425, 55 C.P.R. (3d) 482 (Fed. T.D.), affirmed (1994), 56 C.P.R. (3d) 377, 170 N.R. 360 (Fed. C.A.); *Sheriff v. Canada (Attorney General)*, 2006 FCA 139, [2007] 1 F.C.R. 3 (F.C.A.).

***(3) The relationship between issues of admissibility and issues of pre-hearing disclosure***

31 The obligation to disclose is not necessarily limited by the law of admissibility. Material that is inadmissible can be subject to a disclosure obligation.

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32 To illustrate this, suppose that an authority such as the Commissioner of Competition possesses a document written by one person recounting a discussion with a particular individual. Although that document may be hearsay and arguably inadmissible to prove the contents of what the particular person said, nevertheless the requirements of procedural fairness may require that it be disclosed. The document may be extremely useful, indeed necessary, to the party whose conduct is impugned in the proceedings.

33 For example, during a party's pre-hearing preparation, it may decide that it should interview the particular individual whose words are recounted in the document. Perhaps it may decide to call that person as a witness so that the truth of what was said is in evidence. Maybe the fact that the discussion took place at a particular time is an important fact in the scheme of things. And perhaps the document will be necessary to put to an adverse witness during cross-examination.

34 However, sometimes inadmissible evidence cannot be disclosed. One instance is where privileges that protect fundamentally important interests in confidentiality apply, the privileges have not been waived, and no other exception recognized by law applies. For example, unless legal professional privilege has been waived, material covered by it is normally confidential for all purposes, in just about all circumstances; only the rarest of circumstances will displace the privilege, such as criminal cases where innocence is at stake as a result of the non-disclosure: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 (S.C.C.) at para. 43.

35 The central issue before us is whether the 1,200 remaining documents that the Commissioner refuses to disclose are covered by a public interest class privilege. Assuming the privilege exists, the Commissioner holds the privilege and has not waived it. At least no one has argued waiver either by explicit act or implied conduct: see, *e.g.*, *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 (F.C.A.) at paras. 253-262 (dissenting, but the majority not disagreeing with the legal principle). Accordingly, in the circumstances of this case, if the class privilege exists, *prima facie* the Commissioner need not disclose any documents covered by it. If the class privilege does not exist and the Commissioner wants to maintain confidentiality over individual documents that were said to be in that class, the Commissioner will have to claim a public interest privilege on a document-by-document or case-by-case basis.

**D. The public interest privilege claimable on a document-by-document or case-by-case basis compared with a class privilege: how do they differ?**

36 What is the nature of public interest privilege, claimable on a document-by-document or case-by-case basis? When does it exist?

37 Certain basic principles are at stake in a claim for public interest privilege. In *Carey v. Ontario*, [1986] 2 S.C.R. 637 (S.C.C.) at p. 647, (1986), 35 D.L.R. (4th) 161 (S.C.C.) at p. 169, the Supreme Court identified a basic tension resting at the heart of a claim for public interest privilege:

> It is obviously necessary for the proper administration of justice that litigants have access to all evidence that may be of assistance to the fair disposition of the issues arising in litigation. It is equally clear, however, that certain information regarding governmental activities should not be disclosed in the public interest.

38 Another formulation of this is found in a classic British authority:

> It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

(*Conway v. Rimmer*, [1968] 1 All E.R. 874 (U.K. H.L.) at p. 880.)

39 A leading Canadian text puts the matter this way:

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> The court, therefore, must balance the possible denial of justice that could result from non-disclosure against the injury to the public arising from disclosure of public documents which were never intended to be made public.

(Lederman, Bryant and Fuerst, *The Law of Evidence in Canada*, 4th ed. (Markham, Ont.: LexisNexis, 2014) at p. 1074.)

40 We engage with these competing interests by rigorously assessing a claim for public interest privilege using four criteria:

> First, the [evidence] must originate in a confidence.... Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be 'sedulously fostered' in the public good ('Sedulous[ly]' being defined in the New Shorter Oxford English Dictionary on Historical Principles (6th ed. 2007), vol. 2, at p. 2755, as 'diligent[ly]... deliberately and consciously'). Finally...the court must consider whether in the instant case the public interest served by [confidentiality over the evidence] outweighs the public interest in getting at the truth.

(*R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477 (S.C.C.) at para. 53, citing *Wigmore on Evidence* (McNaughton Rev. 1961), vol. 8, at § 2285.)

41 The four criteria from *Wigmore* are not "carved in stone" but rather provide a "general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court": *Gruenke* at p. 290 S.C.R., p. 689 W.W.R, cited with approval in *National Post* at para. 53; *Globe & Mail c. Canada (Procureur général)*, 2010 SCC 41, [2010] 2 S.C.R. 592 (S.C.C.) at para. 54.

42 No one disputes that the Commissioner could try to claim public interest privilege over the 1,200 remaining documents on a document-by-document or case-by-case basis. But in this case, as his primary position, the Commissioner does not assert that documents are covered by a case-by-case privilege.

43 Instead, the Commissioner says that the 1,200 documents are part of a group of 9,500 documents, all of which are covered by a class privilege. In this case, the class is said to cover all "records created or obtained by the Commissioner, [his] employees, servants, agents or solicitors or obtained from third parties during the Commissioner's investigations."

44 The Commissioner says that this class privilege is necessary. Without it, those complaining about anti-competitive conduct, fearing reprisal, would be reluctant to complain to the Commissioner and offer candid evidence in support of their complaints.

45 A class privilege applies if the documents and information fall within a class that legally qualifies for blanket protection from disclosure. Documents and information are protected from disclosure only because of their membership in a protected class; their contents and the circumstances surrounding them do not otherwise matter. In the words of the Supreme Court, a class privilege applies "without regard to the particulars of the situation" and "is insensitive to the facts of the particular case": *National Post* at para. 42.

46 Class privileges are granted because of the need to protect a particular relationship of importance. "Once the relevant relationship is established between the confiding party and the party in whom the confidence is placed, privilege presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation": *National Post* at para. 42. The class protection is granted because "anything less than blanket confidentiality" would "fail to provide the necessary assurance[s]" to parties in the relationship to perform as they must within the relationship: *National Post* at para. 42; *Lizotte c. Aviva Cie d'assurance du Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521 (S.C.C.) at paras. 39-40.

47 In contrast, a case-by-case or document-by-document public interest privilege looks at the nature of a particular document or information and the circumstances surrounding it, not its membership in a class. A party claiming the

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privilege over certain documents must make an affirmative case, document-by-document, to successfully shield them from disclosure. Unlike a class privilege, this sort of privilege offers no presumptive or default protection from disclosure.

48 So, for example, take the relationship of legal professional and client, established for the purpose of the giving and obtaining of legal advice. Loosely put, the law recognizes that the entire class of all communications within that relationship, including all documents relating to the giving or seeking of legal advice, must be protected on a default, blanket basis from disclosure. The blanket nature of the privilege provides certainty. If only case-by-case or document-by-document privilege could be claimed, uncertainty would be created about whether some information or documents within the relationship might have to be disclosed. The uncertainty might lead clients not to seek legal advice or the legal advice would have to be couched or be less than frank, or both. The effect? The democratic right of people to ascertain their full legal rights and make well-informed decisions would suffer, with resulting damage to the administration of justice. The paramount importance of the relationship between legal professionals and their clients and the vital objectives served by it justify the blanket, presumptive, default protection of confidentiality that class privilege provides.

49 Due to the breadth and generality of a class privilege, it can be blunt, sweeping and indiscriminate in operation and, thus, can work against the truth-seeking purpose of a court or administrative proceeding. A case-by-case or document-by-document privilege — tailored and case-specific as it is — can be more consistent with the truth-seeking purpose.

50 The Supreme Court put this point as follows:

> ...[W]hile the result of any privilege is to impede the search for truth, and thereby to run the risk of an injustice to the persons opposed in interest to the claimant, a class privilege is more rigid than a privilege constituted on a case-by-case basis. It does not lend itself to the same extent to be tailored to fit the circumstances.

(*National Post* at para. 46.)

51 In *Carey*, the Supreme Court expressed concern about the "absolute character of [a class] protection...without regard to subject matter, to whether [the documents] are contemporary or no longer of public interest, or to the importance of their revelation for the purpose of litigation" (at p. 659 S.C.R., p. 178 D.L.R.).

52 Because of these concerns, traditionally courts have been reluctant to find class privileges. Only "very few" class privileges have been found: *National Post* at para. 42. The Supreme Court has gone as far as to say that public interest claims on a class basis will have "little chance of success": *Carey* at p. 655 S.C.R., p. 175 D.L.R. Class privileges can be found only where there is "clear and compelling evidence [they are] necessary" or "really necessary": *R. v. Chief Constable of the West Midlands Police*, [1994] 3 All E.R. 420 (U.K. H.L.) at p. 446; *Conway*, above at p. 888.

53 Recently, the Supreme Court has set the threshold for finding new class privileges as high as can be. New class privileges can be recognized only if they are supported by policy rationales as compelling as the class privilege over solicitor-client communications: *National Post* at para. 42; *Gruenke* at p. 288 S.C.R., p. 688 W.W.R. How compelling is that? The policy rationale behind solicitor-client privilege is an interest protected by our highest law, the Constitution, specifically the privacy interest under section 8 of the Charter: *Lavallee, Rackel & Heintz*, above.

54 Commenting on this, Lederman *et al.*, above observe that new class privileges demand "that the external social policy in question is of such unequivocal importance that it cannot be sacrificed before the altar of the courts" (at p. 919).

55 The Supreme Court also suggests that class privileges — privileges that are "more rigid than a privilege constituted on a case-by-case basis" and cannot "be tailored to fit the circumstances" — are inapt where the relationship said to give rise to the need for blanket confidentiality varies in practice and depends upon the circumstances: *National Post* at paras. 44-46; *Bisaillon c. Keable*, [1983] 2 S.C.R. 60 (S.C.C.) at pp. 97-98, (1983), 2 D.L.R. (4th) 193 (S.C.C.) at p. 223. Further, the existence of a comparable class privilege in "other common law jurisdictions with whom we have strong affinities" can assist in the determination: *National Post* at paras. 43, 47-48.

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56 The extremely high threshold for the recognition of class privileges means that to date only four have been recognized — legal professional privilege, litigation privilege, informer privilege and settlement privilege: *Lizotte*, above at paras. 33-36.

57 As well, this extremely high threshold has led the Supreme Court to opine that "in future such 'class' privileges will be created, if at all, only by legislative action": *National Post* at para. 42. For good measure, the Supreme Court repeated this in *Harkat, Re*, 2014 SCC 37, [2014] 2 S.C.R. 33 (S.C.C.) at para. 87.

58 *Harkat* shows how high the threshold for establishing a class privilege now is. In *Harkat* the provisions of the *Immigration and Refugee Protection Act* concerning security certificates fell before the Supreme Court for consideration.

59 Broadly speaking, security certificates are issued against those who are reasonably believed to have come to Canada, among other things, for the purpose of engaging in terrorism. Once the certificates are issued, the Federal Court must assess their reasonableness. If the security certificate is found to be reasonable, the certificate becomes the equivalent of an order requiring the person named in the certificate to be removed from Canada.

60 Often in the Federal Court proceedings to assess reasonableness much sensitive evidence is adduced. This can include evidence from human intelligence sources — evidence of the highest level of sensitivity. Improper disclosure of that sort of evidence can have the highest of consequences: the lives of sources whose identities are revealed can be put at grave risk. It is notorious in international intelligence circles that improper disclosure has sometimes killed human intelligence sources.

61 A stronger policy rationale for a class privilege imposing blanket confidentiality over a class of evidence can scarcely be imagined. But in *Harkat*, the Supreme Court — citing its reluctance to recognize new class privileges in *National Post* — declined to recognize a class privilege covering evidence from human intelligence sources. As in *National Post*, it held that if a class privilege is warranted, Parliament, not the courts, should enact one (at para. 87):

> Nor, in my view, should this Court create a new privilege for [Canadian Security Intelligence Service] human sources. This Court has stated that "[t]he law recognizes very few 'class privileges'" and that "[i]t is likely that in future such 'class' privileges will be created, if at all, only by legislative action": *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 42. The wisdom of this applies to the proposal that privilege be extended to [Canadian Security Intelligence Service] human sources: *Canada (Attorney General) v. Almalki*, 2011 FCA 199, [2012] 2 F.C.R. 594, at paras. 29-30, *per* Létourneau J.A. If Parliament deems it desirable that [Canadian Security Intelligence Service] human sources' identities and related information be privileged, whether to facilitate coordination between police forces and [Canadian Security Intelligence Service] or to encourage sources to come forward to [Canadian Security Intelligence Service] (see [dissenting] reasons of Abella and Cromwell JJ. [in *Harkat*]), it can enact the appropriate protections.

62 In light of these authorities, it is perhaps not far from the truth to say that it is now practically impossible for a court, acting on its own, to recognize a new class privilege.

**E. Analysis**

63 Based on the foregoing principles, the Commissioner's claim to a public interest privilege over the roughly 1,200 documents he has refused to disclose must be rejected. I offer several reasons in support of this conclusion.

**— I —**

64 The Commissioner stresses that he is not asking this Court to recognize a new class privilege. He says that this Court has already recognized a class privilege covering all documents and information supplied to the Commissioner from third party sources during the Commissioner's investigation: *D & B Co. of Canada Ltd. v. Canada (Director of*

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*Investigation & Research)* (1994), 58 C.P.R. (3d) 353, 176 N.R. 62 (Fed. C.A.); *Hillsdown Holdings (Canada) Ltd. v. Canada (Director of Investigation & Research)*, [1991] F.C.J. No. 1021 (Fed. C.A.).

65 The Commissioner adds that in cases like *National Post*, the Supreme Court has not cast doubt on already recognized class public interest privileges, such as the one recognized in *D&B Companies* and *Hillsdown*.

66 Thus, to the Commissioner, this case is a simple one: we need only apply the class privilege recognized in *D&B Companies* and *Hillsdown*.

67 The Competition Tribunal stated, properly, that it is bound by decisions of our Court. Accordingly, it considered itself bound by this Court's recognition of the class privilege in *D&B Companies* and *Hillsdown*. It applied the class privilege to the 1,200 documents and refused to order that they be disclosed.

68 The Airport Authority disagrees with both the Commissioner and the Competition Tribunal. It submits that this Court's decisions in *D&B Companies* and *Hillsdown* do not recognize the class privilege the Commissioner seeks to assert in this case. In those cases, this Court applied a deferential standard of review and decided only that the Competition Tribunal had made, in today's terms, a reasonable decision. Whether the Competition Tribunal was *correct* in recognizing the class privilege was not before this Court. After *D&B Companies* and *Hillsdown*, the standard of review changed to correctness as a result of *Superior Propane* and *Tervita*, both above. Thus, according to the Airport Authority, the case at bar is the first time this Court has been called upon to assess on the standard of correctness whether the Commissioner has the class privilege it asserts.

69 In the alternative, the Airport Authority says that if those cases do recognize the class privilege, *D&B Companies* and *Hillsdown* can no longer be seen as good authority because they have been overborne by later Supreme Court jurisprudence: *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149 (Fed. C.A.) (circumstances where this Court may depart from earlier authorities); *National Post*.

70 I agree with the Airport Authority. First, I shall examine *D&B Companies*.

71 *D&B Companies* must be seen in light of the standard of review this Court applied in that case. In *D&B Companies*, this Court applied a deferential standard of review. It stated that "a certain curial deference is due to tribunals even on statutory appeals when the issue in question, whether factual or legal, is within the particular expertise of the tribunal" (at p. 357 C.P.R., para. 5 N.R.). In this Court's view, the necessary balancing of the interests between disclosure and confidentiality drew upon "special expertise in the problems of protecting competition in the market place" and, thus, was within the preserve of the Competition Tribunal (*ibid.*). Accordingly, the Court "should not lightly substitute its own views of the proper balance in these circumstances" (*ibid.*).

72 This Court also observed that class privileges "are created as a matter of policy" and the assessment of policy was "within the competence" of the Competition Tribunal, not the Court (at p. 358 C.P.R., para. 7 N.R.). In its view, the Supreme Court decision in *Gruenke*, above, on the recognition of class privileges generally, was not inconsistent with what the Tribunal had done (*ibid.*).

73 In my view, this Court decided in *D&B Companies* that the Tribunal's recognition of a public interest privilege was owed deference and could not be interfered with. This Court did not affirm for itself, nor did it need to affirm for itself given the deferential standard of review, that a class privilege exists.

74 *Hillsdown* is similar to *D&B Companies*. There, the Competition Tribunal did not allow disclosure of certain interview notes. It relied on an earlier Tribunal decision that acknowledged the need to keep certain notes confidential in the public interest so that those making a complaint would not suffer reprisal. This Court applied a deferential standard in its review of the Tribunal's decision, finding "no reviewable error" because the conclusion was "reasonably open" to the Tribunal (at paras. 1-2). In *Hillsdown*, this Court did not affirm for itself that a class privilege exists.

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75 I would add that had this Court in *D&B Companies* or *Hillsdown* affirmed that the public interest class privilege actually exists, these holdings can no longer stand in light of later Supreme Court cases such as *National Post* and *Harkat*. To some extent this point has been made during the discussion of these cases earlier in these reasons at paras. 46-62. And this point will be developed further below when I measure the Commissioner's claim for a class privilege against these cases.

76 The Commissioner cites other cases that support the existence of the public interest class privilege it asserts: *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5386, 231 A.C.W.S. (3d) 922 (Ont. S.C.J.) at para. 15; *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2016 BCSC 97, 262 A.C.W.S. (3d) 883 (B.C. S.C.) at paras. 11 and 25; *Canada (Commissioner of Competition) v. Toshiba of Canada Ltd.*, 2010 ONSC 659, 100 O.R. (3d) 535 (Ont. S.C.J.) at para. 27; *Commissioner of Competition v. Air Canada*, 2012 Comp. Trib. 21 (Competition Trib.) at paras. 3-6; *Canada (Commissioner of Competition) v. United Grain Growers Ltd.*, 2002 Comp. Trib. 35 (Competition Trib.) at para. 59. None of these bind this Court. All of these rely directly or indirectly upon *D&B Companies*, *Hillsdown*, or both.

77 In dismissing the Airport Authority's motion for disclosure, the Competition Tribunal described *D&B Companies*, *Hillsdown* and its own case law as "long standing and unanimous" on the existence of the class privilege, considered it binding, and relied upon it in dismissing the Airport Authority's motion (at para 5.). This was an error in law.

**— II —**

78 It is not possible on the jurisprudence for this Court or the Competition Tribunal to recognize a new class privilege in these circumstances. See the discussion at paras. 46-62, above. The blunt, sweeping nature of a class privilege, even over the public interest in the truth-finding function of the Competition Tribunal, is not supportable in these circumstances. Further, as both *National Post* and *Harkat* suggest, these days the sort of class privilege the Commissioner seeks should only be granted by Parliament.

79 Parliament has already spoken to confidentiality and privilege concerns in the Act. Its failure to enact the class privilege the Commissioner seeks is noteworthy. This provides another reason why this Court should not construct one itself.

80 The *Competition Act* and *Competition Tribunal Rules*, SOR/2008-141 provide a scheme to address the Commissioner's concerns about confidentiality and privilege. For example, the Act requires inquiries to be private (subsection 10(3)), allows third parties to claim solicitor-client privilege (section 19), demands that the Bureau keep a wide range of information obtained confidential (subsection 29(1)) and provides protection for whistleblowing employees against employer reprisals (sections 66.1-66.2). The Rules explain that the public is entitled to access all documents filed or received in evidence subject only to a confidentiality order (sections 22, 66).

81 These avenues to protect confidentiality under the Act and Rules also show that lesser measures are available, short of the extreme step of recognizing a public interest class privilege over all materials gathered by the Commissioner from third parties during his investigation: see also the discussion in *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2003), 28 C.P.R. (4th) 335 (Competition Trib.) at para. 69.

**— III —**

82 Even if the threshold for judicial recognition of a class privilege were not as high as the Supreme Court has set it, a class privilege could not be recognized on the basis of the evidentiary record in this case.

83 In order to establish a class privilege covering all documents and information received from third parties during his investigations, the Commissioner must prove that the relationship between him and third party sources warrants blanket confidentiality protection. In practical terms, like the example of the legal professional and client discussed at para.

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48 above, the Commissioner must prove that anything less than blanket confidentiality protection would substantially impair the relationship, thereby frustrating the Commissioner's ability to discharge his legislative responsibilities.

84 The Commissioner says just that. He says that if anything less than blanket confidentiality protection were afforded to documents and information supplied by third party sources, there might be reprisals or the threat of reprisals against them. Thus, third party sources might be less inclined to act. And the Commissioner would be less able to discharge the important responsibilities Parliament has assigned to him in the *Competition Act*. The public interest would suffer.

85 The Commissioner did not file any evidence before the Competition Tribunal establishing these matters. Thus, in this case, there is no evidentiary basis to support the existence of a class privilege. On this evidentiary record, a class privilege cannot be recognized. Given the consequences of recognizing a class privilege and the high threshold that must be met, the unsworn say-so of the Commissioner in submissions cannot suffice.

86 In upholding the existence of the class privilege, the Competition Tribunal appeared to assume that the prerequisites for it were met (at para. 62). Is this permissible?

87 In the abstract, I accept that, provided procedural fairness obligations are respected, some administrative decision-makers in some circumstances can make assessments without evidence, relying on facts gleaned from their own experience and expertise in their field. As discussed earlier, the rigorous evidentiary requirements in court proceedings do not necessarily apply in certain administrative proceedings: it depends on the text, context and purpose of the legislation that governs the administrative decision-maker.

88 In another case, I put this point as follows:

> The investigator [of the Public Service Commission] did not need specific evidence [that if a vacant public service position were advertised, candidates would apply]. Parliament did not vest decision-making authority over this subject-matter in a body of generalist judges sitting in court who will need evidence of every last thing. Rather, Parliament chose to vest decision-making authority in the Public Service Commission, including investigators employed by it — a body acting within a specialized area of employment, armed with expert appreciation of the nature and functioning of this area.
>
> The Commission knows the skills and capabilities of people who apply for various types of public service positions and the operational needs and pressures bearing upon a staffing decision. From this, the Commission can determine whether an advertising process likely would have found qualified candidates for the position in a timely way.
>
> To insist that the Commission have the sort of evidence a court would require on every element of this determination is to ossify and over-judicialize a process that Parliament intended to be fair and more informal, one enriched by knowledge and insights built from years of administrative specialization and expertise. We should not depart from the decades-old principle of administrative law that "[t]he purposes of beneficent legislation must not be stultified by unnecessary judicialization": *Re Downing and Graydon* (1978), 92 D.L.R. (3d) 355 at p. 373, 21 O.R. (2d) 292 at p. 310 (C.A.).

(*Canada (Attorney General) v. Shakov*, 2017 FCA 250 (F.C.A.) at paras. 94-96 (dissenting, but the majority not disagreeing with the legal principle).)

89 Even accepting for argument's sake that the Competition Tribunal can sometimes draw on its own experience and expertise to make certain assessments in certain circumstances, I am not persuaded that the Competition Tribunal could do so here on its own or by adopting its earlier decisions on this issue.

90 I accept that the Competition Tribunal might be in a position to accept in a general way that third party sources *might* have a fear of reprisal if they assist the Commissioner in an investigation. But the Competition Tribunal is in no position to make definitive conclusions without evidence about the Commissioner's relationship with third party sources

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if the class privilege is not recognized. In particular, without evidence it cannot conclude that the fear of reprisal *actually* exists, third party sources *will* be less inclined to assist, and the Commissioner *will* be prevented from carrying out his investigation and enforcement mandate under the *Competition Act*.

91 The knowledge about third parties' possible fear of reprisal if they cooperate lies with the Commissioner that deals with third party sources, not the Competition Tribunal. From its legislative mandate and the cases it hears, the Competition Tribunal is not well placed to know whether third party sources are reluctant to complain to the Commissioner. But the Commissioner is. It was incumbent on the Commissioner to adduce evidence on this point and allow the Airport Authority to test it.

92 The Competition Tribunal's decision in this case and the Tribunal decisions it relies upon all assume that a public interest class privilege is necessary in order to cause third party sources to come forward and be candid. But in another public interest privilege context, the Supreme Court has cast doubt on the validity of assumptions about the need for candour, particularly where a blanket privilege over a broad class of documents is sought: *Carey*, above at p. 659 S.C.R., p. 178 D.L.R. In *Carey*, Justice La Forest put it this way (at p. 657 S.C.R., p. 176 D.L.R.):

> I am prepared to attach some weight to the candour argument but it is very easy to exaggerate its importance. Basically, we all know that some business is better conducted in private, but generally I doubt if the candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation. Certainly the notion has received heavy battering in the courts.

93 In these circumstances, I conclude that it was incumbent on the Commissioner to adduce evidence before the Competition Tribunal establishing the prerequisites of the public interest class privilege. It did not.

94 The Competition Tribunal found that the class privilege asserted by the Commissioner had "sound policy rationales" (at para. 20) based on previously decided jurisprudence. An examination of that jurisprudence, particularly Competition Tribunal jurisprudence, shows only the most general, and often cursory, consideration of the matter, with the possible exception of *Canada (Commissioner of Competition) v. Sears Canada Inc.*, [2003] C.C.T.D. No. 16 (Competition Trib.) (Q.L.), (2003), 28 C.P.R. (4th) 385 (Competition Trib.). Rather, in these cases, the Competition Tribunal should have examined in a rigorous way whether the blanket confidentiality protection afforded by a class privilege — one that protects from disclosure all documents gathered from third party sources in the course of the Commissioner's investigation — was needed in order to ensure a sufficiently uninhibited sharing of information by third party sources with the Commissioner: see Kent Thomson, Charles Tingley and Anita Banicevic, "Truncated Disclosure in Competition Tribunal Proceedings in the Aftermath of Canada Pipe: An Experiment Gone Wrong," (2006), 31 *The Advocates*' *Quarterly* 67 at p. 104.

95 And "sound policy rationales" are not enough to recognize the class privilege. It will be recalled that the policy rationales supporting a class privilege must be as compelling as those supporting the class privilege over solicitor-client communications and these are extremely compelling, at the level of constitutionally protected interests: see discussion at paras. 53-54, above.

96 The gist of the Competition Tribunal's finding on the alleged public interest class privilege appears in para. 62 of its reasons:

> By its very nature, the Commissioner's mandate and statutory functions require the collection of commercially sensitive information from businesses and actors in various sectors of the economy. In undertaking his investigations of alleged anti-competitive conduct, the Commissioner requires the input from the industry and from various players in the marketplace, including customers, suppliers and competitors of persons under investigation. The Commissioner thus relies on the cooperation of these third parties and on information provided by them, either voluntarily or through compulsion. Disputed matters coming before the Tribunal, such as applications challenging an alleged abuse of dominance, mergers alleged to be anti-competitive or civil arrangements between competitors,

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> involve situations where customers, suppliers and competitors in the marketplace may be at a commercial disadvantage *vis-à-vis* the respondents targeted by the Commissioner. Protecting their identities and information through public interest privilege claims reduces the risk of witness intimidation or reluctance to provide information, and thus preserves the effectiveness of the Competition Bureau's investigations. To gain and secure this cooperation, sources of information must not be concerned about fear of reprisal in the marketplace or other potential adverse consequences, and must be satisfied that their information will be kept in confidence and their identities will not be exposed, unless they are called as witnesses. This is true whether the information is provided voluntarily or pursuant to a Section 11 order.

97 In my view, this is nothing more than an expression that a class privilege would be desirable in increasing the flow of useful information to the Commissioner. Nowhere does the Competition Tribunal find that blanket confidentiality protection is necessary for the preservation of the relationship or the continuance of the information flow. As we shall see in the next section of these reasons, even if the Competition Tribunal could have acted without evidence I doubt that it could have made such a finding.

**— IV —**

98 Even putting aside the absence of a satisfactory evidentiary record and taking the Commissioner's submissions at face value, the Commissioner has not established that blanket confidentiality protection is absolutely necessary for the preservation of the relationship. The Commissioner falls short in a number of respects.

99 The relationship between the Commissioner and third party sources very much depends upon the circumstances, the type of assistance sought and the nature of the particular investigation. For example, sometimes cooperation from a third party source is voluntary; other times it is not. In such circumstances, a rigid class privilege is inapt; a case-by-case or document-by-document privilege may be more appropriate: see *National Post* at paras. 43 and 47-49 and *Bisaillon*, above at pp. 97-98; and see the discussion in these reasons at para. 55, above. Perhaps due to the fact that a determination of public interest privilege often depends on the specific circumstances and particular documents in issue, some opine that while public interest privilege is possible on a case-by-case basis, a public interest class privilege is not: Hubbard, Magotiaux and Duncan, *The Law of Privilege in Canada* (looseleaf) Aurora, Ont.: Canada Law Book, 2006 (loose-leaf updated December 2017) at §3.20; of interest is that these commentators are aware that the Commissioner asserts a public interest class privilege (see *ibid*. at §3.50.50).

100 The class privilege the Commissioner asserts applies even in the case of evidence it compels from third parties under section 11 of the *Competition Act*. When a witness is compelled to cooperate fully with an investigation, there is far less need to motivate a party to come forward or be any more forthcoming in providing evidence: the candour rationale for protection is markedly reduced or, in some situations, even eliminated. In the words of one commentator, "if [an] agency can obtain...information by compulsion of statute then the sources cannot be said to 'dry up' if the confidentiality is breached": T.G. Cooper, *Crown Privilege*, (Aurora, Ont: Canada Law Book, 1990) at p. 56.

101 Similarly, the class privilege is said to apply regardless of whether any promise or undertaking of confidentiality was made to persons with information and documents and whether they relied upon any such promise or undertaking in providing documents and information. This makes no sense:

> Where the information is provided to government agencies by outsiders, there is a greater prospect that the providers of that information may be less frank or will not provide the information at all if there is a prospect of disclosure. *Of course, where no expectation of confidentiality exists, the candour argument is without merit*.
>
> [emphasis added]

(Lederman, above at p. 1079; see also *Gruenke* at pp. 291-292 S.C.R., p. 691 W.W.R.)

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102 Indeed, there is material suggesting that those providing information to the Commissioner can never have any assurance or expectation of confidentiality. In proceedings before the Competition Tribunal, the Commissioner has consistently taken the view that "anyone providing information to the [Commissioner] either voluntarily or pursuant to an order under s. 11 [of the Act] must expect that such information may be used by the [Commissioner] in the administration of the Act including the bringing of an application before this Tribunal under the Act": *Canada (Director of Investigation & Research) v. Air Canada* (1993), 46 C.P.R. (3d) 312 (Competition Trib.) at p. 316.

103 Further, as the facts of this case demonstrate, the alleged public interest class privilege, if asserted by the Commissioner, is waivable by the Commissioner and only the Commissioner at any time. Thus, there is no assurance of confidentiality. This differs from the informer class privilege, which the law recognizes. Informer class privilege belongs jointly to the Crown and to the informer and cannot be waived without the informer's consent: *R. v. Leipert*, [1997] 1 S.C.R. 281, 143 D.L.R. (4th) 38 (S.C.C.) at para. 15.

104 Further, the purported scope of the privilege — "records created or obtained by the Commissioner, [his] employees, servants, agents or solicitors or obtained from third parties during the Commissioner's investigations" — is unnecessarily broad and detached from the compelling public interest asserted by the Commissioner. At the very least, there must be some nexus between these documents and the identity of a third party source and/or information provided by those third party sources to be captured by any public interest privilege. If a document emanates from outside of the purportedly essential relationship between the Commissioner and third party sources, there is no need for the privilege to attach.

105 In these circumstances, measures falling short of a blanket class privilege might suffice to protect the confidentiality interests and preserve the relationship between the Commissioner and third party sources who can assist his investigation. For example, it may be possible for confidentiality to be protected by redactions of documents, undertakings of confidentiality, sealed volumes of documents, or *in camera* sessions.

106 At the hearing of this appeal, we asked the parties whether any other regulator, competition or otherwise, domestic or foreign, has found it necessary to assert the sort of class privilege the Commissioner seeks here. The parties were unable to identify even one. Nor is this Court aware of any.

107 In particular, American, European, Australian and New Zealand competition authorities have not found it necessary to recognize a class privilege over information and documents supplied by third parties. Like the Commissioner here, these authorities gather sensitive information from customers, suppliers and competitors of the party under investigation, with every possibility of retaliation against them for supplying the information. The same is true for domestic agencies which regulate fields such as securities, tax, the environment, human rights and occupational health and safety. All these competition authorities and domestic regulators are able to conduct investigations and make orders without the benefit of a class privilege over information and documents supplied by third parties.

108 In my view, this is a salient legal consideration to be taken into account when assessing whether a class privilege should be recognized. The Supreme Court has suggested that the experience of foreign jurisdictions and whether they have recognized a class privilege in other circumstances should be examined when considering whether to recognize a class privilege: see discussion earlier in these reasons at para. 55 and *National Post* at paras. 43, 47-48. These considerations go directly to the issue whether blanket confidentiality protection is necessary or warranted for the preservation of the relationship between the Commissioner and third party sources.

109 Contrary to this, the Competition Tribunal considered that the experience of foreign competition authorities and domestic regulators was of "no moment" (para. 20). This was a legal error.

**— V —**

110 The Commissioner attempts to support the existence of the alleged class privilege by suggesting that he does not cause any procedural unfairness. The Commissioner reviews the documents covered by the class privilege and

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exercises his discretion to provide the documents necessary to fulfil his procedural fairness obligations. Respondents to competition proceedings brought by the Commissioner receive summaries of the information supplied by third party sources and, later, witness statements if any third party sources are called to testify. Concerns about the adequacy of the summaries can be brought before the Competition Tribunal. Further, if the Commissioner intends to rely on a privileged document at a hearing, it must disclose the document: subsection 68(1) of the *Competition Tribunal Rules*, SOR/2008-141.

111 As an illustration of fairness, the Commissioner points to what it did in this case. While some 9,500 documents were covered by the public interest privilege, the Commissioner exercised his discretion to waive the privilege over roughly 8,300 of these documents and disclose them to the respondent. Summaries of undisclosed documents were vetted and provided to the Airport Authority.

112 As the discussion of case law above shows, the recognition of a class privilege does not depend on whether the beneficiary of the privilege is prepared to act fairly. And the Commissioner cannot defend a class privilege on the basis that it does not create procedural unfairness if there is no sufficient, proven reason for the class privilege to exist in the first place. In any event, fairness is in the eye of the beholder: the Airport Authority believes that the withholding of the 1,200 documents is working unfairness.

113 There is something to this. If the class privilege urged by the Commissioner is recognized, something incongruous emerges: Competition Tribunal proceedings are subject to procedural fairness obligations at the highest level, akin to court proceedings, yet the Commissioner can unilaterally assert a class privilege and withhold all documents obtained from third parties in his investigation — here, the entire case against the Airport Authority — unless the Commissioner unilaterally decides to waive the privilege over some of the documents. Thus, as far as disclosure of the case against the party whose conduct is impugned is concerned, that party gets only what the Commissioner deigns to give it. And requests for more disclosure may well be dismissed by the Competition Tribunal because, on the authority of a decision by this Court upholding the class privilege, the interests in confidentiality supporting the class privilege will be seen to be very high. Perhaps summaries of withheld documents might be provided. But by definition, summaries leave information out. What may seem innocuous or irrelevant to the preparers of the summaries may be critical to the party whose conduct is impugned. And the actual documents authored by participants in the matters under investigation are often more useful for cross-examination than summaries prepared by non-participants. This entire scenario is fraught with the potential of interference with procedural fairness rights and the truth-finding function of the proceedings: see discussion earlier in these reasons at paras. 28-33.

114 The Commissioner's submission that he has acted fairly by disclosing so many documents and by providing summaries is also telling in a related way. After conducting a document-by-document review of the documents covered by the alleged class privilege in this case, the Commissioner found that confidentiality was unnecessary for 86% of them and so it disclosed these documents. As for the others, it says that some information can be disclosed by summaries. This tends to show a number of things:

> • the blanket 100% confidentiality coverage of a class privilege is unnecessary for maintaining the relationship between the Commissioner and third party sources;
>
> • a case-by-case public interest privilege — one that the Supreme Court says gives "the necessary flexibility to weigh up and balance competing public interests in a context-specific manner", where established on the evidence, may be more appropriate: National Post at para. 51; in any event, a class privilege that is so significantly whittled down through waiver after a document-by-document review is no more effective in maintaining the relationship between the Commissioner and third party sources than a case-by-case, document-by-document public interest privilege;
>
> • other lesser measures to protect confidentiality and the relationship between the Commissioner and third party sources, even short of asserting a public interest privilege, may be more appropriate for many of the documents, such as redactions, non-disclosure undertakings, sealed volumes or in camera portions of proceedings.

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115 For the foregoing reasons, I conclude that the Commissioner has not established that there is a class privilege preventing disclosure of the 1,200 remaining documents. If, as a policy matter, the Commissioner considers that there ought to be a class privilege over information and documents supplied by third party sources during his investigations, he can ask Parliament for it.

116 It follows that the Competition Tribunal erred in law in finding a class privilege and, thus, erred in dismissing the Airport Authority's motion on that basis.

**F. Where does this leave the parties?**

117 Because the Competition Tribunal found the presence of a public interest class privilege over the 1,200 remaining documents, it did not assess whether any of them are covered by a case-by-case or document-by-document public interest privilege. Under the disposition of this appeal I propose below, the motion will be remitted to the Competition Tribunal for redetermination. The Airport Authority agrees that in the redetermination the Commissioner should have an opportunity to argue for privilege over individual documents.

118 In considering whether a particular document should be covered by a case-by-case or document-by-document public interest privilege, the Competition Tribunal will wish to follow the legal test discussed earlier in these reasons. In assessing the interests of confidentiality and the extent to which they are sufficiently compelling, the Competition Tribunal should consider whether alternative, lesser means of protecting the relevant confidentiality interests are available, such as redacting portions of individual documents, undertakings of confidentiality, protective orders, sealed volumes of documents, *in camera* sessions, and other effective measures that might be devised: see, *e.g.*, the creative and detailed sealing order made in *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2002 BCSC 1509, 8 B.C.L.R. (4th) 281 (B.C. S.C. [In Chambers]).

**G. Proposed disposition**

119 I would allow the appeal, and set aside the order of the Competition Tribunal, including its award of costs. I would award the Airport Authority its costs of the appeal. I would remit the motion to the Competition Tribunal for redetermination in accordance with these reasons.

***Richard Boivin J.A.*:**

I agree

***J.B. Laskin J.A.*:**

I agree

*Appeal allowed.*

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# TAB 2

2005 FC 281, 2005 CF 281
Federal Court

Créations Magiques (CM) Inc. c. Madispro Inc.

2005 CarswellNat 521, 2005 CarswellNat 5795, 2005 FC 281, 2005 CF 281, 150 A.C.W.S. (3d) 593

# Créations Magiques (CM) Inc., Plaintiff/Defendant by counterclaim and Madispro Inc., Defendant/Plaintiff by counterclaim

Morneau Protonotaire

Heard: February 14, 2005
Judgment: February 23, 2005
Docket: T-688-02

Counsel: Me Daniel M. Kochenburger, pour demanderesse / défenderesse reconentionnelle
Me Richard Uditsky, pour défenderesse / demanderesse reconventionnelle

Subject: Civil Practice and Procedure; Property

***Morneau Protonotaire*:**

1 In this case the Court has before it a motion by the defendant to dismiss the plaintiff's action pursuant to Rule 167 of the *Federal Courts Rules* (the Rules) on the ground that the schedule imposed by this Court in March 2004 has not been observed by the plaintiff, and consequently there was an unjustified delay in the prosecution of the plaintiff's action.

**Background**

2 On April 29, 2002, the plaintiff initiated an action against the defendant for the infringement of patent 2,088,098 for an invention titled [TRANSLATION] "thermotherapeutic cushion".

3 The pleadings were closed on or about July 11, 2002. From that date until May 28, 2003, that is for a period of over ten months, it appears the plaintiff did nothing specific to move its action forward. Following a status review notice, the Court authorized the plaintiff's action to go forward and imposed a schedule by order dated August 25, 2003.

4 That order provided that the parties should do what was necessary in the context of proceeding with an application for judicial review. However, as this was not the appropriate approach, the Court realized this and on January 21, 2004, required the parties to submit a schedule suitable for proceeding with an action. In the interim, however, the plaintiff had filed its affidavit required in principle under rule 306.

5 The new schedule sought by the Court was submitted by consent, and on March 19, 2004, the Court issued an order containing the following schedule:

> . . .
>
> 3) The parties shall adhere to the following deadlines:
>
> a) The service and filing by the Plaintiff of its Reply to the Defendant's Amended Statement of Defence and a Statement of Defence to its Amended Counterclaim by April 9, 2004.
>
> b) The service by both parties of their Rule 223 Affidavit of Documents by April 30, 2004.

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c) Examinations for discoveries of both parties to be completed by June 30, 2004.

d) Replies to all undertakings and questions taken under advisement arising out of the examinations for discovery of the parties to be furnished by August 16, 2004.

e) All motions for the adjudication of objections arising out of the examinations for discovery of the parties to be served and filed by September 15, 2004.

f) Any further examinations for discovery to be completed by October 15, 2004.

4) The whole with costs in the cause.

6 Some time after the end of this schedule, i.e. on December 6, 2004, the Court found that this schedule had been observed and then issued an order requiring the parties to submit a schedule for the next stages. That order read:

[TRANSLATION]

As the schedule contained in the order dated March 19, 2004, must now be taken as completed, counsel for each party shall within 20 days of the date of this order submit to the Court - jointly insofar as possible - a schedule indicating the further measures to be taken in the instant case. Any schedule proposed by the parties shall be limited to the essential measures still remaining to be taken.

7 In a letter to the Court dated December 23, 2004, a copy of which was sent to the plaintiff's counsel, the defendant's counsel objected vigorously to the new schedule submitted by the plaintiff, pointing out that the schedule set out in the order of March 19, 2004, had not been respected by the plaintiff.

8 Consequently, he asked the Court to dismiss the plaintiff's action.

9 By an order dated January 10, 2005, the Court acknowledged that clearly it could not approve the schedule submitted by the plaintiff, and invited the defendant to proceed by motion if it wished to have the plaintiff's action dismissed. That order of January 10, 2005 reads:

[TRANSLATION]

In view of the content of the letter from the defendant and plaintiff by counterclaim (the defendant) dated December 23, 2004, the Court clearly cannot acquiesce in the stages which the plaintiff and defendant by counter-claim (the plaintiff) seeks to arrange through the draft order submitted by the latter on December 23, 2004.

The Court also cannot simply by letter consider the remedy sought by the defendant through its letter dated December 23, 2004. If the defendant wishes to have the plaintiff's action dismissed, it will have to proceed by motion in the proper form under Rule 167 of the *Federal Courts Rules*.

If the defendant decides to go ahead, such a motion shall be served and filed within 30 days of this order.

10 Hence this motion by the defendant, in which by the affidavit filed in support the defendant tells the Court that, apart from the stage mentioned in point 3(a) of the order of March 19, 2004, the plaintiff has taken no other relevant action. Significantly, the plaintiff had not served its affidavit of documents under Rule 223 on April 30, 2004, although the defendant had complied with that deadline.

11 In fact, at the date the motion at bar was heard, the plaintiff had still not served its affidavit of documents.

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12 In its affidavit in reply to the motion at bar, the plaintiff essentially argued that the preparation of this affidavit was a considerable undertaking for it and that from December 2003 to summer 2004, it had to concentrate on dealing with various legal problems in addition to pursuing the action at bar.

**Analysis**

13 The defendant clearly based its motion on the fact that the terms of the Court's order dated March 19, 2004, had not been observed (the failure by the plaintiff to file its affidavit of documents) and that non-observance led to an unjustified delay.

14 Accordingly, it can be validly argued that the defendant's motion is based on rule 167 as well as on paragraph 382(1)(*a*) and rule 385, or even this Court's judgment in *Ferrostaal Metals Ltd. v. Evdomon Corp.* (2000), 181 F.T.R. 265 (Fed. T.D.) (affirmed at trial by a judgment of June 21, 2000, and in the Federal Court of Appeal by a judgment of October 11, 2001, citation 2001 FCA 297 (Fed. C.A.)).

15 In the latter case, the following principles were laid down with regard to a schedule that has not been observed:

> [14] The Court might have expected that this schedule would be observed, since it was taking this action in a case that was already in breach of the rules (there had had to be a notice of status review issued in the case) and which the Court was allowing to continue. Any schedule imposed by the Court certainly should have been taken seriously at that point. This is particularly true for any plaintiff since ultimately it is the plaintiff's action that is at stake, and primary responsibility for ensuring that the case moves forward lies with the plaintiff. This is a matter of the credibility of and respect for the orders of this Court.
>
> . . . . .
>
> [20] In my opinion, any unjustified non-compliance with an Order of the Court establishing a schedule is a serious matter in itself. When that Order was made pursuant to a status review, any unjustified default is even more serious, and the degree of tolerance shown by the Court will be correspondingly lower. After all, the Court is then dealing with a case that is delinquent for the second time. It seems to me that the test that then applies should be even simpler than what we find in *France-Canada Éditions et Publications Inc. et al v. 2845-3728 Québec Inc.*, unreported decision dated March 9, 1999, docket no. T-2278-92, and *Baroud v. Canada*, [1998] F.C.J. No. 1729. In my view, the sound administration of justice justifies saying that a finding of unjustified default is then sufficient in itself for a plaintiff's action to be struck for delay.
>
> [21] Of course, striking an action will definitely prejudice a plaintiff to some extent. However, in terms of a status review, an assessment of the prejudice to a party is not part of the equation that is applied (see *Multibond Inc. v. Duracoat Powder Manufacturing Inc.*, unreported decision dated October 4, 1999, docket no. T-1703-94). This seems to me to be particularly true when, as here, we have a situation that arose after the notice of status review. If any prejudice should be taken into consideration at this point, it is the prejudice to the Court and those of its users who comply with the rules and orders. As my colleague Hargrave wrote in *Trusthouse Forte California Inc. et al. v. Gateway Soap & Chemical Co.* (1998), 161 F.T.R. 88, at page 89:
>
>> These reasons touch on the need for litigants to recognize that they must not delay proceedings unreasonably so as to tie up the court's resources needlessly. If a plaintiff should do so he or she stands to have the action dismissed. For the court to do otherwise results in stale proceedings which not only bring the court and its case management process into disrespect, but also affects and indeed may prejudice other litigants who wish to have their litigation resolved expeditiously.
>
> . . . . .
>
> [24] A party who has an Order from the Court, and particularly a plaintiff, cannot allow the various steps set out in that Order to expire without attempting, in a timely manner, to obtain a variation of the Order by motion.

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[Emphasis added.]

16 In my opinion, in this case the plaintiff's continued lateness in filing its affidavit of documents constitutes an unjustified breach and delay.

17 The evidence in the record which the Court may consider indicates that the plaintiff agreed by consent to the schedule that the Court approved in its order of March 19, 2004. If the plaintiff had been confronting significant distractions since December 2003, it should not have agreed to the schedule of March 2004.

18 In this connection, the Court should add that it is definitely not persuaded that the difficulties experienced by the plaintiff prevented it from respecting the date of April 30, 2004, for the filing of its affidavit.

19 The plaintiff further appeared to suggest in its reply record that its affidavit of documents would ultimately be quite straightforward and that the affidavit it filed in October 2003 under rule 306 could serve as a rule 223 affidavit of documents. That cannot stand. The order of March 19, 2004, required an affidavit under Rule 223 — which is completely different from an affidavit under Rule 306. Further, if the documents already collected by the plaintiff in October 2003 were sufficient to meet the requirements of Rule 223, it would have been easy for the plaintiff to file its affidavit of documents in late April 2004.

20 In view of the foregoing reasons, and although the Court dislikes drawing such a conclusion, it must in the circumstances allow the defendant's motion with costs and dismiss the plaintiff's action for unjustified delay. In view of the stage reached, and bearing in mind what has gone before, it cannot be argued that the Court is now giving procedure precedence over law.

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# TAB 3

2010 FC 481, 2010 CF 481
Federal Court

Apotex Inc. v. Sanofi-Aventis Canada Inc.

2010 CarswellNat 1242, 2010 CarswellNat 2639, 2010 FC 481, 2010 CF 481, [2010] F.C.J. No. 560, 188 A.C.W.S. (3d) 659

# Apotex Inc., Plaintiff and Sanofi-Aventis, Defendant

Sanofi-Aventis and Bristol-Myers Squibb Sanofi Pharmaceuticals Holdings Partnership, Plaintiffs and Apotex Inc. Apotex Pharmachem Inc. and Signa SA de CV, Defendants

Mireille Tabib Prothonotary

Heard: March 5, 2010
Judgment: April 30, 2010
Docket: T-644-09, T-933-09

Counsel: Mr. Nando De Luca, Mr. Sandon Shogilev, for Apotex Inc.
Mr. Anthony Creber, Ms Cristin Wagner, for Sanofi-Aventis

Subject: Intellectual Property; Civil Practice and Procedure

RULING on whether to order that no supplementary affidavit of documents be served after fixed date and no corrected or completed information in answer to discovery question provided after that date should be deemed effective for purpose of R. 232 and 248 of Federal Courts Rules unless other party has consented or leave has been granted by court.

***Mireille Tabib Prothonotary*:**

1 In accordance with the Notice to the Parties and the Profession dated May 1, 2009, relating to the streamlining of complex litigation, dates have been set aside, beginning on April 18, 2011, for a five-week trial of the consolidated actions herein. In order to ensure that those dates are met and that the trial proceeds within the time allowed, the Court has, at the occasion of earlier case management conferences, raised the issue of whether a date should be fixed after which service of supplementary affidavits of documents would require the consent of the opposing party or leave of the Court. The parties were formally required, by Order dated February 18, 2010 [*Apotex Inc. v. Sanofi-Aventis*, 2010 CarswellNat 345 (F.C.)], to be prepared to discuss that issue at a case management telephone conference held on March 5, 2010.

2 Counsel for Sanofi agreed to this measure with alacrity. Apotex, however, argued that it was unnecessary as any issue as to the admissibility of evidence based on late disclosure could and should be determined at trial.

3 I have, in earlier reasons issued in this matter (*Apotex Inc. v. Sanofi-Aventis*, 2010 FC 77 (F.C.)), discussed the need for the parties to comply not only with the letter of their obligations under the *Federal Courts Rules* to correct without delay inaccuracies or deficiencies in their affidavits of documents pursuant to Rule 226, but with their spirit and purpose, by reviewing on a continuing basis the completeness and accuracy of their disclosures.

> [16] Finally, it should also be remembered that while the Rules provide that a party may correct any inaccuracy or deficiency in an affidavit of documents by serving a supplementary affidavit of documents, this must be done without delay. This is all the more important in actions subject to the streamlining initiative, as the tight schedules afford little "extra" time to re-open discoveries should new documents be disclosed. Where, on an informal request or a motion for production of further documents, a party's attention is drawn to a particular type or source of documents or to a particular factual issue which it had not considered for relevance, the party's duty to review its

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disclosure in order to correct any inaccuracy or deficiency in its affidavit of documents is triggered, and should result in such supplementary affidavit of documents as the review may require, without delay, and without the need for a specific order.

4 The same reasoning equally applies to a party's continuing duty to correct or complete answers given to discovery questions, pursuant to Rule 245.

5 The Rules provide that documents or information that have not been disclosed in affidavits of documents or have been withheld in answer to discovery questions cannot be adduced at trial unless certain conditions are met or leave of the Court is obtained. Rules 232(1) and 248 of the *Federal Courts Rules* provide:

232. (1) Unless the Court orders otherwise or discovery of documents has been waived by the parties, no document shall be used in evidence unless it has been

(a) disclosed on a party's affidavit of documents as a document for which no privilege has been claimed;

(b) produced for inspection by a party, or a person examined on behalf of one of the parties, on or subsequent to examinations for discovery; or

(c) produced by a witness who is not, in the opinion of the Court, under control of the party.

248. Where a party examined for discovery, or a person examined for discovery on behalf of a party, has refused, on the ground of privilege or for any other reason, to answer a proper question and has not subsequently answered the question, the party may not introduce the information sought by the question at trial without leave of the Court.

232. (1) À moins que la Cour n'en ordonne autrement ou que les parties n'aient renoncé à leur droit d'obtenir communication des documents, un document ne peut être invoqué en preuve que dans l'un des cas suivant:

a) il est mentionné dans l'affidavit de documents de la partie et, selon celui-ci, aucun privilège de nondivulgation n'est revendiqué;

b) il a été produit par l'une des parties ou par une personne interrogée pour le compte de celle-ci pour examen, pendant ou après les interrogatoires préalables;

c) il a été produit par un témoin qui, de l'avis de la Cour, n'est pas sous le contrôle de la partie.

248. La partie soumise à un interrogatoire préalable, ou la personne interrogée pour son compte, qui a refusé de répondre à une question légitime au motif que les renseignements demandés sont protégés par un privilège de non-divulgation ou pour tout autre motif, et qui n'y a pas répondu par la suite, ne peut donner ces renseignements à l'instruction à moins d'obtenir l'autorisation de la Cour.

6 Clearly, these provisions aim to avoid a party being prejudiced by late disclosure of documents or information and to prohibit "trial by ambush". Yet a party could just as effectively ambush its opponent by serving a supplementary affidavit of document or supplemental answers to discovery a few days, weeks or even months before the trial, yet without sufficient time for the opposing party to adequately prepare to respond to the new documents or information.

7 To leave the receiving party with the choice of making a motion to rule on the admissibility of evidence (which if brought pursuant to Rule 220(1)(b)) is an unwieldy two-stage process), or to deal with the matter as an objection to evidence at trial is simply inefficient. Further, to the extent justice between the parties requires that the evidence be allowed to be adduced at trial subject to further discoveries or additional export reports, it is clear that leaving the determination to the Trial Judge leads straight to an adjournment of the trial, whereas early determination of these issues by the case management Judge could potentially provide a timely remedy and avoid an adjournment.

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8 There is, in my view, a need for a procedural mechanism by which potential disputes as to the parties' compliance can be determined or remedied before trial on an adequate record and in a timely manner. I am therefore satisfied that a date should be set after which supplementary affidavits of documents or production of documents or information in answer to discoveries would require either consent of the opposing party or leave of the Court in order to be effective for the purposes of Rules 232 and 248. This will ensure that, if the parties do not meet their obligations to review their disclosure on an ongoing basis, there is a date by which a comprehensive review should be made, after which parties will have to provide justification for late disclosure and any prejudice caused to the other party can be addressed or remedied if possible. It will further promote the early identification and disposition of issues of admissibility related to late disclosure, freeing up trial and time and possibly avoiding adjournments.

9 In the circumstances, that date should roughly coincide with the date on which the last of the rebuttal expert reports are to be served and filed. Indeed, by then, documents on which litigation privilege may have been claimed but which have been relied upon by experts expected to be called at trial should be subject to waiver and accordingly moved from Schedule II of the Affidavit of Document to its Schedule I. Also, the parties will then have as complete an understanding as they are likely to get before the actual start of the trial as to the issues in dispute and their opponent's position thereon. Combined with the theory of the case and the trial strategy which they ought to have been refining and developing throughout the discovery stages, the parties should then be in a position to know with great precision on what documents and information they might wish to rely at trial and to fully appreciate the consequence of any incomplete and inaccurate disclosures they might have made. As such, it is expected that there should be few or no new disclosures after that date. Imposing on the parties a mechanism by which they can justify why or on what conditions disclosures made after that date should be admissible at trial is neither unfair nor overly burdensome.

**Order**

*THIS COURT ORDERS that:*

1. No supplementary affidavit of documents served after December 15, 2010, and no corrected or completed information in answer to a discovery question provided after January 15, 2010 shall be deemed effective for the purposes of Rules 232(1) or 248 unless:

(a) The other party has consented; or

(b) Leave has been granted on motion made, without delay, before the case management Judge.

2. The trial of this matter shall begin at 9:30 a.m. on April 18, 2011, for a duration of 25 days, in French and in English, at a place to be determined either on motion or at the pre-trial conference.

*Ruling made; Order granted.*

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# TAB 4

2011 FC 457, 2011 CF 457
Federal Court

Potskin v. Canada (Minister of Indian Affairs & Northern Development)

2011 CarswellNat 1465, 2011 CarswellNat 2922, 2011 FC 457, 2011 CF 457, [2011] 3 C.N.L.R. 301, 204 A.C.W.S. (3d) 1, 393 F.T.R. 18 (Eng.)

## Dalvin Stewart Potskin Albert Lawrence Potskin and Richelle Marie Potskin, Plaintiffs and Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development, Defendant

Paul S. Crampton J.

Heard: March 21-22, 2011
Judgment: April 18, 2011
Docket: T-1261-01

Counsel: Mr. Terence P. Glancy, for Plaintiffs
Mr. Kevin P. Kimmis, Ms Sherry Daniels, for Defendant

***Paul S. Crampton J.*:**

1 At the time of their birth, the Plaintiffs were illegitimate children within the meaning of paragraph 11(1)(e) of the *Indian Act*, RSC 1970, c. I-6 (the "Former Act"). Therefore, they were registered on the Band List of the Sawridge Band, of which their mother was a member at that time. When they were still toddlers, their mother married Neil Morin, a member of the Enoch Band. The following year, she and Mr. Morin signed Statutory Declarations declaring Mr. Morin to be the natural father of the Plaintiffs. Shortly after receiving a copy of those Statutory Declarations, the Registrar under the Former Act instructed the Lesser Slave Lake Indian Regional Council to report the transfer of the Plaintiffs from the Sawridge Band to the Enoch Band, as contemplated by section 10 of the Act.

2 When their mother transferred from the Sawridge Band to the Enoch Band subsequent to her marriage to Mr. Morin, she received a payment in the amount of $210,891.62. This represented the difference between the value of a *per capita* share in the Sawridge Band and the value of a *per capita* share in the Enoch Band.

3 The Plaintiffs maintain that a similar payment should have been made to a trustee, to hold on their behalf until they reached the age of majority. However, no such payment on their behalf was ever made to anyone. As a result, they commenced this action alleging, among other things, that the Defendant breached its fiduciary obligation to protect their economic interests.

4 For the reasons that follow, I find that on the particular facts of this case, the Defendant did not owe to the Plaintiffs the specific fiduciary obligations that the Plaintiffs have identified. I also find that if the Defendant had any fiduciary obligations towards the Plaintiffs, those obligations were not breached by the actions taken by the Registrar or any other persons in the Department of Indian Affairs and Northern Development (the "Department").

5 I also find that this action is barred by the *Limitation of Actions Act*, RSA 1980, c L-15 and/or the *Limitations Act*, RSA 2000, c L-12, which are the relevant limitations statutes in this case.

### I. Background

6 The Plaintiffs are all children of Harriet Potskin. Dalvin Stewart Potskin was born on February 7, 1979. Albert Lawrence Potskin was born on March 27, 1980. Richelle Marie Potskin was born on April 14, 1981.

7 Given that Harriett Potskin was unmarried at the time of their birth, the Plaintiffs were registered on the Band List of the Sawridge Band, of which she was a member, as contemplated by paragraph 11(1)(e) of the Former Act.

8 The Former Act was administered by the Defendant Minister of Indian Affairs and Northern Development. Pursuant to section 5 of the Former Act, an Indian Register was required to be maintained, consisting of Band Lists and General Lists in which were recorded the names of every person entitled to be registered as an Indian. The Indian Register and all such membership lists were controlled by the Registrar.

9 On or about November 27, 1981, Harriet Potskin married Neil Morin, a member of the Enoch Band. As required by section 14 of the Former Act, she therefore transferred from the Sawridge Band to the Enoch Band.

10 Pursuant to subsection 16(3) of the Former Act, the Sawridge Band then made two payments. The first payment, in the above-mentioned amount of $210,891.62, was made to Harriet Potskin. The second payment, in the amount of approximately $6,000, was made to the Enoch Band. That sum represented the value of a *per capita* share in the Enoch Band. Together, the two sums represented the value of a *per capita* share in the Sawridge Band at that time.

11 On April 15, 1982, Harriet Potskin and Neil Morin signed Statutory Declarations declaring Neil Morin to be the natural father of the Plaintiffs. However, for one reason or another, those Statutory Declarations were not forwarded to the Registrar until March 29, 1983, when they were sent to the Registrar by Mr. David Fennell, the solicitor for the Sawridge Band. In his cover letter to the Registrar, Mr. Fennell stated that the Plaintiffs "should have been transferred to the Enoch Band List as they are now the legitimate children of their father." In addition, he requested that the Registrar "deal with this matter as expeditiously as possible." It appears that the reason why the Sawridge Band was anxious to have the matter dealt with promptly was that it had been continuing to issue oil royalty cheques on a regular basis to Mrs. Harriet Potskin on behalf of the Plaintiffs.

12 On April 27, 1983 the Registrar wrote to the Lesser Slave Lake Indian Regional Council to request that the Council report the transfer of the Plaintiffs from the Sawridge Band to the Enoch Band in its next Band Membership Report for the former Band. By copy of its letter to the Office Manager of the Enoch Band, it requested that Band to do the same.

13 To this date, the Plaintiffs remain members of the Enoch Band. However, neither they nor the Enoch Band has ever received payments from the Sawridge Band similar to those that were made subsequent to their mother's transfer to the Enoch Band.

**II. Relevant Legislation**

14 Pursuant to subsection 2(1) of the Former Act, the Registrar was the officer of the Department who was in charge of the Indian Register.

15 The transfer of the Plaintiffs and their mother from the Sawridge Band List to the Enoch Band List maintained by the Registrar resulted from the operation of subsection 7(1), section 10, paragraphs 11(1)(d) and (e), and section 14 of the Former Act. Those provisions, which are part of a scheme that focused upon the status of the male in spousal and parental relationships (*Martin v. Chapman*, [1983] 1 S.C.R. 365 (S.C.C.), at 370), stated as follows:

> *Indian Act*, RSC 1970, c. I-6
>
> **Definition and Registration of Indians**
>
> [...]

7. (1) The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

[...]

10. Where the name of a male person is included in, omitted from, added to or deleted from a Band list or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be. R.S., c. 149, s. 10.

[...]

11. (1) Subject to section 12, a person is entitled to be registered if that person

[...]

(d) is the legitimate child of

(i) a male person described in paragraph (a), (b); or

(ii) a person described in paragraph (c);

(e) is the illegitimate child of a female person described in paragraph (a), (b) or (d); or

[...]

14. A woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band, but if she marries a member of another band, she thereupon becomes a member of the band of which her husband is a member. R.S., c. 149, s. 14.

*Loi sur les indiens*, SRC 1970, c. I-6

**Définition et enregistrement des indiens**

[...]

7. (1) Le registraire peut en tout temps ajouter à une liste de bande ou à une liste générale, ou en retrancher, le nom de toute personne qui, d'après la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste.

[...]

10. Lorsque le nom d'une personne du sexe masculin est inclus dans une liste de bande ou une liste générale, ou y est ajouté ou omis, ou en est retranché, les noms de son épouse et de ses enfants mineurs doivent également être inclus, ajoutés, omis ou retranchés, selon le cas. S.R., c. 149, art. 10.

[...]

11. (1) Sous réserve de l'article 12, une personne a droit d'être inscrite si

[...]

d) elle est l'enfant légitime

(i) d'une personne du sexe masculin décrite à l'alinéa a) ou b), ou

(ii) d'une personne décrite à l'alinéa c);

e) elle est l'enfant illégitime d'une personne du sexe féminin décrite à l'alinéa a), b) ou d); ou

[...]

14. Une femme qui est membre d'une bande cesse d'en faire partie si elle épouse une personne qui n'en est pas membre, mais si elle épouse un membre d'une autre bande, elle entre dès lors dans la bande à laquelle appartient son mari. S.R., c. 149, art. 14.

16 Subsection 15(1) of the Former Act allowed for the payment of a per capita share of the monies held by Her Majesty on behalf of an Indian Band, and certain other monies, to an Indian who became "enfranchised" or who otherwise ceased to be a member of that Band. Subsection 15(3) identified the options available to the Minister where such a person was under the age of twenty-one. However, subsection 16(1) of the Former Act excluded the operation of section 15 in situations where a person ceased to be a member of one Band by reason of becoming a member of another Band. Moreover, subsection 16(2) specifically precluded such a person from any entitlement to any interest in the lands or moneys held by Her Majesty on behalf of the former Band. Pursuant to subsection 16(3), this was subject to one exception, namely, where a woman transferred from one Band to another Band by reason of marriage. The full text of these provisions were as follows:

*Indian Act*, RSC 1970, c. I-6

**Definition and Registration of Indians**

[...]

15. (1) Subject to subsection (2), an Indian who becomes enfranchised or who otherwise ceases to be a member of a band is entitled to receive from Her Majesty

(a) one per capita share of the capital and revenue moneys held by Her Majesty on behalf of the band, and

(b) an amount equal to the amount that in the opinion of the Minister he would have received during the next succeeding twenty years under any treaty then in existence between the band and Her Majesty if he had continued to be a member of the band.

[...]

(3) Where by virtue of this section moneys are payable to a person who is under the age of twenty-one, the Minister may

(a) pay the moneys to the parent, guardian or other person having the custody of that person or to the public trustee, public administrator or other like official for the province in which that person resides, or

(b) cause payment of the moneys to be withheld until that person reaches the age of twenty-one.

[...]

16. (1) Section 15 does not apply to a person who ceases to be a member of one band by reason of his becoming a member of another band, but, subject to subsection (3), there shall be transferred to the credit of the latter band the amount to which that person would, but for this section, have been entitled under section 15.

(2) A person who ceases to be a member of one band by reason of his becoming a member of another band is not entitled to any interest in the lands or moneys held by Her Majesty on behalf of the former band, but he is entitled to the same interest in common in lands and moneys held by Her Majesty on behalf of the latter band as other members of that band.

(3) Where a woman who is a member of one band becomes a member of another band by reason of marriage, and the per capita share of the capital and revenue moneys held by Her Majesty on behalf of the first-mentioned band is greater than the per capita share of such moneys so held for the second-mentioned band, there shall be transferred to the credit of the secondmentioned band an amount equal to the per capita share held for that band, and the remainder of the money to which the woman would, but for this section, have been entitled under section 15 shall be paid to her in such manner and at such times as the Minister may determine. R.S., c. 149, s. 16.

*Loi sur les indiens*, SRC 1970, c. I-6

**Définition et enregistrement des indiens**

[...]

15. (1) Sous réserve du paragraphe (2), un Indien qui devient émancipé ou qui, d'autre manière, cesse d'être membre d'une bande a droit de recevoir de Sa Majesté

a) une part *per capita* des fonds de capital et de revenu détenus par Sa Majesté au nom de la bande, et

b) un montant égal à la somme que, de l'avis du Ministre, il aurait reçue durant les vingt années suivantes aux termes de tout traité alors en vigueur entre la bande et Sa Majesté s'il était demeuré membre de la bande.

[...]

(3) Lorsqu'en vertu du présent article, des deniers sont payables à une personne de moins de vingt et un ans, le Ministre peut

a) payer les deniers au père ou à la mère, au tuteur ou à l'autre personne ayant la garde de cette personne, ou au curateur public ou administrateur public ou autre semblable fonctionnaire de la province où réside ladite personne, ou

b) faire suspendre le paiement des deniers jusqu'à ce que la personne ait atteint l'âge de vingt et un ans.

[...]

16. (1) L'article 15 ne s'applique pas à une personne qui cesse d'appartenir à une bande du fait qu'elle devient membre d'une autre bande, mais, sous réserve du paragraphe (3), le montant auquel cette personne aurait eu droit en vertu de l'article 15, sans le présent article, doit être transféré au crédit de la bande en dernier lieu mentionnée.

(2) Une personne qui cesse de faire partie d'une bande du fait qu'elle est devenue membre d'une autre bande n'a droit à aucun intérêt dans les terres ou deniers détenus par Sa Majesté au nom de la bande en premier lieu mentionnée, mais elle a droit au même intérêt en commun, dans les terres et les deniers détenus par Sa Majesté au nom de la bande en deuxième lieu mentionnée, que les autres membres de cette dernière.

(3) Lorsqu'une femme qui fait partie d'une bande devient membre d'une autre bande du fait de son mariage et que la part *per capita* des fonds de capital et de revenu détenus par Sa Majesté au nom de la bande en premier lieu mentionnée, est plus élevée que la part *per capita* des fonds ainsi détenus pour la bande en deuxième lieu mentionnée, il doit être transféré au crédit de la bande en deuxième lieu mentionnée un montant égal à la part *per capita* détenue pour cette bande, et le solde des deniers auxquels cette femme aurait eu droit aux termes de l'article 15, dans le présent article, doit lui être versé de la manière et aux époques que le Ministre détermine. S.R., c. 149, art. 16.

17 In addition, section 9 of the Former Act allowed, among other things, a person to protest, in writing to the Registrar, the inclusion, omission, addition or deletion of that person's name on or from a Band List or a General List. In the event of an adverse decision on the protest, section 9 also allowed such a person to request the Registrar to refer the decision to a judge for review. In this case, it is common ground that no such protest or request for judicial review was ever made.

18 Finally, it is relevant to note that the management, use and expenditure of "Indian moneys" under the Former Act was governed by sections 61 to 69. Among other things, subsection 61(1) provided that "Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held ..."

**III. Issues**

19 In their Statement of Claim, the Plaintiffs alleged that the Defendant breached:

i. a statutory obligation that they claimed existed under subsection 15(3) of the Former Act;

ii. an unspecified treaty obligation of fair dealing; and

iii. a fiduciary obligation to protect their economic interests.

20 Those allegations were all baldly asserted. It does not appear that the Plaintiffs articulated, at any time prior to the trial, the specific nature of the alleged obligations that they claimed had been breached.

21 At trial, the Plaintiffs abandoned their claims that the Defendant had breached statutory and treaty obligations owed to them. Indeed, as to the alleged statutory obligations, counsel to the Plaintiffs acknowledged that:

i. a plain reading of subsections 16(1), 16(2) and 16(3) of the Former Act supported the Defendant's position that subsection 15(3) did not apply to the Plaintiffs; and, therefore

ii. there was no basis upon which they could maintain that the Defendant had breached a statutory obligation, whether under subsection 15(3) or otherwise, to ensure that they were paid the difference between the value of a *per capita* share in the Sawridge Band and a *per capita* share of the Enoch Band (Court Transcript, pp 205-207, 257, and 274).

22 In short, the Plaintiffs accepted that, unlike their mother, who was entitled to be paid such an amount by virtue of being an Indian woman explicitly described in subsection 16(3), they had no statutory entitlement to be paid any monies as a result of their transfer from the Sawridge Band to the Enoch Band.

23 In addition to abandoning their claims that the Defendant had breached statutory and treaty obligations owed to them, the Plaintiffs also abandoned at trial their claims to: (i) judgment in the amount of $500,000 or such further or other sum as may be proved at trial; (ii) punitive damages in the sum of $100,000; and (iii) costs on a solicitor client basis.

24 Accordingly, the only remaining issue is whether the Defendant breached a fiduciary duty owed to the Plaintiffs.

**IV. Analysis**

***A. Did the Defendant owe a fiduciary duty to the Plaintiffs?***

25 As noted above, the Plaintiffs claimed that the Defendant breached a fiduciary obligation to protect their economic interests. At trial, they clarified, for what appears to have been the first time, the specific nature of the fiduciary obligation that they claim was owed to them in the circumstances of this case. It bears underscoring that, before providing that clarification, the Plaintiffs conceded that they had no entitlement to receive any payments from the Sawridge Band when they transferred the Enoch Band.

26 Having made that concession, the Plaintiffs then claimed that, prior to the point in time at which their parents signed the Statutory Declarations that the Registrar relied upon in directing the transfer of their names from the Sawridge Band List to the Enoch Band List, the Registrar had a fiduciary obligation to advise their parents, in their capacity as their guardians:

i. of the potential adverse financial consequences associated with signing the Statutory Declarations; and

ii. that it was open to them to refrain from signing the Statutory Declarations.

27 The principal adverse financial consequence that they identified was the significant difference between the monthly payments made by the Sawridge Band and the Enoch Band to their respective members. Mrs. Potskin testified that she received approximately $100 per month for each of the Plaintiffs from the Sawridge Band, whereas the corresponding payments received from the Enoch Band were only approximately $25 per month. In addition, counsel to the Plaintiffs implied that the Plaintiffs also may have been deprived of other financial benefits that might have been associated with being a member of the Sawridge Band, because a *per capita* share in that Band was worth approximately 30 times the value of a *per capita* share in the Enoch Band.

28 Moreover, the Plaintiffs claimed that, subsequent to the signing of the Statutory Declarations, the Registrar had a fiduciary duty to advise their parents of:

i. the aforementioned potential adverse financial consequences; and

ii. their right to protest the transfer, pursuant to subsection 9(3) of the Former Act, within the three month time period set forth in that provision.

*1. The Fiduciary Duties Alleged to Exist Prior to the Execution of the Statutory Declarations*

29 The fiduciary duties that the Plaintiffs claim were breached prior to the signing of the Statutory Declarations of paternity do not require significant discussion. In short, there is no persuasive evidence that the Registrar or anyone at the Department knew or ought to have known, prior to the execution of those documents that the Plaintiffs' parents were considering executing, or had been requested to execute, those documents. Indeed, there is no persuasive evidence that the Registrar or anyone at the Department knew or ought to have known that the Statutory Declarations had been signed prior to when they were sent to the Registrar by Mr. Fennell, on March 29, 1983.

30 During the Defendant's examination for discovery, Mrs. Potskin testified that the first time the Department was made aware of the identity of the Plaintiffs' father was after Mr. Fennell sent the Statutory Declarations of paternity to the Department in March 1983. The Plaintiff Dalvin Potskin testified that he adopted the testimony given by his mother on behalf of the Plaintiffs, and that he was authorized to give answers on behalf of his siblings.

31 During trial, a question arose as to whether Carole Holland, the Commissioner of Oaths who witnessed the execution of the Statutory Declarations by Harriet Potskin and Neil Morin, was an employee of the Department at that time. During his direct examination of Harriet Potskin, counsel to the Plaintiffs asked whether Mrs. Potskin was aware that another employee of the Department, Susan Weston, had testified that Ms. Holland was in fact an employee of the Department. Mrs. Potskin replied in the affirmative. However, counsel to the Defendant subsequently read into evidence the relevant portion of the transcript of the examination of Ms. Weston, dated January 17, 2006. That transcript revealed that Ms. Weston was not aware of whether Ms. Holland was employed with the Department at the time that Mrs. Potskin and Neil Morin signed their Statutory Declarations of paternity. After stating this fact, Ms. Weston simply stated that Ms. Holland was an employee of the Department when Ms. Weston began working with the department in December 1984.

32 Significantly, the Plaintiffs' counsel did not ask Mrs. Potskin whether, at the time she and Neil Morin signed the Statutory Declarations, they believed that Ms. Holland was employed by the Department. Instead, his focus was on: (i)

the circumstances under which she and Mr. Morin signed the Statutory Declarations; (ii) the communications she had with the Department; and (iii) whether anyone at the Department ever represented to her that monies were or would be held in trust for the Plaintiffs.

33 Regarding the circumstances under which the Statutory Declarations were signed, Mrs. Potskin testified that counsel to the Sawridge Band, Mr. Fennell, required her to sign a Statutory Declaration of paternity in late 1981 or early 1982, before the Sawridge Band would be prepared to release to her a special Christmas bonus that was paid to its Band Members at that time. She stated that she did not want to sign the declaration because she knew that it would probably lead to the Plaintiffs being transferred to the Enoch Band. However, she agreed to sign the document after Mr. Fennell told her that her children would receive a payment similar to the one that she received. Mrs. Potskin testified that Mr. Fennell added that, because they were minors, their respective payments would be placed in a trust account for them.

34 As it turned out, the document that Mrs. Potskin signed at Mr. Fennell's request either was misplaced or was not in fact a Statutory Declaration of paternity. As a result, Mrs. Potskin testified that, in April 1982, after she made an enquiry at the Enoch Band Office about why she had been receiving royalties from both the Sawridge Band and the Enoch Band, a representative of the latter Band requested her and Neil Morin to sign the Statutory Declarations of paternity that were the only such declarations filed in evidence in these proceedings. Those documents were executed on April 15, 1982. There is no evidence to suggest that they were signed under any form of duress.

35 For some reason, it was not until March 1983, when Mr. Fennell discovered that the Plaintiffs remained on the Sawridge Band list, that copies of those Statutory Declarations were forwarded to the Department for what appears to have been the first time. No evidence was adduced to suggest that the Department may have been aware, prior to March 1983, of the existence of those Statutory Declarations, or the Statutory Declaration that Mrs. Potskin testified to having signed at the behest of Mr. Fennell in late 1981 or early 1982.

36 With respect to her communications with the Department, Mrs. Potskin testified that she contacted the Department on numerous occasions. However, she did not state that any of those contacts were made prior to when she and Mr. Morin signed the Statutory Declarations. Indeed, two of the three people with whom she testified she had communicated at the Department (Mr. Sisson and Ms. Weston) did not begin to work at the Department until long after the Statutory Declarations had been signed. No evidence was adduced regarding when the third person (Mr. Hughes) started to work at the Department.

37 With respect to the question of whether anyone in the Department ever represented to her that monies were being held in trust for the Plaintiffs, Mrs. Potskin testified that no such representations were ever made by anyone in the Department. She stated that those representations were made by Chief Twim of the Sawridge Band and Mr. Fennell. There was no evidence that anyone at the Department ever knew or ought to have known that such representations had been made by Chief Twim and Mr. Fennell.

38 Based on the foregoing, I find that the Plaintiffs have not established, on a balance of probabilities that the Registrar or anyone else at the Department knew or ought to have known, prior to the point in time when the Statutory Declarations of paternity were signed, that their parents were considering executing, or had been requested to execute, those documents. As noted above, the evidence does not establish that anyone at the Department knew those documents had been signed until almost a year later, on March 29, 1983. Accordingly, even if I were prepared to agree with the Plaintiffs' submission that, prior to when the Statutory Declarations of paternity were signed, the fiduciary obligations described at paragraph 26 above were owed to them by the Defendant, the Defendant could not have breached those obligations. That said, for the reasons discussed below, I find that the Defendant was not subject to any of the fiduciary obligations asserted by the Plaintiffs.

39 I will now turn to the fiduciary duties that the Plaintiffs claim were owed to them and their parents *subsequent* to the signing of the Statutory Declarations.

*2. The Fiduciary Duties Alleged to Exist After the Execution of the Statutory Declarations*

40 In *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.), at 136, it was observed that fiduciary obligations have been imposed by the courts when relationships possess the following three general characteristics:

1. The fiduciary has scope for the exercise of some discretion or power.

2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

41 In *Apsassin v. Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 S.C.R. 344 (S.C.C.), at para 38, this view was briefly endorsed in the context of considering whether the circumstances of that case gave rise to a fiduciary obligation on the Crown with respect to the surrender of an Aboriginal reserve.

42 The leading cases in which the nature of the Crown's fiduciary obligation, if any, towards Aboriginal peoples has been assessed in greater detail have emphasized the existence of Crown discretion as being a critical threshold issue in the assessment.

43 In *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), at 383, Justice Dickson (as he then was), placed the importance of Crown discretion in context by noting, at the outset of his discussion of the Crown's fiduciary obligation in that case, that "[t]he concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery." After observing that, in enacting the Former Act, Parliament conferred discretion upon the Crown to protect Aboriginal peoples' "interests in transactions with third parties" from being exploited, he then proceeded to state, at p. 384, the following:

> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 UTLJ 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p 4, he puts the point in the following way:
>
>> [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.
>
> [Emphasis added.]

44 Importantly, Justice Dickson then clarified, at p. 385, that "[p]ublic law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the 'political trust' cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function."

45 The requirement that there be an exercise of Crown discretion, beyond the exercise of the Crown's legislative or administrative function, before a fiduciary obligation towards Aboriginal peoples will be recognized, has been embraced in several subsequent cases. Those cases have recognized that the existence of a public law duty on the part of the Crown

does not exclude the possibility that a fiduciary obligation will be found to exist in connection with the exercise of the Crown's discretion. However, before such an obligation will be triggered, the public duty must be "in the nature of a private law duty", or the obligation must originate "in a private law context" (*Roberts v. R.*, [2002] 4 S.C.R. 245 (S.C.C.) [hereinafter Wewaykum], at paras 85 and 96). This is so even in a general context in which the Crown may be said to be in a fiduciary relationship with Aboriginal peoples (*Wewaykum*, above, at paras 83 and 92).

46 In *Ermineskin Indian Band & Nation v. Canada*, [2009] 1 S.C.R. 222 (S.C.C.), at para 128, it was held that the surrender of the interests of the appellant Indian Bands' interests in oil and gas reserves found beneath the surface of their reserves gave rise to fiduciary obligations on the part of the Crown with respect to (i) the granting of rights to others to exploit those resources; and (ii) the manner in which the Crown handled the royalties received from such exploitation of the Bands' resources. Such obligations were found to arise by virtue of the Crown's "discretion with respect to the terms on which it granted rights to exploit the minerals and with respect to the way in which it dealt with the royalties it received on the bands' behalf" (*Ermineskin*, above, at paras 69-70, and 74).

47 That said, the Court proceeded to observe that "[a] fiduciary that acts in accordance with legislation cannot be said to be breaching its fiduciary duty" (*Ermineskin*, above, at para 128).

48 This approach is consistent with the jurisprudence of this Court and the Federal Court of Appeal. For example, in *Fairford First Nation v. Canada (Attorney General)* (1998), [1999] 2 F.C. 48 (Fed. T.D.), at para 63, it was held that "duties that arise from legislative or executive action are public law duties" and that "[s]uch duties ... typically do not give rise to a fiduciary relationship." With this in mind, the Court concluded:

> [T]he actions taken by the Indian Affairs Branch arose under and by reason of the *Indian Act* and the *Department of Citizenship and Immigration Act* and were public law duties. There is no indication they would be in the nature of private law duties such as when Indian land is surrendered. Nor is there any suggestion the Crown was exercising a discretion or power for on or behalf of the Indians. For these reasons, course of conduct by the Crown in its dealings with and for Indians under these Acts generally, may not be relied upon as a basis for the creation of a fiduciary duty upon the Crown and, in particular, with respect to its involvement with the Water Control Structure in this case." (*Fairford*, above, at para 63.)

49 A similar position was adopted in *Tsartlip Indian Band v. Canada (Minister of Indian Affairs & Northern Development)* (1999), [2000] 2 F.C. 314 (Fed. C.A.), at para 35, where the Federal Court of Appeal held:

> The concept of fiduciary duty is remarkably unsuited, in my view, for the purpose of defining what is the role of the Minister when, in the exercise of his statutory duties with respect to the management of land in a reserve, he assesses the competing interests of a member of a band on the one hand, and of the band as a whole. The Minister has no interest in the outcome of his decision. The Crown does not stand to gain any benefit from the decision of the Minister. Whatever the decision, the lands will remain lands on the reserve. There is no adversarial relationship between the Crown and the band as a whole or the member of the band. There is no legitimate public purpose to be advanced by the Minister which would be adverse to the interest of the Aboriginal people. There is no "exploitation" by the Crown of the band's or the locatee's rights.

50 In *Songhees Indian Band v. Canada (Minister of Indian Affairs & Northern Development)*, 2006 FC 1009 (F.C.), at para 67, the passage immediately above was quoted with approval by my colleague Justice Tremblay-Lamer, who added:

> [69] I echo the words of the Court of Appeal in *Tsartlip Indian Band* that the concept of fiduciary duty is unsuited to the Minister's exercise of his discretionary powers under the Act with respect to the management of reserve land. Under subsection 50(4), the Minister's role is simply to approve or not. The Minister is an uninterested participant in the process. The Crown is not a party and has nothing to gain from section 50 sales as these sales are only open to those eligible individuals under the Act, those being band members.

51 In *Squamish Indian Band v. R.*, [2000] F.C.J. No. 1568 (Fed. T.D.), at para 521, my colleague Justice Simpson went further and held as follows:

> It cannot be the case that each time legislation gives the Crown discretion to act, a Private Law Fiduciary Duty or even a *sui generis* fiduciary duty applies. This must be so because, in matters of public law, there will generally not be a reasonable expectation that the Crown is acting for the sole benefit of the party affected by the legislation. For this reason, it is my conclusion that, in matters of public law, discretion and vulnerability can exist without triggering a fiduciary standard. There would have to be special circumstances, other than those created by the legislation, to justify the imposition of a fiduciary duty on the Crown.

52 In the case at bar, no special circumstances were identified that would justify the imposition of such a fiduciary duty on the Crown.

53 Other courts have also taken the view that the Crown is not subject to any fiduciary duty in the exercise of its purely public law statutory responsibilities under the Act. This includes the exercise of the Registrar's duties under the Act. For example, in *Tuplin v. Canada (Registrar of Indian & Northern Affairs)*, 2001 PESCTD 89 (P.E.I. T.D.), the Prince Edward Island Supreme Court (Trial Division) rejected the appellant's assertion that the Registrar had a fiduciary duty towards him and his father when making her decision under the protest provisions in section 14.2 of the *Indian Act*, RSC 1985, c. I-5. In the course of reaching this conclusion, the Court observed:

> **56** This case calls for a note of clarification regarding application of fiduciary duty to government relations in aboriginal matters. There is an element of fiduciary duty in government relations with aboriginal peoples, applicable to negotiations and like matters. However, its presence does not extend to the Registrar's administration of an individual protest. In my understanding, the Supreme Court directives do not intend fiduciary duty to override, emasculate, or stand in conflict with the performance by an administrator such as the Registrar of a public law duty specifically prescribed by statute.

54 The same conclusion was reached in *Wilson v. Canada (Registrar of the Indian Registry)* (1999), 71 B.C.L.R. (3d) 145 (B.C. S.C.), at para 79.

55 Applying the jurisprudence discussed above to the Plaintiffs' claims, it is clear that, in the particular factual matrix of this case, the Crown did not owe to the Plaintiffs any of the fiduciary obligations to which the Plaintiffs claim the Defendant was subject.

56 None of the hallmarks of a fiduciary relationship that are identified in that jurisprudence were present in the relationship that existed between the Plaintiffs, as represented by their mother, and the Department.

57 In brief, counsel to the Plaintiffs conceded that, once the Registrar received the executed Statutory Declarations of paternity from Mrs. Potskin and Neil Morin, the Registrar had no discretion as to whether to transfer the Plaintiffs from the Sawridge Band to the Enoch Band (Court Transcript, at pp. 183, 203 and 241).

58 Moreover, throughout the history of this matter, the Registrar and other representatives of the Department who were involved were simply exercising public law duties that were not "in the nature of a private law duty" and that did not originate "in a private law context" (*Wewaykum*, above, at paras 85 and 96).

59 I am satisfied that, throughout their involvement in this matter, the Registrar and other representatives of the Department were simply acting in accordance with their responsibilities under the Former Act, such that they could not be said to have breached any fiduciary duty towards the Plaintiffs (*Ermineskin*, above, at para 128; *Fairford*, above, at para 63).

60 As in *Sam*, above, the Department was an uninterested participant throughout its dealings with the Plaintiffs and their parents. In this context, the above-quoted comments made by the Federal Court of Appeal in *Tsartlip* apply with

equal force. In short, the Department appears to have been caught between competing interests of the Plaintiffs and the Sawridge Band. The Department had no interest in the outcome of the matter, namely, whether the Plaintiffs remained on the Band List of the Sawridge Band or were transferred to the Band List of the Enoch Band, as contemplated by section 10 of the Former Act. The Department did not stand to gain any benefit from the transfer of the Plaintiffs to the Enoch Band. In addition, there was no adversarial relationship between the Department and the Plaintiffs, the Sawridge Band or the Enoch Band.

61 The Plaintiffs attempted to support their position by relying statements made by the Supreme Court in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (S.C.C.), at para 43. However, that part of the Court's decision dealt with the scope of the Crown's *duty to consult and accommodate, in connection with unresolved land claims*. In that regard, it was held that the content of *that* duty "varies with the circumstances" (para 39). The Court then proceeded to state: "At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida*, above, at para 43). Earlier in that case, it was specifically determined that "[t]he Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal Group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title" (*Haida*, above, at para18). Accordingly, that case does not assist the Plaintiffs.

62 In summary, based on all of the foregoing, I find that, subsequent to its receipt of the Statutory Declarations signed by the Plaintiffs' parents, the Department did not owe to the Plaintiffs any of the fiduciary obligations described at paragraph 28 above.

***B. Did the Defendant breach the fiduciary duty it owed to the Plaintiffs?***

63 Given my conclusions in Part IV.A above, it follows that the Defendant did not breach any of the fiduciary obligations that the Plaintiffs claimed were owed to them.

64 In short, there is no persuasive evidence that the Registrar or anyone else in the Department was aware that steps were being taken to effect the transfer of the Plaintiffs from the Sawridge Band to the Enoch Band until March 29, 1983, approximately one year after Harriet Potskin and Neil Morin signed the Statutory Declarations of paternity. So, even assuming, to put the matter in the best possible light for the Plaintiffs, that the Registrar owed fiduciary duties to advise the Plaintiffs' parents of the potential adverse financial consequences that might be associated with signing those Statutory Declarations, and that it was open to them to refrain from signing those documents, the Registrar was never in a position in which those duties could be exercised on behalf of the Plaintiffs. In these circumstances, it cannot be said that those fiduciary duties were breached, assuming that they even existed.

65 For the reasons discussed in Part IV.A above, once the Statutory Declarations of paternity were signed, the Registrar did not have a fiduciary obligation to advise the Plaintiffs or their parents of either: (i) the potential adverse financial consequences that could result from the transfer of the Plaintiffs from the Sawridge Band to the Enoch Band; or (ii) their right to protest the transfer, pursuant to subsection 9(3) of the Former Act, within the three month time period set forth in that provision. Accordingly, the Registrar's failure to provide such advice did not constitute a breach of any fiduciary duty.

66 Even if the Registrar had recognized that the Plaintiffs might be adversely impacted financially by virtue of being transferred from the Sawridge Band to the Enoch Band, the Registrar would not have breached any fiduciary duty that may have been owed to the Plaintiffs, by simply directing that such transfer occur. In acting as he did, the Registrar simply fulfilled the responsibilities that were contemplated by sections 10, 11 and 16 of the Former Act.

67 Specifically, once the Registrar was satisfied that Neil Morin was the natural father of the Plaintiffs, section 10 and paragraph 11(1)(d) of the Former Act contemplated that the Plaintiffs should be transferred to his band, namely, the Enoch Band. In addition, subsections 16(2) and (3) explicitly and implicitly contemplated that the Plaintiffs were

not entitled to any interest in the lands or moneys held by the Crown on behalf of the Sawridge Band. Moreover, as counsel to the Plaintiffs conceded during the trial of this matter, the plain wording of subsection 16(1) is inconsistent with the Plaintiffs' initial claim that they were entitled, under subsection 15(3) of the Former Act, to receive a share of the Sawridge Band's monies, upon their ceasing to be members of that band.

68 The evidence suggests that the Department's interpretation of these provisions in the Former Act was consistent with the interpretation and policies that it maintained prior and subsequent to the execution of the Statutory Declarations by the Plaintiffs' parents (Agreed Exhibit Book, Exhibits #1, 2, 16, 17, 23, 28, 34, 36, 38 and 41). That interpretation also was consistent with the legal advice received by the Department, after Mrs. Potskin's inquiries prompted local officials who were unaware of the Department's position regarding the aforementioned provisions of the Former Act to request clarification from the Department's head office in Ottawa.

69 There was nothing in the Former Act that required the Registrar or anyone else in the Department to advise the Plaintiffs or their parents of: (i) the financial consequences of being transferred from the Sawridge Band to the Enoch Band; or (ii) their right to protest that transfer, pursuant to subsection 9(3) of the Former Act. There was also nothing in the Former Act that required the consent of either the person(s) being transferred or the Bands involved in the transfer.

70 Indeed, Mrs. Potskin was well aware of at least some of the adverse financial consequences that would be associated with such a transfer, because, for a period of time in early 1982, she was receiving monthly payments from both the Sawridge Band and the Enoch Band. As discussed above, those payments were approximately $100 and $25 per person, respectively. It was the receipt of these payments from both Bands that prompted her to make the inquiries which, in turn, led the Enoch Band to request that she and Neil Morin sign the Statutory Declarations that led to the official transfer of the Plaintiffs to the Enoch Band.

71 During the trial, counsel to the Plaintiffs kept returning to Mrs. Potskin's allegation that Mr. Fennell and Chief Twim represented to her that a portion of the Plaintiffs' *per capita* share interest in the Sawridge Band would be placed in trust for the Plaintiffs until they reached the age of majority. When pressed as to the relevance of that allegation for the purposes of these proceedings, he suggested that it could be inferred from this that the Department was aware that "something was going on with Mrs. Potskin that [it] ought to be getting involved with" (Court Transcript, at pp. 222-223). However, the only "evidence" that he identified to support this assertion was a document from another file, involving Mrs. Potskin's sister and her nephews.

72 That document was a letter from the Registrar, dated February 1, 1984, to Mr. Fennell in which the Registrar: (i) agreed with Mr. Fennell that, upon the marriage of the parents of two of Harriet Potskin's nephews, he would "have to transfer [the nephews] from the Sawridge Band to [their father's band] under the provisions of section 10 of the Indian Act"; and (ii) stated that, "in such an instance, an appropriate portion of per capita share of the Sawridge Band also becomes transferable to the [father's band] as provided by section 15 of the *Indian Act*." In my view, that letter does not provide any persuasive support whatsoever for the claim that the Department was aware that "something was going on with Mrs. Potskin [and the Plaintiffs that the Department] ought to be getting involved with." That letter involved Mrs. Potskin's nephews, rather than the Plaintiffs, and post-dated, by almost two years, the point in time at which Mrs. Potskin and Neil Morin signed their Statutory Declarations. As to the reference in the letter to section 15, it may well have simply been a typographical error. In any event, it has little, if any, import for the case at bar.

73 Counsel to the Plaintiffs attempted to rely on another document from the file of Mrs. Potskin's nephews, to support the claim that the Department should have advised Mrs. Potskin that she was not obliged to sign a Statutory Declaration of paternity. However, unlike her sister, who approached the Department to inquire as to the potential consequences of signing such a declaration, Mrs. Potskin made no such similar approach to the Department prior to signing her Statutory Declaration. As discussed above, the Department did not know anything about this matter until after Mrs. Potskin and Neil Morin signed their Statutory Declarations.

74 Moreover, the Department did not advise Mrs. Potskin's sister that she was not obliged to sign a Statutory Declaration of paternity. It simply stated that if Statutory Declarations were provided by both parents, the Department would be obliged to report their children's transfer to their father's band, subject to one exception, namely, where the children were found to be not entitled to to be registered (Exhibit 36).

75 In passing, I should add that I have great difficulty with the suggestion that it might be possible for the Department to breach a fiduciary obligation owed to the Plaintiffs, by failing to advise their mother as to how she might avoid the application of the law. This is particularly so given that: (i) Dalvin Potskin and Mrs. Potskin appear to have accepted, in examination for discovery and testimony, respectively, that Neil Morin is the natural father of the Plaintiffs; and (ii) the only other evidence regarding the paternity of the Plaintiffs suggests that Mr. Morin is in fact the Plaintiffs' natural father. At no time did Mrs. Potskin or Dalvin Potskin ever take the opportunity to raise any doubt on this point.

76 In summary, I find that the Defendant did not breach any fiduciary obligation owed to the Plaintiffs by failing to advise them or their parents of either: (i) the potential adverse financial consequences that could result from the transfer of the Plaintiffs from the Sawridge Band to the Enoch Band; or (ii) their right to protest the transfer, pursuant to subsection 9(3) of the Former Act.

77 There was no exploitation, wrongdoing, misconduct, disloyalty, lack of good faith or evenhandedness, ineptitude or other behaviour that could be said to be tantamount to a breach of confidence or that otherwise might provide the basis for this Court to find that the Defendant breached any fiduciary obligation that the Defendant may have owed to the Plaintiffs in respect of their economic interests (*Guerin*, above, at 383; *Wewaykum*, above, at paras 80 and 95). The Registrar simply acted in accordance with his statutory responsibilities (*Ermineskin* , above, at para 128; *Fairford*, above, at para 63; *Tsartlip*, above, at para 35; *Sam*, above, at para 67).

***C. Did the Plaintiffs initiate this action beyond the applicable limitation period?***

78 It was common ground between the parties that, pursuant to the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, ss 24 and 32, and the *Federal Courts Act*, RSC 1985, c F-7, s 39, the applicable limitation period in this case is that which is established by the laws of Alberta (Court Transcript, p. 287).

79 The Plaintiffs filed their Statement of Claim on July 10, 2001. They submit that this action was brought within the applicable limitation period, because the Defendant continued to reassess its position regarding the interplay between subsection 15(3) and section 16, until February 5, 2001, when it finally provided a definitive response regarding its position. I disagree.

80 On examination for discovery, Mrs. Potksin stated as follows:

> I've been trying to do this lawsuit forever. I started it, like in 1989 and procrastinated, left it alone for a few years; and strated [*sic*]again with Tony Mandamin and then kind of left it alone. And finally got serious about this, yes. And I gathered a little bit of information and then lose [*sic*] the paperwork again.

81 The foregoing passage indicates that Mrs. Potskin was well aware, at least as early as approximately 1989, that she had a potential cause of action in respect of the claims that are the subject of this action.

82 In any event, on December 10, 1993, Mr. Jim Sisson, the Acting Director of the Lands and Trust Services Branch of the Department's Alberta Region, confirmed in writing the verbal response that he gave to Mrs. Potskin on December 2, 1993. In his letter, he explained that her file had been forwarded to Ottawa for review and that it had been determined by officials in Ottawa that the Plaintiffs "were not entitled to a share of Sawridge Band Indian moneys in respect to [*sic*] their transfer of band membership." Mr. Sisson also explained that subsection 15(3) of the Former Act had no application to a minor who transferred into another Band pursuant to subsection 16(1), and that the Plaintiffs fell within the scope of the latter provision.

83 In my view, as of the date of that letter from Mr. Sisson, Mrs. Potskin, on behalf of the Plaintiffs, ought to have been able to determine whether the Plaintiffs had a potential cause of action in respect of this matter, by exercising reasonable due diligence and retaining counsel (*Papaschase Indian Band No. 136 v. Canada (Attorney General)*, [2008] 1 S.C.R. 372 (S.C.C.), at para 16; *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at 224; *Stack v. Hildebrand*, 2010 ABCA 108 (Alta. C.A.), at para 14).

84 If I am wrong on this point, then, at the very latest, the Plaintiffs discovered that they had a potential cause of action when they retained legal counsel, in 1994 or early 1995. On January 25, 1995, their former legal counsel, Mr. Tony Mandamin, wrote to the Department to advise that he was advancing a claim on behalf of the Defendants. In his letter, Mr. Mandamin stated that: (i) the claim was for the funds the Plaintiffs should have received upon their transfer from the Sawridge Band to the Enoch Band; (ii) the Crown, through the Minister and his officials, stood in a fiduciary relationship with the Plaintiffs; and (iii) the Crown was obligated to protect their interests. Mr. Mandamin elaborated on this position in a more detailed letter dated March 22, 1995.

85 At the end of the latter letter, Mr. Mandamin: (i) stated that he understood that the Department was reconsidering the matter "in conjunction with Justice Department lawyers"; and (ii) requested that his letter be forwarded to those lawyers, so that they could give consideration to the "fiduciary and trust issues arising in this case." Even if I were to agree with the Plaintiffs' position that the applicable limitation period did not start to run until the Defendant reached a definitive position on this matter and communicated that position to the Plaintiffs, I find that this occurred on June 28, 1995. In a letter written to Mr. Mandamin, dated July 28, 2005, Mr. Gregor MacIntosh, Director General of the Registration, Revenues and Band Governance Branch at the Department's headquarters in Ottawa, confirmed the advice that he stated was provided to Mr. Mandamin verbally on June 28, 1995. That advice was that the Plaintiffs were not entitled to any Sawridge Band monies as a result of their transfer to the Enoch Band.

86 The Plaintiffs' current counsel claims that the Department continued to reassess its position until February 5, 2001. I disagree. In response to letters that he wrote to the Department on June 9, 2000 and December 8, 2000, Mr. Daniel Kumpf, an official in the Department's Alberta Region, stated:

> Please be advised that my staff consulted with our Indian Moneys Directorate in Ottawa on this issue. As indicated in Susan Weston's June 30, 1995 correspondence (copy attached) a reassessment of this issue was completed. As a result of this review, the department's position remains unchanged from our position set out in the letter dated July 28, 1995 from Gregor MacIntosh to Tony Mandamin (copy attached).

87 In my view, it is clear from the foregoing passage that the last internal reassessment of the Department's position took place in June 1995. As I have noted above, that position was communicated to Mr. Mandamin on June 28, 1995. Accordingly, even if I were to accept the Plaintiffs' position that the applicable limitation period did not start to run until the Department finished reassessing its position regarding the interplay between subsection 15(3) and section 16 of the Former Act, that date would be June 28, 1995. The Statement of Claim in this matter was filed more than six years after that date.

88 The date upon which the last of the Plaintiffs reached the age of majority in Alberta was on April 19, 1999, which is more than two years before their Statement of Claim was filed.

89 Therefore, even under the former *Limitation of Actions Act*, RSA 1980, c L-15, this action was statute-barred.

90 However, the applicable limitation period is now set forth in the *Limitations Act*, RSA 2000, c L-12, which was proclaimed into force on March 1, 1999. Pursuant to section 2 of that legislation, the limitation period in this matter expired by the earlier of:

> i. June 28, 2001, which is six years after the latest date by which the Plaintiffs ought to have known that they had a potential cause of action, and is the most favourable date under the *Limitation of Actions Act*, above; and

ii. March 1, 2001, which is two years after the *Limitations Act*, above, came into force.

91 Subsections 2(1) and 2(2) of the *Limitations Act*, above, set forth the transitional provisions applicable to causes of action arising before March 1, 1999. Those provisions state:

*Limitations Act*, RSA 2000, c. L-12

**Application**

2(1) This Act applies where a claimant seeks a remedial order in a proceeding commenced on or after March 1, 1999, whether the claim arises before, on or after March 1, 1999.

(2) Subject to sections 11 and 13, if, before March 1, 1999, the claimant knew, or in the circumstances ought to have known, of a claim and the claimant has not sought a remedial order before the earlier of

(a) the time provided by the *Limitation of Actions Act*, RSA 1980 cL-15, that would have been applicable but for this Act, or

(b) two years after the *Limitations Act*, SA 1996 cL-15.1, came into force,

the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

(2.1) With respect to a claim for the recovery of possession of land as defined in the *Limitation of Actions Act*, RSA 1980 cL-15, subsection

(2) shall be read without reference to clause (b) of that subsection.

(3) Except as provided in subsection (4), this Act is applicable to any claim, including a claim to which this Act can apply arising under any law that is subject to the legislative jurisdiction of the Parliament of Canada, if

(a) the remedial order is sought in a proceeding before a court created by the Province, or

(b) the claim arose within the Province and the remedial order is sought in a proceeding before a court created by the Parliament of Canada.

(4) This Act does not apply where a claimant seeks

(a) a remedial order based on adverse possession of real property owned by the Crown, or

(b) a remedial order the granting of which is subject to a limitation provision in any other enactment of the Province.

(5) The Crown is bound by this Act.

92 Accordingly, it is clear that the applicable limitation period in this matter expired on March 1, 2001, before the Statement of Claim was filed by the Plaintiffs. This action is therefore statutebarred, even on a view of the facts that is the most favourable to the Plaintiffs.

**V. Procedural Issues**

93 Just before the Plaintiffs closed their case at trial, they verbally sought leave to amend their pleadings, pursuant to Rule 201 of the *Federal Courts Rules*, SOR/98-106. In short, they sought to amend their pleadings to add the Enoch Band as a party to the proceedings. They wanted to do this to enable the Plaintiffs to claim, on behalf of the Enoch

Band, the monies that the Enoch Band should have received from the Sawridge Band, pursuant to subsection 16(1) of the Former Act, when the Plaintiffs were transferred from the latter to the former.

94 I rejected the Plaintiffs' request from the Bench, on the basis that I was inclined to agree with the Defendant's position that it would suffer substantial prejudice if the amendment were allowed. I added that I did not believe that it would be appropriate to allow the amendment in the circumstances.

95 Those circumstances were essentially those that were identified by the Defendant. These included the following: (i) the Plaintiffs gave no indication during the pre-trial conference or at the outset of the trial that this potential amendment might be sought; (ii) no discovery had been conducted in respect of the issue of why the Enoch Band had not received from the Sawridge Band the payment contemplated by subsection 16(1); (iii) no party led evidence in respect of that issue; (iv) there was no document from the Enoch Band authorizing the Plaintiffs to seek that payment on behalf of the Enoch Band; (v) there was no evidence that the Plaintiffs had even consulted with the leadership of the Enoch Band in respect of this issue; and (vi) the Enoch Band appears to have had the opportunity to join this lawsuit as long ago as 1998, when one of the Plaintiffs' parents discussed this lawsuit with representatives of the Band, which subsequently extended a loan to enable the Plaintiffs to retain their current counsel.

96 Based on the foregoing, it would not have been in the interest of justice to permit the proposed amendment. In my view, such an amendment would have resulted in severe prejudice to the Defendant that would not have been compensable by a cost award (*Maurice v. Canada (Minister of Indian Affairs & Northern Development)*, 2004 FC 528 (F.C.), at paras 10-11; Rule 76).

97 After the Plaintiffs closed their case and had addressed all issues with the exception of whether this action was statute-barred, their counsel asked for leave to adduce into the evidentiary record three additional documents. Prior to that time, he had not disclosed the documents, which he stated had just been found over the lunch period that day, to counsel to the Defendant. After briefly exploring whether any of those documents might be particularly relevant, such that it might be contrary to the interests of justice to refuse the Plaintiffs' request, I upheld the Defendant's objection to that request.

98 In short, I agree with the Defendant that Rule 232(1) contemplates that the Court should not allow a party to adduce documents into evidence that fail to meet one of the three requirements set forth therein, or that fail to meet the exception set forth in Rule 232(2), unless it would be in the interest of justice or otherwise appropriate to grant the party's request. In the case of the three documents sought to be adduced by the Plaintiffs, I am not persuaded that it would have been in the interest of justice or otherwise appropriate to grant the Plaintiffs' request, particularly given (i) the very late stage in the proceedings at which the request was made; (ii) the prejudice that would be caused to the Defendant; and (iii) the very limited, if any, relevance of the documents to the issues that then remained in this case.

**VI. Conclusion**

99 The Plaintiffs clearly suffered at least some adverse financial consequences, such as reduced monthly royalty payments, as a result of their transfer from the Sawridge Band to the Enoch Band. However, those consequences flowed directly from the Registrar's application of the Former Act. In short, section 10 of the Former Act required the minor children of a male Aboriginal to be registered on the same Band List as their father.

100 In these circumstances, even if the Registrar could be said to have owed a general fiduciary duty to protect the Plaintiffs' economic interests, he did not breach that duty by (i) directing the transfer of the Plaintiffs from the Sawridge Band to the Enoch Band; (ii) failing to advise the Plaintiffs' parents of the potential adverse financial consequences associated with signing the Statutory Declarations of paternity; (iii) failing to advise the Plaintiffs' parents that it was open to them to refrain from signing those documents; or (iv) failing to advise the Plaintiffs' parents of their right to protest the transfer, pursuant to subsection 9(3) of the Former Act.

101 Moreover, this action was brought beyond the applicable limitation period. As such, it is statute-barred.

102 This action is, therefore, dismissed with costs to the Defendant.

**Judgment**

*THIS COURT ORDERS AND ADJUDGES that*:

1. This action is dismissed with costs to the Defendant; and,

2. The style of cause in this matter shall be amended to reflect the correct spelling of the Plaintiffs' names, as indicated in the style of cause above.

*Action dismissed.*

TAB 5

CT-2017-008

**THE COMPETITION TRIBUNAL**

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

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

**B E T W E E N:**

**COMMISSIONER OF COMPETITION**


COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT
Date: November 28, 2017
CT-2017-008
Bianca Zamor for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT. # 24


**Applicant**

**-and-**

**HUDSON'S BAY COMPANY**

**Respondent**

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**Memorandum of Fact and Law of the Commissioner of Competition**

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Counsel to the Commissioner of Competition

**CT-2017-008**

**THE COMPETITION TRIBUNAL**

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

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**B E T W E E N:**

**COMMISSIONER OF COMPETITION**

**Applicant**

**-and-**

**HUDSON'S BAY COMPANY**

**Respondent**

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**Memorandum of Fact and Law of the Commissioner of Competition**

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## Overview

1. This motion is for an order directing the Hudson's Bay Company ("**HBC**") to comply with the Scheduling Order dated May 26, 2017 (the "**Scheduling Order**") and that it be made to produce a further and better affidavit of documents, inclusive of the period from approximately February 2015 until now (the "**Disputed Time Period**"), within ten days of this motion, failing which the HBC Response is to be struck preemptively. HBC has failed to identify a single document to the Commissioner of Competition (the "**Commissioner**") in respect of the Disputed Time Period.

2. HBC and the Commissioner, with the assistance of the Competition Tribunal (the "**Tribunal**"), agreed to a Scheduling Order which required the parties to produce an affidavit of documents. The Scheduling Order accommodated HBC's request for additional time to produce its affidavit of documents. Despite the clear terms of the Scheduling Order, HBC has failed to produce an affidavit of documents for the Disputed Time Period. HBC is in substantial non-compliance with the Scheduling Order.

3. The deficiencies of HBC's affidavit of documents cannot be cured or addressed through oral discoveries. HBC has failed to identify documents for almost a three year period. There is a marked difference between situations where (a) a select number of documents have not been produced and where the examination for discovery can elicit this missing documentary information and (b) there has been substantial non-compliance with a production order and discovery obligations. The latter cannot be cured through oral discoveries. HBC must be made to produce a complete affidavit of documents in advance of oral discoveries.

4. HBC's conduct is a deliberate attempt to narrow these proceedings into its "reviewable conduct" and preclude the Commissioner from addressing the entirety of HBC's conduct. HBC is attempting to limit discovery and ultimately the Tribunal's remedial powers to those discrete misrepresentations identified in the Commissioner's Notice of Application. HBC misreads the Notice of Application. HBC continues to engage in "reviewable conduct" and substantially similar reviewable conduct as it relates to sleep sets, conduct that extends well beyond 2015. The promotional practices underlying HBC's "reviewable conduct" are also widespread and apply to other products, beyond sleep sets. The purpose of Part VII.1 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "**Act**") is to remedy the harm caused by the deceptive marketing practices for the benefit of consumers and the Canadian economy. In furtherance of that purpose, which is provided for in the Act, the Commissioner is entitled to seek a remedy (and hence obtain discovery and a complete affidavit of documents) for the conduct in issue or substantially similar conduct. The Commissioner is entitled to inquire into the extent to which HBC continues to engage in "reviewable conduct" as it relates to sleep sets for the Disputed Time Period and, more broadly, how the underlying promotional practices have been applied and continue to be applied by HBC to other products.

5. The Commissioner is not engaged in a fishing expedition. To the contrary, the Commissioner has a very clear view of what category of documents should be produced by HBC in these proceedings for the Disputed Time Period, which should, for example, include: (a) documents relating to HBC's post-January 2015 practices for setting prices for sleep sets, including documents related to setting the regular price and promotional prices; changing the regular or promotional price; monitoring of competitors' prices; influence of manufacturers on prices, etc.; (b) documents relating to HBC's post-January 2015 sleep set marketing practices, including documents related to the marketing process; market research and studies; (c) HBC's post-January 2015 financial documents related to sleep sets including documents setting out gross margin analysis; profitability; revenues; strategic planning and growth strategies; forecasting, etc.; (d) documents relating to HBC's post-Jan 2015 practices regarding compliance with the Act for sleep sets; (e) documents relating to HBC's continued use of "end of line" representations with respect to sleep sets; and (f) documents relating to HBC's compliance practices and policies for the products other than sleep sets HBC offers and has offered for sale. A more detailed listing of categories of documents, which is cross-referenced to the Notice of Application, is found at Annex "A" to this Memorandum of Fact and Law.

**Part I – The Facts**

6. Pursuant to an application by the Commissioner, the Federal Court issued an order pursuant to paragraph 11(1)(b) of the *Act* requiring HBC to produce records up to the date of issuance of that Order, January 30, 2015 (the "**Section 11 Order**"). HBC produced approximately 27,000 records in response to the Section 11 Order. These documents, which were produced prior to these proceedings, form part of the 37,000 that were produced in the HBC affidavit of documents.

7. On February 22, 2017, the Commissioner filed a Notice of Application for an order pursuant to section 74.1 of the *Act*, in respect of conduct reviewable pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the *Act*. The Commissioner is seeking an order prohibiting HBC from engaging in the reviewable conduct or substantially similar reviewable conduct for **any** product supplied by HBC in Canada. The remedy is broad and extends beyond sleep sets.

8. The Notice of Application states that HBC's conduct is ongoing and HBC has engaged in deceptive marketing practices since at least March 1, 2013 until now. The Notice of Application contains discrete examples of sleep set representations made by HBC which constitute "reviewable conduct" under the *Act*, but the remedy sought is not limited to only those examples.[1] HBC continues to promote sleep sets and many other types of products using the same promotional practices as are illustrated in the Notice of Application.

9. The Notice of Application states that HBC's internal compliance mechanism applies to all products that it offers for sale. Yet this same compliance program was unable to ensure that the representations identified in the Notice of Application were compliant with subsection 74.01(3) and paragraph 74.01(1)(a) of the *Act*.[2] The same compliance measures used by HBC for sleep sets also apply to all other products HBC offers for sale.

10. In his Reply, the Commissioner states: "[T]he conduct at issue is HBC's promotional practices. Requiring HBC to comply with the law for similar representations regardless of product is in line with an order prohibiting 'substantially similar reviewable conduct'. HBC's compliance program applies to a full host of products HBC offers for sale to consumers and in the example of [the representations in the Application]…, utterly failed to prevent breaches of the *Act*." [3]

11. On May 25, 2017, a Case Management Conference was held during which the scheduling of the steps in these proceedings was discussed with counsel. HBC's counsel indicated HBC required additional time to produce an affidavit of documents given the volume of documents that it had previously collected but not produced in response to the Section 11 Order. The time requested by counsel for HBC was agreed to by the Commissioner, but it was assumed that

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[1] Notice of Application, at p.10 of Commissioner's Motion Record, Exhibit "A" of Affidavit of Alexander, at para. 3, Commissioner Motion Record, at p. 6.

[2] Paras. 106 to 110 of the Notice of Application, at p.48 of Commissioner's Motion Record, Exhibit "A" of Affidavit of Alexander, at para. 3, Commissioner Motion Record, at p. 6.

[3] Para 19 of the Reply, at p.88 of Commissioner's Motion Record, Exhibit "C" of Affidavit of Alexander, at para. 4, Commissioner's Motion Record, at p. 6.

HBC would produce a complete affidavit of documents in due course and as provided for in the eventual Scheduling Order.[4]

12. On May 26, 2017, the Tribunal issued the Scheduling Order in which it ordered the parties to exchange affidavits of documents and produce the documents listed therein on or before September 29, 2017.[5]

13. By agreement of counsel, both HBC and the Commissioner agreed to list but not reproduce the documents already provided in response to the Section 11 Order in their respective affidavits of documents.[6]

14. On September 29, 2017, HBC provided a copy of its affidavit of documents to the Commissioner. HBC produced approximately 10,000 documents with its affidavit of documents, supplementing the approximately 27,000 documents previously produced pursuant to the Section 11 Order. HBC failed to list or produce any documents after February 9, 2015, in its affidavit of documents. HBC's production extends only 10 days beyond the issuance of the 2015 Section 11 Order.[7] HBC contends that anything beyond the February 9, 2015, date is not relevant, regardless of the fact that it continues to make the same type of representations to promote sleep sets and other products.

15. HBC has not disclosed any documents for the Disputed Time Period. Almost three years of HBC's conduct is unaccounted for in its documentary production notwithstanding that the Notice of Application for this proceeding states HBC's conduct is ongoing and that the underlying promotional practices are widespread.[8]

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[4] Affidavit of Alexander, at para.6, Commissioner's Motion Record, at p. 6.

[5] Scheduling Order, at pgs 91-96 of Commissioner's Motion Record, "Exhibit "D" of Affidavit of Alexander, at para.6, Commissioner's Motion Record, at p. 6.

[6] Affidavit of Alexander, at para.8, Commissioner's Motion Record, at p. 6.

[7] Affidavit of Alexander, at para.9, Commissioner's Motion Record, at p. 7.

[8] Affidavit of Alexander, at para.10, Commissioner's Motion Record, at p. 7.

16. On October 24, 2017, counsel for the Commissioner wrote to counsel for HBC to advise him of the deficiencies in HBC's affidavit of documents. Counsel for the Commissioner requested an explanation for the limited scope of HBC's production.[9]

17. On October 31, 2017, counsel for HBC responded and advised that "it may be appropriate [for HBC] to make some supplementary production" in **due course** [emphasis added]. Counsel for HBC went on to say "Assuming that HBC will make some supplementary production, we are hoping to be able to do so **by mid-December**" [emphasis added]. No firm time frame or commitment to produce the documents was communicated by counsel for HBC.[10] At no time did HBC indicate that the Disputed Time Period was not relevant to the proceedings.

18. On November 6, 2017, counsel for the Commissioner advised counsel for HBC that he required a commitment from HBC to produce the documents, with a date for the production of these documents. Further, counsel for the Commissioner requested a response from HBC, in order to avoid a motion before the Tribunal.[11] The language used in the October 31, 2017 HBC email was tentative, non-committal and indicative of a party that was not prepared to comply with the Scheduling Order.

19. To date, a total of approximately 37,000 documents have been produced by HBC as part of these proceedings. Of these, 27,000 documents had already been produced under the Section 11 Order. Given the number of documents HBC has already produced, HBC may be in possession of tens of thousands of additional documents relevant to this Application that it has not listed or produced.[12]

[9] Pg 98 of Commissioner's Motion Record, Exhibit "E"of Affidavit of Alexander, at para.11, Commissioner's Motion Record, at p. 7.

[10] Pg 100 of Commissioner's Motion Record, Exhibit "F" of Affidavit of Alexander, at para.12, Commissioner's Motion Record, at p. 7.

[11] Pg 103 of Commissioner's Motion Record, Exhibit "G" of Affidavit of Alexander, at para.13, Commissioner's Motion Record, at p. 7.

[12] Affidavit of Alexander, at para.14, Commissioner's Motion Record, at p. 8.

20. Following the filing of the Commissioner's motion, HBC has now changed its positon from what it communicated to the Commissioner in the email of October 31, 2017 and it has now taken the position that the documents for the Disputed Time Period are either not relevant or the efforts required to produce them are disproportionate. [13]

**Part II - The Issue**

21. The issue to be resolved is as follows:

Is the Commissioner entitled to a remedy in respect of HBC's substantial non-compliance with the Scheduling Order requiring it to produce a complete affidavit of documents?

**Part III – Argument**

*There has been Substantial Non-Compliance with Tribunal Order*

22. HBC has failed to comply with the Scheduling Order. While HBC delivered its affidavit of documents on September 29, 2017 in accordance with the date in the Scheduling Order, its affidavit of documents fails to list documents from the Disputed Time Period. This is substantial non-compliance with a Tribunal Order that must attract serious sanctions.

23. Within the context of court orders issued under status review, the Federal Court has made it clear in that any unjustified non-compliance with a scheduling order is a serious matter in itself. An unjustified default is sufficient for the Court to strike the pleading of a Respondent.[14] An affidavit of documents that omits to identify almost three-year's worth of documents is clearly an unjustified default.

24. This is not a case where there has been a mere omission for which a remedy can be dispensed under Rule 227 of the *Federal Courts Rules*. This is a case about substantial non-compliance

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[13] Pg 100 of Commissioner's Motion Record, Exhibit "F" of Affidavit of Alexander, at para.12, Commissioner's Motion Record, at p. 7.

[14] *Créations Magiques (CM) Inc. v. Madispro Inc.*, 2005 FC 281, at paras 20 – 21.

with a Scheduling Order for which this Tribunal is not limited to the remedies provided for under Rule 227. Striking out the HBC Response is very much an option for the Tribunal.

25. While the striking out of the HBC Response is a serious act, the prejudice to HBC should not be of great concern to the Tribunal. As is the case with the breach of a scheduling order under status review, an assessment of the prejudice to a party is not part of the equation that is to be applied. If any prejudice should be taken into consideration, it is the prejudice to the Tribunal and those of its users who comply with the rules and the orders that it issues.[15] Every single day that this matter is delayed is a day where HBC engages in potentially reviewable conduct in the promotion of the products it offers for sale and generates significant revenues from the sale of those products.

26. HBC identified almost 37,000 documents in its affidavit of documents. Based on the number of documents already produced, the Commissioner will be seriously prejudiced in having to process what may be thousands of additional documents. The Commissioner also has no idea of when HBC will produce the remaining documents, if at all, and whether he will have sufficient time to review them in time for the oral discovery. These delays are prejudicial to the mandate of the Commissioner which among other things is to ensure that consumers are not misled when making purchasing decisions.

27. HBC has acknowledged in its correspondence that its affidavit of documents does not cover the Disputed Time Period. At first, as seen in the HBC October 31, 2017 email, counsel remained tentative on its obligation to produce documents for the Disputed Time Period, almost suggesting that a further production would follow. That tune has now changed. The position now taken by HBC is that the Disputed Time Period is not relevant to these proceedings as the inquiry is only in respect of a select number of sleep sets. HBC misreads the Notice of Application or chooses to read it in a manner that is self-serving. The Commissioner has no option but to request a remedy from this Tribunal.

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[15] *Trusthouse Forte California Inc. et al. v. Gateway Soap & Chemical Co.* (1998), 1998 CanLII 8897 (FC), 161 F.T.R. 88, at page 89.

*HBC must be ordered to produce a further and better Affidavit of Documents*

28. There has been substantial non-compliance by HBC of its discovery obligations under the Tribunal rules and it must be ordered to produce a further and better affidavit of documents within a period of ten days, failing which its Response must be struck pre-emptively. HBC has had the benefit of an inordinate amount of time under the Scheduling Order to produce an affidavit of documents, which it has failed to do.

29. Rule 60 (1) of the *Competition Tribunal Rules* provides that the applicant and the respondent must, within the time prescribed at a case management conference, serve an affidavit of documents on each other party. Rule 60(2) further provides that the affidavit of documents must, amongst other things, include a list identifying the documents that are relevant to any matter in issue and that are or were in the possession, power or control of the party.[16] The obligations found in Rule 60(1) were rolled up and inserted into a Scheduling Order which elevates the legal obligations that HBC had in producing a complete affidavit of documents.

30. In any event, when faced with a deficient affidavit of documents, a party to a proceeding has one of two choices: (a) it may wait until examination for discovery and elicit the documents that it requires at discoveries, or (b) it may move before the Tribunal compelling a further and better affidavit of documents. However, the tipping point is where the affidavit of documents is so deficient and lacking that eliciting of documents at discoveries is not a suitable substitute. In this case, not a single document has been produced for the period February 2015 to present.

31. There is no debate between the parties that an entire period has not been included in HBC's affidavit of documents. More than 37,000 documents have been produced up to February 2015. HBC has, however, failed to produce a complete and accurate affidavit of documents and thousands of documents may be missing.

[16] Rule 60(1) and 60(2) of the *Competition Tribunal Rules*, Commissioner's Book of Authorities, at Tab 2.

32. The failure on the part of HBC to produce a complete affidavit of documents for the Disputed Time period is not a mere accidental omission that can be cured through oral discoveries. The non-compliance is a deliberate attempt to thwart the proceedings into the company's deceptive marketing practices. Waiting for oral discoveries is simply not an option for the Commissioner.

33. The Commissioner is "presumed to act in the public interest, and significant weight should be given to these public interest considerations".[17] The Commissioner is entitled to discovery respecting the conduct at issue in the pleadings, namely HBC's promotional practices. Discovery is not limited to a discrete number of allegedly misleading representations, namely the sleep sets referred to in the pleading. These are mere examples of a broader commercial conduct. This very point was made in *The Commissioner of Competition v. Rogers et al.*:

> I agree that the discoveries should not simply consist of a review of a discrete number of allegedly misleading consumer representations. The Commissioner is entitled to explore whether these alleged misrepresentations are generically the product of a close business or working relationship between the defendant wireless companies and the content providers who create the products in question and who, the Commissioner argues, are in effect partners with the defendant wireless companies in the premium text messaging business.[18]

34. By limiting its production to a discrete number of sleep sets, HBC is attempting to narrow the remedy from these proceedings and thereby preclude the Commissioner from addressing the entirety of the HBC's underlying promotional marketing practices – deceptive or otherwise. HBC's hope is to limit discovery and ultimately the Tribunal's remedial powers under the *Act* to those discrete misrepresentations specifically identified in the Commissioner's Notice of Application. However, the purpose of the Deceptive Marketing Practices provisions of the *Act* is to remedy the harm caused by deceptive marketing practices for the benefit of the public at large and the Canadian economy. In furtherance of that purpose, the Commissioner may seek a remedy (and hence obtain discovery) for the conduct in issue or substantially similar conduct and not merely for a discrete set of misrepresentations.

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[17] *Commissioner of Competition v. Parkland Industries Ltd.,* 2015 Comp. Trib. 4 at paras. 59, 107 and 114.

[18] *The Commissioner of Competition v. Rogers et al*, 2013 ONSC 3224 (CanLII), at para 16.

35. In *Canada (Commissioner of Competition) v. Premier Career Management Group Corp*, the Federal Court of Appeal explained the objective of the civil deceptive marketing provisions of the *Act*. These provisions aim to improve the accuracy of information in the market and to discourage deceptive marketing practices to ensure the market – and hence the Canadian economy – functions efficiently.

> With the purpose clause in mind [section 1.1 of the Act], it becomes clear that the objective of the deceptive marketing provisions in subsection 74.01 is to incent firms to compete based on lower prices and higher quality, in order "to provide consumers with competitive prices and product choices". Importantly, the deceptive marketing provisions – unlike many other provisions of the Act – do not list actual harm to competition as an element of the offence. Since harm to competition is not listed as an element of the offence in this case, but it is a truism that the Act always seeks to prevent harm to competition, it is presumed that whenever the elements of paragraph 74.01(1)(a) are made out, there is per se harm to competition.
>
> When a firm is permitted to make misleading representations to the public, putative consumers may be more likely to choose the inferior products of that firm over the superior products of an honest firm. When consumer information is distorted in this manner, firms are encouraged to be deceitful about their goods or services, rather than to produce or provide higher quality goods or services, at a lower price. Therefore, as the appellant contends, when a firm feeds misinformation to potential consumers, the proper functioning of the market is necessarily harmed, and the Act is rightly engaged, given its stated goals.[19]

36. Accordingly, the inquiry under section 74.01 is concerned with whether a particular misrepresentation was made. However, section 74.1 of the *Act* allows the Tribunal to fashion a broad remedy that is not limited to the specific representation at issue. By allowing for a remedy that addresses substantially similar conduct, section 74.1 recognizes that conduct that may otherwise comply with the *Act* can still be subject to an order addressing a specific instance of reviewable conduct under the *Act*. Thus, the demand by the Commissioner that HBC produce a complete affidavit of documents.

37. In support of issuing an order addressing substantially similar conduct, even if that conduct does not constitute "reviewable conduct" under the *Act*, subsection 74.03(4) of the *Act* does not require that the Commissioner establish that any person was deceived or mislead. As noted in the *Canada (Commissioner of Competition) v. Premier Career Management Group Corp* quote in paragraph 33 above, "… it is a truism that the *Act* always seeks to prevent harm to competition …". Subsection 74.03(4) of the *Act* provides as follows:

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[19] *Canada (Commissioner of Competition) v. Premier Career Management Group Corp*., 2009 FCA 295 at paras. 61-62.

> 74.03(4) For greater certainty, in proceedings under sections 74.01 and 74.02, it is not necessary to establish that
> (a) any person was deceived or misled;
> (b) any member of the public to whom the representation was made was within Canada; or
> (c) the representation was made in a place to which the public had access.

38. Section 74.1 of the *Act* authorizes the Tribunal to remedy the "reviewable conduct" at issue and substantially similar conduct. The provision permits the Commissioner to seek a remedy for the underlying marketing practices and conduct that is broader in scope than merely seeking a remedy for a discrete misrepresentation.

39. Furthermore, section 74.1 of the *Act* specifically contemplates that a remedy limited to the "reviewable conduct" may not be sufficient to overcome the harm. Limiting a remedy to only a handful of sleep sets is not helpful to consumers. The *Act* therefore also permits the Tribunal to prohibit "substantially similar reviewable conduct." Thus, the remedies under section 74.1 of the *Act* are designed to allow the court to correct the full extent and systemic nature of the deceptive marketing practices, such as the ones at issue in this proceeding. In this way, the Tribunal can effectively address the harm these practices cause to the proper functioning of the Canadian economy. The effectiveness of the remedy would be severely compromised if it were limited to addressing only discrete instances of deception.

40. When the deficiencies of the affidavit of documents are so serious, as is the case here, the only option for the Tribunal is to compel the party to comply with its obligations and deliver what the *Federal Courts Rules* require or, as is the case here, what is provided for in the Scheduling Order. There must be a preemptive sanction in the order to ensure compliance and prevent recidivist conduct.

41. Rule 227 of the *Federal Courts Rules* provides for sanctions in the event that there is non-compliance with a party's discovery obligations. One of the sanctions is the requirement to produce a further and better affidavit of documents, failing which the pleading can be struck. Rule 227 reads as follows:

> 227 On motion, where the Court is satisfied that an affidavit of documents is inaccurate or deficient, the Court may inspect any document that may be relevant and may order that

> (a) the deponent of the affidavit be cross-examined;
> (b) an accurate or complete affidavit be served and filed;
> (c) all or part of the pleadings of the party on behalf of whom the affidavit was made be struck out; or
> (d) that the party on behalf of whom the affidavit was made pay costs.

42. This Tribunal clearly has the authority to request that HBC produce a complete affidavit of documents and impose a sanction if there is non-compliance with the terms. The Tribunal has already been overly indulgent by giving HBC an abundance of time to produce an affidavit of documents.

43. The Tribunal has tried hard in the last few years to establish confidence in its processes by imposing strict scheduling orders and making the Tribunal a place where litigants will want to have their cases adjudicated. The Tribunal has signaled that it would hold all litigants to the strict time-lines provided for in the Scheduling Orders and that it would not tolerate unexplained delays. HBC must be held to account by the Tribunal.

*Request for Documents does not Offend the Principles of Proportionality*

44. HBC cannot contend that the Commissioner's request for further production offends the principles of proportionality. There is no evidence on the record on the number of documents still to be produced, the efforts that HBC would have to make to produce them, the cost of producing them or the length of time that HBC would require to produce a complete affidavit of documents.

45. The Commissioner in this case has provided a clear vision of the different categories of documents that he would expect to be included in the affidavit of documents (see Annex "A" of Memorandum of Fact and Law), all of which is grounded in the pleading. This is not a fishing expedition.

46. While the Esposito affidavit that has been filed by HBC describes the efforts made in producing the affidavit of documents, it is misleading in some respects. The sum of $425,000.00 (US) that it has expended is with respect to both documents produced under the Section 11 Order and the within proceedings. The amounts expended prior to the filing of the Notice of

Application are irrelevant in making any assessment. HBC has expended $160,000.00 (US) in respect of the affidavit of documents. From the amounts that have been expended, the Esposito affidavit is silent on the efforts, if any, that were made by HBC or its agents in respect of the Disputed Time Period. HBC has also not disclosed the number of documents that it would have to review for this period or the length of time that it would take to produce a complete affidavit of documents. The Esposito affidavit is of no value in assessing the burden that the production request imposes on HBC.

47. In a context where not a single document has been produced for the Disputed Time Period and in the absence of any evidence explaining the efforts that have been made or that would be required to identify the relevant documents, it does not lie in HBC's mouth to suggest to the Tribunal that the Commissioner's request for a further and better affidavit of documents offends the principles of proportionality. Proportionality is not an answer against a proper and measured documentary request, as is the case here.

48. To make matters worse, HBC was accommodated and provided with a very generous time frame to produce an affidavit of documents. The production of a seriously deficient affidavit of documents that is framed on a very narrow reading of the Notice of Application should come as a complete surprise to the Tribunal.

**Part IV – Order Sought**

49. The Commissioner seeks an Order:

    (a) Requiring HBC to comply with the Scheduling Order and produce an affidavit of documents inclusive of the period from approximately February 2015 until now for which it has failed to produce, and deliver the omitted documents to the Commissioner within ten days of this motion, failing which its Response is to be struck;

    (b) To the extent HBC has failed to produce an affidavit of documents inclusive of the period from approximately February 2015 until now, an order compelling HBC to produce a

further and better affidavit of documents and deliver the omitted documents to the Commissioner within ten days of this motion, failing which its Response is to be struck;

(c) Costs of this motion, payable forthwith; and

(d) Such further and other relief as counsel may request and the Tribunal may permit.

**ALL OF WHICH IS RESPECTUFLLY SUBMITTED THIS 28TH DAY OF NOVEMBER, 2017**

Alexander Gay

Alexander Gay
Derek Leschinsky
Katherine Rydel

Counsel to the Commissioner of Competition

**Part V – List of Authorities**

<u>Statutes and Regulations</u>

*Competition Act*, R.S.C. 1985, c. C-34, s. 74.1

*Competition Tribunal Rules,* SOR/2008-141, Rule 60

*Federal Courts Rules,* SOR/98-106, Rule 227

<u>Jurisprudence</u>

*Canada (Commissioner of Competition) v. Premier Career Management Group Corp*., 2009 FCA 295

*Commissioner of Competition v. Parkland Industries Ltd.,* 2015 Comp. Trib. 4

*The Commissioner of Competition v. Rogers et al*, 2013 ONSC 3224

*Créations Magiques (CM) Inc. v. Madispro Inc*., 2005 FC 281

*Trusthouse Forte California Inc. et al. v. Gateway Soap & Chemical Co.* (1998), 161 F.T.R. 88

ANNEX "A"

| CATEGORIES OF DOCUMENTS | LINK TO PLEADINGS | SAMPLE DOCUMENTS FROM HBC'S AFFIDAVIT OF DOCUMENTS |
|---|---|---|
| **A. Documents relating to HBC's post- Jan 2015 practices regarding setting prices for sleep sets, including documents related to setting and establishing regular and promotional prices; monitoring the price; changing the regular or promotional price; monitoring or review of competitors' prices; the influence of manufacturers on prices.**<br><br>**B. Documents relating to HBC's post-Jan 2015 sleep set marketing practices, including documents related to the marketing process (approvals, promotional event calendars); market research and studies(but not including actual representations).**<br><br>**C. Documents relating to HBC's post-2015 financial results and estimates for sleep sets, including documents setting out gross margin analysis; profitability; revenues; strategic planning and growth strategies, forecasting; internal sales estimates and actual volumes.** | APPLICATION<br><br>Paragraph 2 – "HBC has engaged in deceptive marketing practices by offering sleep sets at grossly inflated regular prices, and then advertising deep discounts off these deceptive regular prices in order to promote the sale of the sleep sets to the public. The regular prices of the sleep sets were so inflated above what the market would bear that sales at the regular price were virtually non-existent."<br><br>Paragraph 3 – "HBC markets many of the products it sells using a 'high-low' pricing strategy. Under this strategy, HBC offers merchandise at a high regular price with frequent deep promotional discounts off that price."<br><br>Paragraph 8 – "HBC continues to offer sleep sets using both of these types of deceptive marketing practices. HBC has been making these types of representations throughout Canada to promote the sale of various products since at least 1 March 2013 until now."<br><br>Paragraph 111 – "HBC has made, and continues to make, the foregoing false or misleading representations to the public for the purpose of promoting sleep sets and their business interests more generally."<br><br>Paragraph 112 – "Pursuant to subsection 74.1(5) of the Act, the deceptive conduct described herein is aggravated by the following: ... b. HBC has made the same or similar representations frequently and over an extended period of time…"<br><br>RESPONSE<br><br>Paragraph 31 – "Each year, Hudson's Bay offers numerous collections and, within those collections, multiple sleep sets, for sale in Canada. In 2013, for example, Hudson's Bay offered approximately two dozen collections of mattresses for sale, consistent with a product assortment developed by Hudson's Bay's mattress buyer in conjunction with managers in Hudson's Bay's major home products division. The Commissioner's Application in respect of HBC's purported breach of subsection 74.01(3) of the Act relates only to four particular sleep sets offered for sale by Hudson's Bay in 2013 and 2014." | A - SETTING PRICES<br>• Setting regular and promotional price:<br>○ HBC00023315<br><br>• Establishing regular price (flooring at regular price prior to any promotions):<br>○ HBC00035526<br><br>• Monitoring and changing the price:<br>○ HBC00039850<br><br>• Monitoring or review of competitors prices:<br>○ HBC00026876<br><br>• Influence of manufacturers on prices:<br>○ HBC00026987<br><br>B - MARKETING<br>• Planning/Approvals:<br>○ HBC00032825<br>○ HBC00028492<br><br>• Promotional Event Calendars:<br>○ HBC00013682 (tab-Marketing Calendar 2013)<br><br>• Market analysis, research and studies:<br>○ HBC00034775<br>○ HBC00006106<br>○ HBC00009235<br><br>• Marketing costs:<br>○ HBC00031195<br><br>C - FINANCIALS |

| **Categories of Documents** | **Link to Pleadings** | **Sample Documents from HBC's Affidavit of Documents** |
| --- | --- | --- |
| | | • Margin analysis:<br>  ○ HBC00039406<br><br>• Profitability:<br>  ○ HBC00021515<br><br>• Revenues:<br>  ○ HBC00003022<br><br>• Growth strategies / Strategic planning:<br>  ○ HBC00012016<br>  ○ HBC00002812<br><br>• Internal sales estimates and forecasts:<br>  ○ HBC00013682 (tab-Sales Forecast)<br>  ○ HBC00002784<br><br>• Actual volume of sales:<br>  ○ HBC00038061<br>  ○ HBC00030439 |
| **D. Documents relating to HBC's post-Jan 2015 practices regarding compliance with the Competition Act for sleep sets, including documents related to monitoring of volumes of sleep sets sold at the regular price; sleep set compliance sales grids ; compliance policies, procedures and manuals; practical application of compliance policies; remedial actions taken as a result of breaches with compliance policies, procedures or manuals; internal reporting related to compliance; management monitoring and verification of** | <u>Application</u><br><br>Paragraph 100 – "HBC's compliance monitoring, verification and reporting mechanisms are all ineffective. Three successive Mattress Buyers conducted ongoing monitoring of promotional representations and yet HBC continued to make deceptive representations during the tenure of all three. Further, HBC management continually failed to verify if monitoring was being done properly and instead relied entirely on the Mattress Buyers self-reporting on whether they were compliant."<br><br>Paragraph 106 – "Deceptive OSP representations and false or misleading clearance and end of line representations promoting sleep sets occurred despite HBC's compliance mechanism. HBC's compliance mechanism was completely ineffective in preventing contraventions of the law. The shortcomings in HBC's compliance program and its ineffectiveness regarding sleep sets are representative of the overall poor functioning of HBC's compliance mechanism. The egregious compliance failures with respect to sleep sets are the inevitable outcome of HBC's flawed compliance model." | • Volume sold at regular price:<br>  ○ HBC00022023<br><br>• Compliance Sales Grids:<br>  ○ HBC00036295<br><br>• Compliance policies, procedures, manuals and training:<br>  ○ MMFG00012_00000453<br><br>• Practical application of compliance:<br>  ○ HBC00017477 |

| CATEGORIES OF DOCUMENTS | LINK TO PLEADINGS | SAMPLE DOCUMENTS FROM HBC'S AFFIDAVIT OF DOCUMENTS |
|---|---|---|
| **compliance; changes or modifications in compliance structure and reporting.** | <u>RESPONSE</u><br><br>Paragraph 9 – "In addition, even if some of Hudson's Bay's advertising did contravene section 74.01of the Act, which is denied, the Commissioner is not entitled to the corrective notices and administrative monetary penalty he is seeking against HBC because HBC exercised due diligence to prevent the reviewable conduct from occurring. HBC has (and at the relevant times, had) a strict and comprehensive advertising compliance program and trains all of its employees engaging in marketing or buying the mattresses that Hudson's Bay offers for sale on the importance of being, and how to be, compliant with advertising law."<br><br><u>REPLY</u><br><br>Paragraph 18 – "HBC has neither a credible and effective compliance program, nor has it demonstrated a clear, continuous and unequivocal commitment to compliance with the Act, notwithstanding past judicial proceedings under the Act. The simple existence of a compliance manual and training are not a sufficient exercise of due diligence to prevent reviewable conduct from occurring, as provided for in subsection 74.1(3) of the Act. HBC's failure to adhere to an effective compliance program is illustrative of a corporate culture focused more on sales than on compliance." | • Internal reporting / management monitoring and verification:<br>  ○ HBC00019319<br><br>• Modifications in compliance structure:<br>  ○ HBC00020740 |

<table>
<tr><th>Categories of Documents</th><th>Link to Pleadings</th><th>Sample Documents from HBC's Affidavit of Documents</th></tr>
<tr><td>E. Documents relating to HBC's continued use of "end of line" representations with respect to sleep sets.</td><td><u>Application</u><br><br>Paragraph 73 – "In addition to making deceptive OSP representations, as set out above, HBC has also made deceptive clearance representations to consumers in order to further promote sales of sleep sets. HBC has failed to comply with paragraph 74.01(1)(a) of the Act concerning the making of false or misleading representations to the public. HBC has made and continues to make representations to the public that are false or misleading in a material respect in its clearance and end of line promotions of sleep sets."<br><br>Paragraph 74 – "HBC made clearance representations for the purpose of promoting sleep sets since at least 1 March 2013. HBC changed the language of its representations promoting sleep sets from 'clearance' to 'end of line' on or about 26 December 2014."<br><br>Paragraph 86 – "Effective December 2014, HBC adopted a revised 'Mattress Transition Pricing Policy'. The policy states that no new orders for end of line sleep sets could be placed with the sleep set manufacturer after a predetermined date (known as the 'D-Date'). Twenty three days prior to the D-Date, the sleep set moves to end of line promotional pricing."<br><br>Paragraph 87 – "In line with the revised policy, HBC stopped making 'clearance' representations with respect to sleep sets starting with the Boxing Week 2014 promotional materials and instead changed to 'end of line' representations."<br><br><u>Response</u><br><br>Paragraph 16 – "With respect to the allegations in paragraphs 86-87 of the Application, HBC admits that Hudson's Bay changed from making 'clearance' to 'end of line' promotional representations in respect of mattresses/sleep sets in or about December 2014. HBC further states that the Commissioner was aware of Hudson's Bay's change in this regard at the time it was made, and did not object to the use of 'end of line' representations by Hudson's Bay until the Application was filed."</td><td>• End of Line:<br>  ○ HBC00026573<br>  ○ HBC00027401<br>  ○ HBC00038954</td></tr>
</table>

| | | |
|---|---|---|
| **F. Documents relating to HBC's post-January 2015 compliance practices and policies for the products other than sleep sets HBC offers and has offered for sale; documents concerning whether or the extent to which HBC complies with such policies; compliance policies, procedures and manuals; remedial actions taken as a result breaches with compliance policies, procedures or manuals; internal reporting related to compliance; management monitoring and verification of compliance; changes or modifications in compliance structure and reporting.** | <u>APPLICATION</u><br><br>Paragraph 107 – "Furthermore, the policies in the Compliance Manual apply not only to promotions of sleep sets, but to ALL products HBC offers for sale. With the exception of seasonal products and occasion-specific goods, the sections of the Compliance Manual which are meant to promote compliance with subsection 74.01(3) and paragraph 74.01(1)(a) of the Act apply to ALL the products HBC offers for sale."<br><br>Paragraph 108 – "The type of representations used to promote sleep sets are used extensively by HBC to promote other products. Sleep sets are but a subset of the larger 'Major Home Division' which is responsible for furniture, sleep sets and major appliances. More specifically, the Major Home Division is part of the larger Home Division, which also includes three other divisions offering bed and bath linens, seasonal home products and housewares. All of these divisions, as well as many others, use OSP representations to promote the sale of HBC products. For example, in the 9 to 15 December 2016 flyer, HBC used OSP representations to promote the sale of luggage, women's clothing, men's clothing, small appliances, toys, footwear, cookware, jewellery, linen, towels, and glassware as well as sleep sets."<br><br>Paragraph 109 – "The consequence of HBC's lack of a credible and effective compliance program is HBC's inability to ensure the numerous OSP and clearance representations it makes to the public are compliant with the Act."<br><br>Paragraph 110 - "HBC's internal compliance mechanism, which applies to ALL the HBC products it sells, is unable to ensure compliance with subsection 74.01(3) and paragraph 74.01(1)(a) of the Act."<br><br><u>REPLY</u><br><br>Paragraph 2 – "The sleep set sample and the representations relied on in the Notice of Application are representative of HBC's overall business practices."<br><br>Paragraph 19 – "Paragraph 74.1(1)(a) of the Act states that the Tribunal may make an order that HBC not "engage in the conduct or <u>substantially similar reviewable conduct</u>" [emphasis added]. The conduct at issue is HBC's promotional practices. Requiring HBC to comply with the law for similar representations regardless of product is in line with an order prohibiting 'substantially similar reviewable conduct'. HBC's compliance program applies to a full host of products HBC offers for sale to consumers and in the example of the Specified Sleep Sets, utterly failed to prevent breaches of the Act." | • Compliance practices for other products:<br>○ Compliance Manual - MMFG00012_00000453 |

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*.

**BETWEEN:**

**COMMISSIONER OF COMPETITION**

**Applicant**

**- and -**

**HUDSON'S BAY COMPANY**

**Respondent**

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**Memorandum of Fact and Law of the Commissioner of Competition**

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**Counsel to the Commissioner of Competition**

# TAB 6

CT-2017-008

**THE COMPETITION TRIBUNAL**

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

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**B E T W E E N:**

**COMMISSIONER OF COMPETITION**

**Applicant**

**- and -**

**HUDSON'S BAY COMPANY**

**Respondent**

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE
FILED / PRODUIT
Date: November 14, 2018
CT-2017-008
Andrée Bernier for / pour
REGISTRAR / REGISTRAIRE
OTTAWA, ONT. # 99

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

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## 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,<br>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,<br>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,<br>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,<br>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,<br>p. 70 | To advise how Sears' mix and match promotions work. | Ibid. | Ibid. |
| 13. | Q. 333,<br>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,<br>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,<br>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,<br>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,<br>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,<br>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,<br>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 |
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| 21. | Q. 597,<br>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,<br>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,<br>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,<br>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 |

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| | | | | 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,<br>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. | | | | |

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| 28. | | | | |
| 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. |

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| | | | | 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. |