Competition Tribunal Tribunal de la concurrence

PUBLIC VERSION

Reference: *The Commissioner of Competition v. Hudson's Bay Company*, 2018 Comp Trib 20
File No.: CT-2017-008
Registry Document No.: 115

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34, as amended;

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

BETWEEN:

The Commissioner of Competition
(applicant)

and

Hudson's Bay Company
(respondent)

Date of hearing: November 20, 2018
Before Judicial Member: J. Gagné J.
Date of Order: November 28, 2018

ORDER AND REASONS FOR ORDER ON MOTIONS TO COMPEL ANSWERS TO QUESTIONS REFUSED ON DISCOVERY

I. OVERVIEW

[1] The Tribunal is seized with two motions brought by the parties to compel the opposite party's representative to answer several questions that were refused during examinations for discovery. Christine Jelley, Hudson's Bay Company's ("**HBC**") representative, was examined on August 23-24, 2018 and Adam Zimmerman, the Commissioner of Competition's representative, was examined on September 6-7, 2018.

[2] These examinations were conducted in relation with the Commissioner's application made pursuant to section 74.1 of the *Competition Act*, RSC 1985, c C-34 ("**Act**"), wherein he alleges that HBC has engaged in and continues to engage in two types of reviewable conduct. First, the Commissioner alleges that HBC has engaged in deceptive marketing practices by offering sleep sets at grossly inflated regular prices, and then advertising deep discounts of these deceptive regular prices in order to promote the sale of sleep sets to the public, thus engaging in reviewable conduct pursuant to subsection 74.01(3) of the Act (ordinary selling price ("**OSP**") representations). Second, the Commissioner alleges that HBC engages in reviewable conduct under paragraph 74.01(1)(a) of the Act by offering sleep sets as part of inventory "clearance" or "end of line" promotions, implying that the price has been permanently lowered in order to sell remaining inventory. Despite such advertisements, the Commissioner alleges that HBC continues to replenish its stock by ordering new sleep sets from manufacturers during these sales.

[3] The relief sought by the Commissioner includes a prohibition order and administrative monetary penalties pursuant to section 74.1 of the Act.

[4] In the Commissioner's initial application, the OSP representations concerned four specific sleep sets and were said to have been made from July 19, 2013, to October 30, 2014.

[5] Having failed to obtain the production of documents relating to sleep sets other than the four identified in the initial application, and to post-January 2015 compliance practices and policies (*The Commissioner of Competition v Hudson's Bay Company*, 2017 Comp Tribunal 19) ("**AOD decision**"), the Commissioner amended its application, generally extending it to all of HBC's sleep sets and adding that the reviewable conduct was ongoing.

[6] In its amended response, HBC argues that it has exercised due diligence in preventing the alleged reviewable conduct from occurring by having a strict and comprehensive advertising compliance program in place at all relevant times and by requiring that all of its employees in its marketing and buying groups take an online course on advertising compliance annually and attend a session with HBC's legal counsel on advertising law. HBC further argues that the Tribunal must consider the "landscape" and competitiveness of the relevant market in assessing its good faith, as contemplated in paragraph 74.01(3)(b) of the Act, and in determining the appropriate remedy, should it make a finding of reviewable conduct in application of subsection 74.1(5) of the Act.

II. THE COMMISSIONER'S MOTION

[7] At the hearing before the Tribunal, only five refusals to questions given during the Jelley examination remained at issue and they all concerned, directly or indirectly, HBC's compliance efforts and policies with respect to sleep sets and also any other product sold by HBC in Canada.

[8] The Commissioner argues that he should be permitted to ask questions about HBC's compliance program as it applies to any product sold in Canada because:

a) the remedy sought in his amended application not only applies to HBC's sleep sets but extends to "substantially similar reviewable conduct for any product supplied by HBC"; and

b) HBC's compliance program applies broadly to all products sold.

[9] HBC replies that those questions are not relevant to the issues raised by the Commissioner's amended application and that, in any event, they are overbroad. HBC adds that the Commissioner is also attempting to re-argue issues that were settled by the Tribunal's AOD decision.

[10] In *Canada v Lehigh Cement Limited*, 2011 FCA 120 at para 34, the Federal Court of Appeal noted the broad scope of relevance on examination for discovery:

> The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary.

(1) Request 1: Certifications for HBC's Code of Business Conduct

[11] Ms. Jelley was asked to produce the records relating to certifications for all persons responsible for mattresses and each of their supervisors, level by level. The certifications attest that a person has read and understood HBC's Code of Business Conduct. The Commissioner argues that this request is relevant to the due diligence defense, the compliance issue and the scope of remedy.

[12] Since HBC's Code of Business Conduct is not even part of the advertising compliance program which HBC relies on for its due diligence defence in this proceeding, I am of the view that it is not relevant to the issues raised by this case. HBC's Code of Business Conduct is very general and covers broad ethical principles such as conflicts of interests, the treatment of confidential information, corporate opportunities, insider information, etc. In addition to being irrelevant, the scope of the information sought would be overbroad.

[13] HBC does not have to respond to Request 1.

(2) Request 3: Discipline for non-compliance with Advertising Manual

[14] Ms. Jelley was asked to advise whether any employees of HBC have been disciplined for failing to comply with the rules in the Advertising Compliance Manual since March 2013.

[15] HBC argues that on its face, this question (i) would apply to any product offered for sale by HBC and (ii) would apply to advertising "rules" in HBC's advertising compliance manual that are unrelated to reviewable conduct under section 74.01 of the Act, as alleged by the Commissioner in this proceeding. As such, the question runs afoul of the Tribunal's AOD decision which limited the scope of relevant evidence to that concerning HBC's sleep sets.

[16] The Commissioner replies that this question needs to be general since (i) HBC does not have a distinct manual that would apply specifically to the advertising of sleep sets; and (ii) HBC does not identify "failures in compliance" with respect to the representations concerning mattresses challenged by the Commissioner in this proceeding.

[17] In my view, the only relevant information pertains to disciplinary measures for non-compliance with HBC's Advertising Compliance Manual related to any reviewable conduct under section 74.01 of the Act in the advertising of sleep sets.

[18] As formulated, HBC does not have to respond to Request 3.

(3) Request 4: Documents sent and received by HBC's audit committee

[19] Ms. Jelley was asked to produce all documents sent and received by HBC's audit committee relating to the Commissioner's investigation.

[20] HBC states that this request is not limited to advertising compliance and that in any event, the responsibility for advertising compliance has been delegated to HBC's EVP General Counsel, and to his delegates in HBC's legal department.

[21] I find the above reference to the Commissioner's investigation to be a reference to the investigation that led to his amended application, which is an investigation of HBC's advertising compliance.

[22] With this in mind, I am of the view that the question is relevant, irrespective of the delegation of authority in favour of HBC's legal department and irrespective of any broader role HBC's audit committee might have.

[23] HBC will respond to Request 4.

(4) Request 11: Reports to Board of Directors

[24] Ms. Jelley was asked to advise whether reports have been made to the Board of Directors respecting advertising compliance, and if so, what the content of that reporting is.

[25] Just as it did for Request 3, HBC argues that on its face, this question (i) would apply to any product offered for sale by HBC and (ii) would apply to advertising compliance issues that are unrelated to the alleged reviewable conduct under section 74.01 of the Act, in this proceeding. The Tribunal's AOD decision has limited the scope of relevant evidence to that concerning HBC's sleep sets.

[26] Just as I found with respect to Request 3, HBC does not have to respond to Request 11 as formulated.

(5) Request 14: HBC's marketing Expenses

[27] Lastly, Ms. Jelley was asked about HBC's total marketing expenses for each year from 2013 to 2017.

[28] The Commissioner argues this information is relevant to the aggravating factors the Tribunal considers in awarding an administrative monetary penalty in application of paragraph 74.1(5)(l) of the Act, which states that the Tribunal shall take into account "any other relevant factor".

[29] First, it is not clear to the Tribunal in what way HBC's total marketing expenses would be relevant to the awarding of a penalty.

[30] Second, the Commissioner suggests that he could calculate HBC's approximate spending on advertising sleep sets by multiplying its total marketing expenses by the proportion of total revenue and profits derived from selling sleep sets. In my view, it would be reckless to use speculative mathematical calculations to assess HBC's marketing expenses for sleep sets. The presumed and suppositional results could not reasonably have any bearing on the appropriate quantum for an administrative monetary penalty.

[31] HBC does not have to respond to Request 14.

III. HBC'S MOTION

[32] The 30 outstanding refusals to questions from the Zimmerman examination were still live issues at the hearing. HBC grouped them in three categories: (1) The documents and information produced by Sears in response to section 11 orders and the Commissioner's actions in relation to Sears, **[CONFIDENTIAL - LEVEL C]**; (2) any information the Commissioner might have concerning the volume of mattress sales at regular price made by the competitors identified in HBC's amended response, along with an acknowledgement by the Commissioner that HBC is a relatively small player in the market with no power to set or move market prices for mattresses; and (3) any information the Commissioner might have regarding the practices of HBC's competitors with respect to "clearance" sales, "end of line", or mix and match promotions.

[33] In my view, all of these questions can be regrouped into a single category as they relate to third-party information obtained by the Commissioner in the exercise of the broad mandate conferred to him by the Act.

[34] HBC argues that all of the requested information is highly relevant since the Tribunal will have to consider the "landscape" and competitiveness of the relevant market in assessing HBC's good faith (paragraph 74.01(3)(b) of the Act), assessing the "general impression" left by the "clearance" and "end of line" representations (paragraph 74.01(1)(a) of the Act), and determining the appropriate remedy should it make a finding of reviewable conduct (section 74.1 of the Act).

[35] First, the Commissioner replies that given HBC's good faith is to be determined on a subjective basis (*Commissioner of Competition v Sears Canada Inc*, 2005 Comp Trib 2, at para 239), any information regarding the landscape or competitiveness of the market that was not known to HBC at the time of the alleged conduct is irrelevant.

[36] Second, the Commissioner states that a competitor's conduct has no bearing on the general impression left by any given representation. The legislation requires the Tribunal to consider whether the general impression the representation conveys, as well as its literal meaning, is false or misleading in a material respect. What is not of "much consequence or important or pertinent or germane or essential to the matter", such as a competitor's conduct, cannot be said to be material (*Sears*, above, at paras 333-336).

[37] Finally, the Commissioner notes that "whether a competitor also engaged in similar reviewable conduct" is not one of the relevant factors chosen by the legislator under subsection 74.1(5) of the Act to help decision-makers in the assessment of a proper administrative monetary penalty.

[38] I agree with the Commissioner. HBC has not referred me to any authority supporting its proposition that third- party information, unknown to a party at the time of the impugned conduct, that is collected by the Commissioner in the exercise of his broad and extensive investigation powers would be relevant to that party's defense in cases such as the one before me.

[39] I do not agree with HBC that as a consequence of a negative finding on this issue, it would have to defend its case in a factual and contextual vacuum. The "landscape" and the level of competitiveness of the market can be established with the information available to HBC at the time of the alleged conduct.

[40] In my view, HBC's request to have access to the third-party information and documents obtained in the course of investigating **[CONFIDENTIAL – LEVEL C]** is so broad that it would amount, in my view, to a fishing expedition.

[41] As I am of the view that none of the third-party information unknown to HBC at the time of the alleged reviewable conduct is relevant, I do not need to examine the Commissioner's refusals based on litigation privilege.

[42] Finally, two specific requests call for further comment.

[43] Mr. Zimmerman was asked (i) whether the Commissioner accepts that HBC had and has no market power in respect of the sale of mattresses, and (ii) whether the Commissioner would agree with the statement that HBC is a price-taker or price-follower when it comes to mattresses.

[44] I agree with the Commissioner that, as formulated, these questions seek opinion evidence. My view might have been different had the question been whether HBC was considered so during the Commissioner's investigation, and whether this had an impact on the Commissioner's actions or decisions.

[45] For the above reasons, the Commissioner does not have to respond to HBC's requests.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[46] The Commissioner's motion is granted in part;

[47] The Commissioner's Request 4 will be answered;

[48] HBC's motion is dismissed;

[49] As the results of these motions have been mainly unsuccessful for both parties, costs shall be in the cause.

DATED at Ottawa, this 28th day of November, 2018.

SIGNED on behalf of the Tribunal by the presiding judicial member

(s) Jocelyne Gagné

COUNSEL OF RECORD

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