PUBLIC

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

Bianca Zamor for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT. #158

THE COMMISSIONER OF COMPETITION

Applicant

\- and -

HUDSON'S BAY COMPANY

Respondent

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT
(Respondent's Motion to Strike Evidence)
(returnable March 12, 2019)

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

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

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

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

Counsel for the Respondent

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

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

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

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

Counsel for the Commissioner of Competition

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

PUBLIC

CT-2017-008

THE COMPETITION TRIBUNAL

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

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

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

HUDSON'S BAY COMPANY

Respondent

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT
(Respondent's Motion to Strike Evidence)
(returnable March 12, 2019)

1. Hudson's Bay Company ("**HBC**") brings this motion for an order ruling inadmissible certain evidence that the Commissioner of Competition (the "**Commissioner**") proposes to tender at the hearing of this matter. The proposed evidence is clearly inadmissible and fundamentally inconsistent with the applicable rules and principles of procedural fairness applicable to pre-hearing disclosure.

2. First, on even a cursory review, it is apparent that the proposed expert report of Theodore L. Banks dated December 18, 2018 (the "**Banks Report**") flies in the face of the accepted principles and rules concerning admissible expert opinion evidence tendered in Canadian proceedings. Mr. Banks, who is an American-trained lawyer and president of a consulting firm that the Competition Bureau ("**Bureau**") hires to serve as a "compliance monitor", impermissibly encroaches on the province of the Tribunal by offering legal conclusions based on the facts in this case. The Banks Report contains improper argument, unfounded

conclusions, legal opinion and bare advocacy for the Commissioner and ought to be struck in its entirety.

3. Second, the witness statement of Adam Zimmerman affirmed December 19, 2018 (the "**Zimmerman Statement**") is not admissible as evidence in chief (i.e. "fact evidence that could be given orally by the witness", per Tribunal Rule 68(2)) as it is replete with argument, opinion, factual findings, speculation and hearsay. The Zimmerman Statement repeatedly references discovery evidence (including 142 paragraphs of direct quotes from HBC's discovery transcripts) to draw legal or factual conclusions on every contested issue in this proceeding. The Zimmerman Statement is nothing more than an advocacy piece on behalf of the Commissioner and wholly improper as evidence in chief.

4. The Banks Report and Zimmerman Statement are so clearly out of bounds of what is admissible as expert and lay witness evidence that they ought to be struck now. HBC will be highly prejudiced if it is required to prepare for the hearing on the basis of this inadmissible evidence.

5. Third, the blanket listing of over 98,000 documents in Schedules B and C of the Commissioner's notice delivered pursuant to Rule 72 (the "**Rule 72 Notice**") as documents to be introduced into evidence without further proof is improper, inconsistent with the purpose of the rules on pre-hearing disclosure and denies the Respondent procedural fairness.

6. In the last section of these submissions, HBC addresses the confidentiality of the within motion. As set out herein, the Commissioner's confidentiality challenge should be addressed after the Tribunal's determination of the admissibility of the underlying evidence contained in HBC's motion record in accordance with the confidentiality order in place.

PART I - FACTS

a. Nature of the Application

7. The Commissioner issued an Amended Notice of Application, dated February 26, 2018, seeking relief against HBC pursuant to section 74.01(1)(a) and 74.01(3) of the the *Competition Act*, R.S.C, 1985, c. C-35 (the "**Act**").

8. In this Application, the Commissioner challenges two types of representations made by HBC in connection with the advertising of certain mattresses (sleep sets) during the period from 2013-2018 (the "relevant period"). The Commissioner alleges that HBC: (a) contravened s. 74.01(3) of the Act by improperly using ordinary sale price ("**OSP**") representations of its regular prices in comparison to its sale/promotional prices being offered for particular mattresses during promotional periods; and (b) contravened s. 74.01(1)(a) of the Act by using the terms "clearance" and "end of line" in certain promotional advertisements for mattresses nearing the end of their "life-cycle" (which typically is one year).[1]

9. HBC's position is that its advertising did not contravene the Act.

10. With respect to the OSP representations, the issue in dispute between the parties is whether HBC contravened the "time test" in s. 74.01(3)(b) of the Act:

> (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,
>
> [...]

---

[1] Amended Notice of Application, para 7, 12.

> (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.

11. There are two aspects to the time test: the "good faith" element and the "frequency" element. That is, the advertised regular price for the mattress on promotion must have been offered (i) in good faith, and (ii) for a substantial period of time recently before the making of the OSP representation. As is evident from the pleadings, the key issue at the hearing of the application will be the application of the time test to the facts. As HBC pleads in its Amended Response:

> The Commissioner's position is based on an inherently flawed interpretation of the meaning of "good faith" in paragraph 74.01(3)(b) of the Act; it is an interpretation that conflicts with the Competition Bureau's own Ordinary Price Guidelines and that, if adopted, would effectively write the "time test" contained in paragraph 74.01(3)(b) right out of the Act. Hudson's Bay offered the identified (and all of its) sleep sets at a good faith regular price for a substantial period of time within the meaning of paragraph 74.01(3)(b), and therefore HBC did not contravene the Act.

12. In addition, even if HBC is found not to have satisfied the time test, the Tribunal must then consider s. 74.01(5) of the Act before HBC's OSP representations can be found to have contravened the Act.

13. With respect to "clearance" or "end of line" language for mattresses in HBC's advertising, the issue for determination by the Tribunal is whether the representations were material under s. 74.01(1)(a) of the Act, which provides:

> 74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
>
> (a) makes a representation to the public that is false or misleading in a material respect.

b. Procedural History

14. By order dated March 28, 2018, the Tribunal set a timetable governing, amongst other things, the exchange of pre-hearing disclosure. Pursuant to that Order, the Commissioner was required to serve all documents relied upon, witness statements and expert reports by December 19, 2018. Further, by January 4, 2019 the Commissioner was to serve a list of documents proposed to be admitted without further proof. HBC is required to serve its documents relied upon, witness statements and own expert reports by March 1, 2019.[2]

15. By order dated May 8, 2018 (the "Amended Confidentiality Order"), the Tribunal set out the procedure for protecting the confidentiality of certain records ("Protected Records") including: (a) information relating to prices (to the extent that such prices have not been published or made generally known to competitors and customers, (b) sales figures of the Respondents that are otherwise not public, (c) confidential contractual arrangements between the Respondent and its customers, agents, and/or suppliers, (d) financial data or reports, or financial information relating to the Respondent or its customers, suppliers or a Third Party, (e) business plans, marketing plans, strategic plans, budgets, forecasts and other similar information, and (f) records containing competitively sensitive and/or proprietary information of a Party or Third Party.

16. On December 19, 2018, the Commissioner served: (i) the Zimmerman Statement (ii) the Banks Report, and (iii) the report of Joel Urbany. On February 7, 2019 the Commissioner served a late Supplemental Affidavit of Adam Zimmerman. HBC opposes the granting of leave to file this late evidence and will address this issue in its response to the Commissioner's submissions.

---

[2] *The Commissioner of Competition v. Hudson's Bay Company*, 2018 Comp. Trib. 6, Respondent's Book of Authorities ("Respondent's BOA"), Tab 1.

17. On January 4, 2019 the Commissioner delivered the Rule 72 Notice which contained three Appendices consisting of some 98,752 documents. In particular:

(a) **Appendix A** lists documents attached to the Zimmerman Statement, Banks Report and Urbany Report, which HBC does not take issue with;

(b) **Appendix B** lists HBC's complete documentary disclosure materials (94,576 documents) including those submitted under Section 11 orders; and

(c) **Appendix C** lists 4,176 documents described as "representations and court documents" which appears to contain all documents listed in the affidavits of documents submitted by the Commissioner.

18. HBC served the within motion to strike on February 8, 2019 on a confidential basis. The Commissioner refused to provide a response to the motion.

19. After receipt of the notice of motion to strike, the Commissioner delivered an amended Rule 72 Notice dated February 22, 2019 (the "**Amended Rule 72 Notice**") which made some amendments to the Appendices, but they essentially contain a similar (and slightly longer) list of documents. The Commissioner states in the Amended Rule 72 Notice that while he intends to proceed based on documents listed at Appendix A, he "reserves the right to admit without further proof additional documents in responding to HBC's case such as those which may be included with the Commissioner's Reply and for purposes of cross examination at the hearing".

c. The Banks Report

20. The Commissioner has submitted an expert report from Mr. Theodore, an American-trained lawyer in private practice, who is also president of a consulting firm that the Bureau hires to serve as a "compliance monitor" for it. [3]

21. Mr. Banks purports to have approached his engagement by the Commissioner in this matter "as if he had been engaged by a commercial client who was looking for an evaluation of its compliance program" – notwithstanding that he was not so engaged by HBC and, indeed, Mr.

---

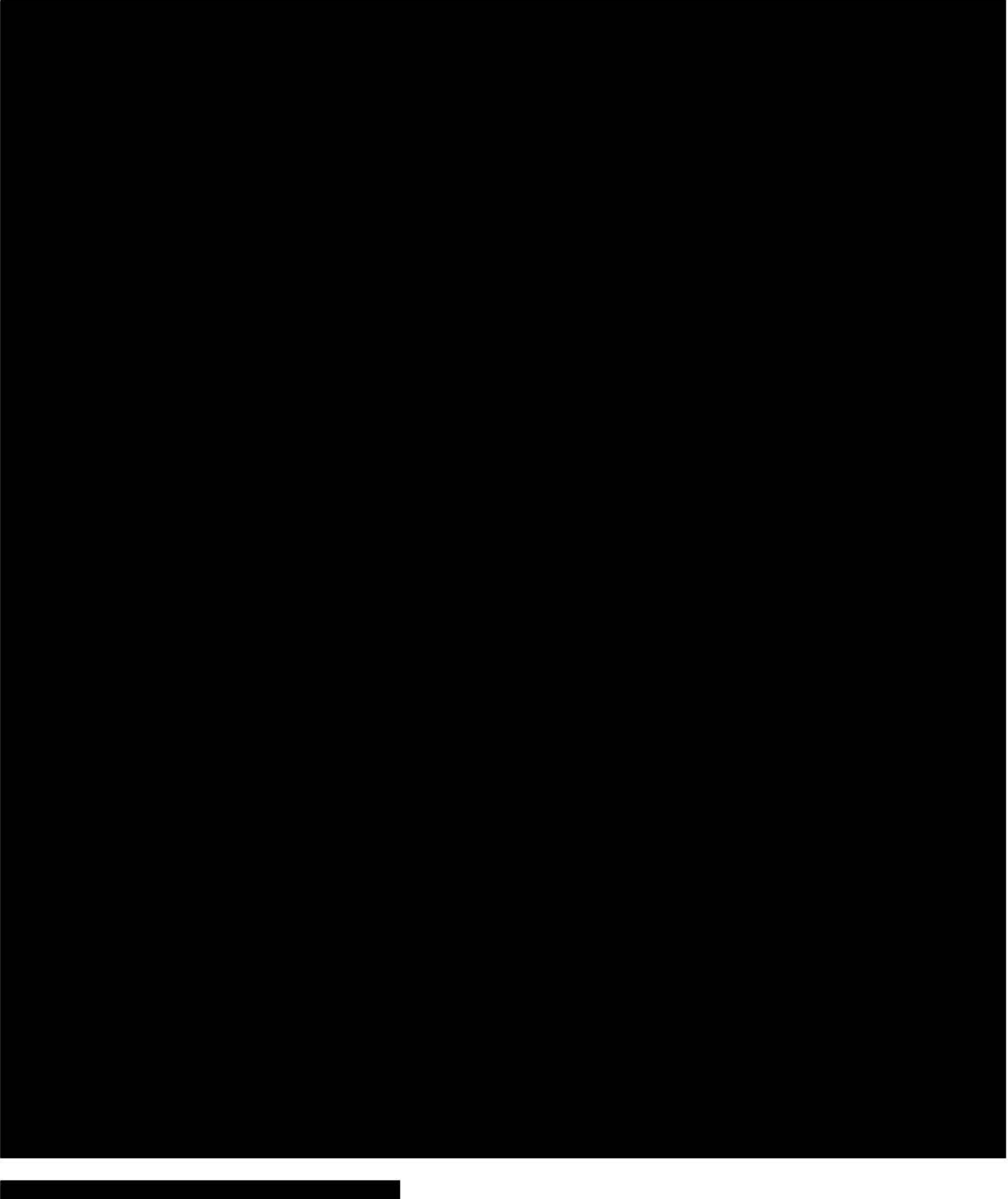
[3] Banks Report, para 1, Motion Record of the Respondent, Tab 2.

Banks does not claim that he ever spoke to anyone at HBC in connection with the preparation of the Banks Report.

22. Mr. Banks states that he has been retained by the Commissioner "to provide expert testimony in connection with his investigation of the marketing and advertising practices of the Hudson's Bay Company (HBC) with regard to its compliance practices" based on a review of "the relevant laws and policies in this area, and ... documents produced and transcripts of depositions given in this matter".[4]

23. The Banks Report fundamentally misconceives the proper role of an expert witness and presents partial assessments of evidence that go so far as to directly advocate for the Commissioner's theory of the case.

[4] *ibid*, para 15.



d. The Zimmerman Statement

30. The Commissioner has delivered the witness statement of Adam Zimmerman, the Senior Competition Law Officer with the Bureau who conducted the primary investigative work related to this proceeding, as the Commissioner's lay witness evidence in chief under Tribunal Rule 68.

31. The Zimmerman Statement is simply not admissible as evidence in chief. It is essentially a 328-page closing submission containing legal argument, opinion evidence, speculation and factual findings.

32. The Zimmerman Statement references the discovery evidence of HBC's representatives at length, and often uses the same extracts more than once, to draw general conclusions or make factual findings on every key issue in dispute. By way of example, Mr. Zimmerman makes the following far-reaching conclusions:

---

33. HBC's alleged lack of good faith, which is an issue for the Tribunal to determine as part of the "time test", is a consistent theme throughout the Zimmerman Statement as illustrated by yet another example:

34. Similarly, the Zimmerman Statement repeatedly references evidence to draw legal conclusions concerning HBC's pricing strategy such as:

35. Another example, found at paragraph 241, reflects the precise legal position the Commissioner would hope the Tribunal adopts as advocated by Mr. Zimmerman:

36. The Zimmerman Statement contains repeated references to discovery evidence (starting at paragraph 56 through to 420) as well as case law (paras 383-385, 462 and 480).

37. In this regard, the Zimmerman Statement uses headings as a way of encouraging certain legal conclusions favourable to the Commissioner's claims. For example, one section is titled, "HBC did not exercise Due Diligence to prevent Reviewable Conduct."[17]

38. In fact, a significant portion of that same section, from paragraphs 369 to 371 and 375, reads as an advocacy piece on behalf of the Commissioner given the itemized application of the facts to support the conclusion HBC was not diligent in applying sufficient compliance mechanisms.

39. The Zimmerman Statement goes even further in applying the law by referencing the Tribunal's *Sears* decision in concluding that HBC did not adopt a pricing strategy in line with the Tribunal's recommendations in *Sears*.[18]

40. The most glaring example of HBC's main objection to the inclusion of the Zimmerman Statement as lay evidence are the 14 pages of legal argument, starting at paragraph 447, which

---

[17] *ibid*, para 369.
[18] *ibid*, para 384.

discusses the appropriate remedy should the Commissioner be successful in establishing the case against HBC. The lengthy arguments in the Zimmerman Statement are blatantly not admissible evidence in chief. Here, Mr. Zimmerman takes on the role of counsel or adjudicator by identifying the factors the Tribunal should consider in imposing a significant monetary penalty and prohibition order on HBC.

41. The chart at Appendix B contains a paragraph by paragraph analysis of the Zimmerman Statement. While there are numerous paragraphs containing improper advocacy or fact finding in the first 100 or so paragraphs, these paragraphs (with a few exceptions as noted in Appendix B) generally address background matters and are not listed as objections.

42. However, starting at paragraph 127, the Zimmerman Statement becomes an advocacy piece for the Commissioner on each legal issue to be determined by the Tribunal (including the two elements of the "time test" being good faith and the frequency test, whether the representations were materially misleading, HBC's due diligence and remedy). For each issue, the Zimmerman Statement begins with a legal test or legal conclusions and purports to support that legal conclusion through a selective review of the evidence, fact finding and argument. While this could be acceptable as submissions of counsel, it is highly inappropriate as evidence in chief of a fact witness.

43. As set out below, given the egregious problems with the Zimmerman Statement, it should be struck, perhaps with leave to be refiled in a manner in compliance with the rules as long as HBC is permitted to respond to the refiled evidence.

PART II - ISSUES

44. The issues for determination by the Tribunal are:

(a) whether the Banks Report should be struck in whole or in part;

(b) whether the Zimmerman Statement should be struck in whole or in part;

(c) whether Schedules B and C to the Amended Rule 72 Notice should be struck; and

(d) the timing for the determination of confidentiality of the motion record.

PART III - LAW AND ARGUMENT

A. Procedural Fairness and Pre-Hearing Disclosure

45. It is well established that administrative proceedings must be procedurally fair and that "a high degree of procedural protection is needed in Tribunal proceedings because of its court-like process" attracting the "highest level of procedural fairness). Pre-hearing disclosure is an important aspect of procedural fairness. [19]

46. Procedural fairness obligations require the Commissioner to disclose to HBC evidence that is relevant to issues in the proceedings. This is necessary for HBC to know the case it has to meet and to fairly defend itself against the allegations. [20]

47. As set out below, the pre-hearing disclosure at issue on this motion is fundamentally inconsistent with the applicable principles of procedural fairness. If the evidence is not struck, HBC will be prejudiced in its defence of the allegations.

B. The Banks Report is Inadmissible

i. Function of an expert and test for admissibility of expert evidence

48. It has long been settled that the role of an expert witness is to provide an impartial, independent and unbiased opinion that would be of assistance to the Tribunal. It is never acceptable for an expert to assume the role of an advocate, as that is flatly inconsistent with the

[19] *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24, para 29, Respondent's BOA, Tab 2.
[20] *ibid*, para 30.

expert's primary duty to the Tribunal. Advocacy pieces in the guise of expert opinion are inadmissible.[21]

49. It is equally improper for an expert to attempt to substitute himself for, or try to usurp the function of, the Tribunal in deciding questions of law. Expert testimony is inadmissible where it is nothing more than "masked legal conclusions" or when the testimony effectively "reworks the argument of counsel".[22] Where the expert evidence is legal opinion evidence on an ultimate issue, the necessity criteria is applied strictly.[23]

50. As the Court of Appeal for Ontario recently stated in *Abbey (2017)*, the two-stage approach adopted by the Supreme Court of Canada in *White Burgess* is "now the governing test for the admissibility of expert evidence in Canada":[24]

> Expert evidence is admissible when:
>
> (1) It meets the threshold requirements of admissibility, which are:
>
> a. The evidence must be logically relevant;
>
> b. The evidence must be necessary to assist the trier of fact;
>
> c. The evidence must not be subject to any other exclusionary rule;
>
> d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:
>
> i. impartial,
>
> ii. independent, and
>
> iii. unbiased.

[21] *Regent Boily v Her Majesty the Queen*, 2017 FC 1021, para 34, Respondent's BOA, Tab 3 citing *Québec (Attorney General) v Canada*, 2008 FC 713, para 161.
[22] *Association of Chartered Certified Accountants v The Canadian Institute of Chartered Accountants*, 2016 FC 1076, para 31, Respondent's BOA, Tab 4.
[23] *R v Mohan*, [1994] 2 SCR 9, para 25, Respondent's BOA Tab 5; *Boily*, para 39, Respondent's BOA, Tab 3.
[24] *R v. Abbey*, 2017 ONCA 640 (CanLII) [*Abbey 2017*], para 53, Respondent's BOA, Tab 6.

e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,

and

(2) The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

a. legal relevance

b. necessity,

c. reliability, and

d. absence of bias.

51. The Banks Report fails to meet at least two of the four criteria set out in the first stage of the *White Burgess* test: (i) it provides legal conclusions based on the facts and is therefore unnecessary (requirement 1(b)), and, (ii) it lacks independence and impartiality (requirement 1(d)). It should therefore be excluded pursuant to the Tribunal's gatekeeper function, the importance of which is discussed below.

ii. The importance of the Tribunal's gatekeeper function

52. In *White Burgess*, Justice Cromwell found that the "unmistakable overall trend of the jurisprudence [...] has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role." [25] In *Abbey (2017)*, the Ontario Court of Appeal noted that "recent case law, including *White Burgess* itself, has emphasized the importance of the trial judge's gatekeeper role."

53. In *J.-L.J.*, the Supreme Court of Canada stated that the "admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than

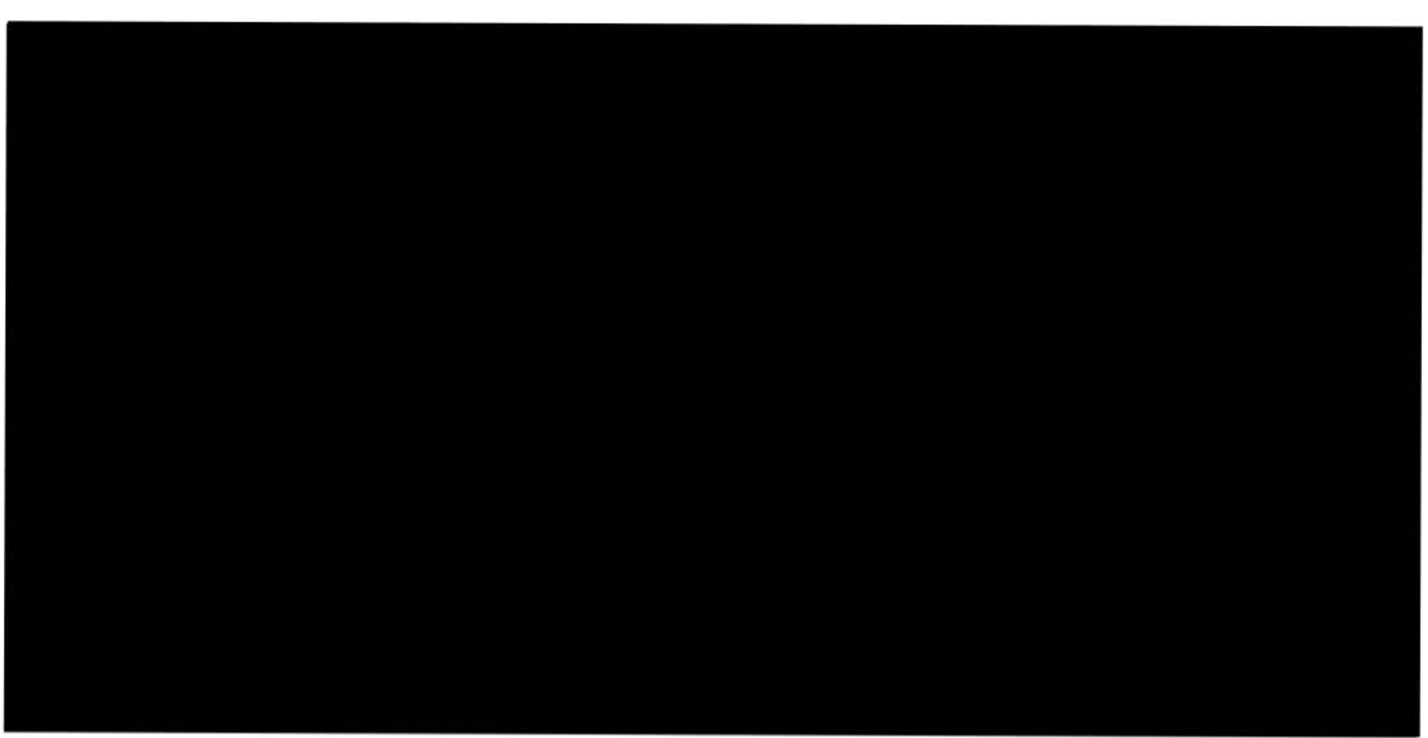
[25] *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 [*White Burgess]*, para 20, Respondent's BOA, Tab 7.

admissibility."[26] Thus, as the Ontario Court of Appeal held in *Abbey (2017)*, "[n]o longer should expert evidence be routinely admitted with only its weight to be determined by the trier of fact."[27]

iii. The Banks Report should be struck

54. Mr. Banks appears to have fundamentally misconceived the proper role of an expert and the Banks Report is wholly inadmissible as "evidence" in this proceeding, assuming it is even relevant (the quality of HBC's compliance program is not relevant to whether or not there has been a breach of the Act).

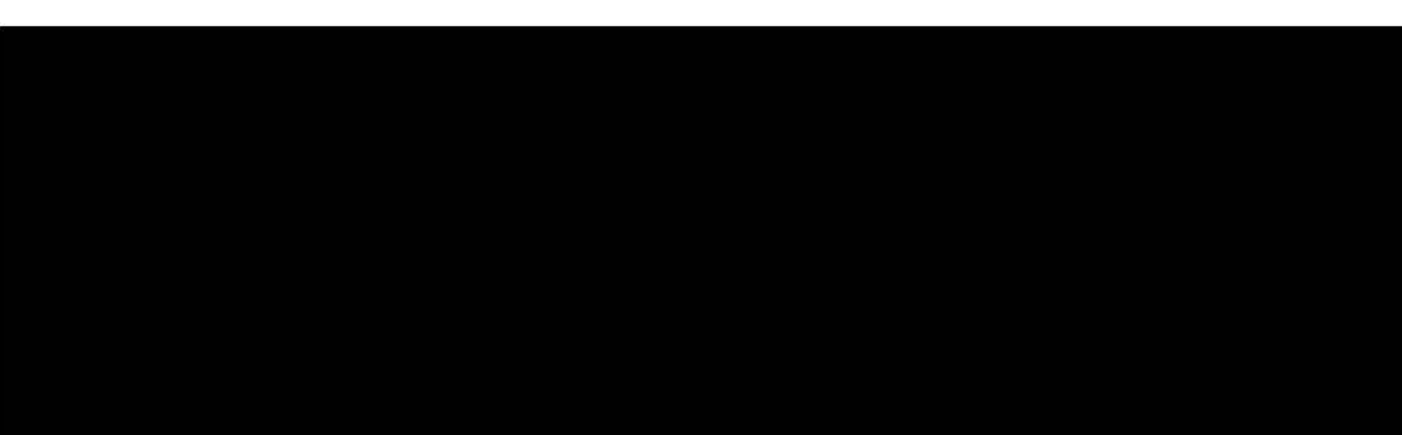
55. The Banks Report runs to 142 paragraphs in length. Although it is pervaded throughout with improper argument, unfounded conclusions, legal opinion and bare advocacy for the Commissioner, the patent improprieties of Mr. Banks' evidence (and the evident inadmissibility of his Report) are encapsulated by the summary of "conclusions" found in Part VII (paragraphs 135-143).



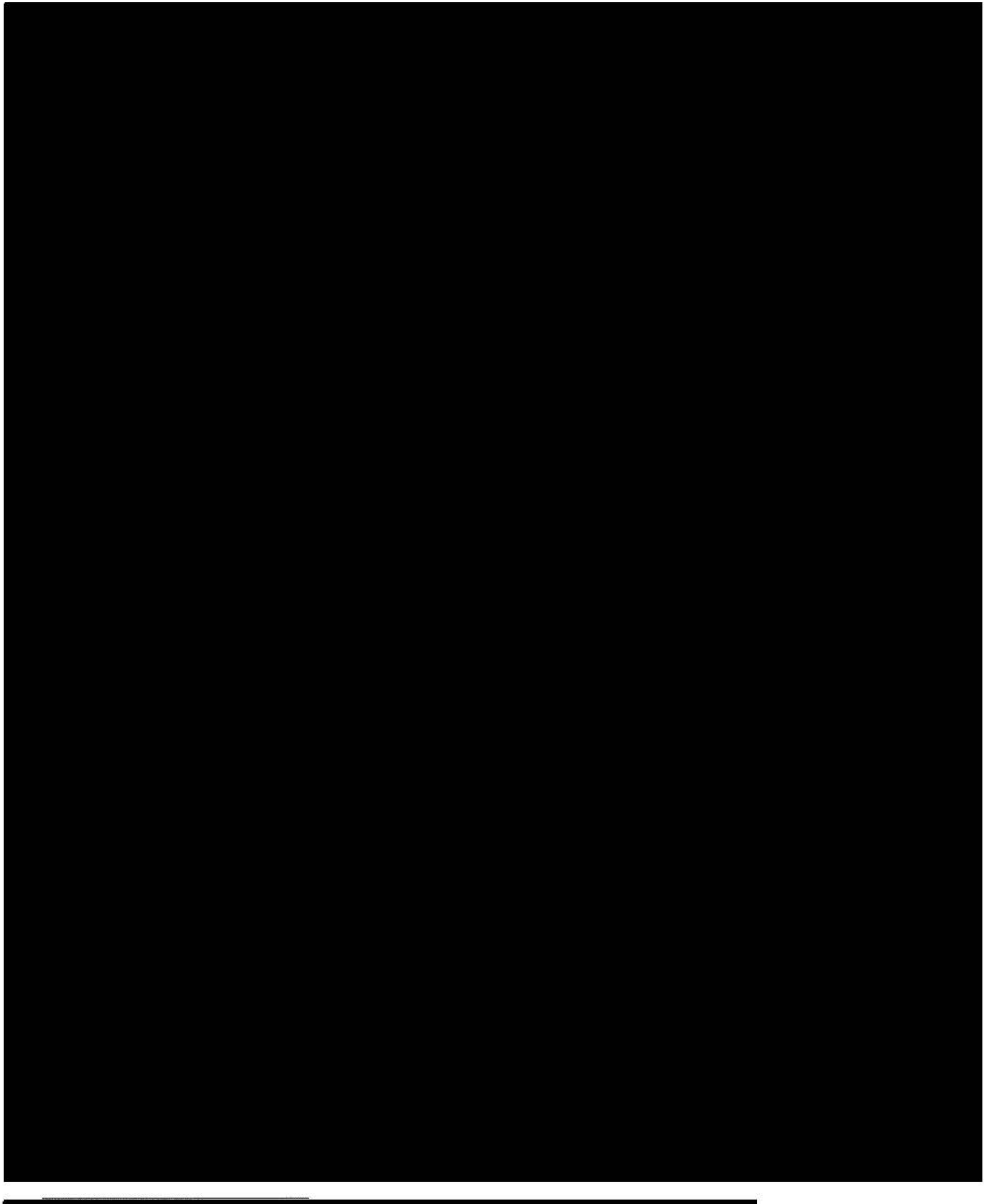
---

[26] *R. c. J. (J.)*, 2000 SCC 51, para 28, Respondent's BOA, Tab 8.
[27] *Abbey (2017)*, para 53, Respondent's BOA, Tab 6.

58. As is clear from the pleadings in this proceeding, HBC and the Commissioner disagree on the proper construction of section 74.01(3) of the Act, including the proper interpretation of the "good faith" element of the "time test" found in s. 74.01(3)(b). HBC's position is, among other things, that the Commissioner's proposed interpretation of good faith (now parroted by Mr. Banks) would effectively write the time test in s.74.01(3)(b) out of the Act, by improperly conflating it with the volume test in s.74.01(3)(a), and also that the Commissioner (and now, Mr. Banks) has misread the Tribunal's decision in *Sears*.[28] For present purposes, the point is that the meaning of "good faith" is a legal question for the Tribunal to decide on the basis of argument from counsel – it is not a subject matter for "expert evidence", let alone from a lawyer whose firm is a compliance monitor for the Bureau.



[28] Amended Response, para 4.



This is an argument that the Commissioner's counsel has already made to the Tribunal on multiple occasions. The Tribunal has noted the lack of logic in the Commissioner's position, and the lack of any evidence to support contraventions of the Act by HBC in respect of any other product (let alone "all products").[30] And Mr. Banks, who is seemingly willing to "find" facts in favour of the Commissioner at will, offers no such evidence in the Banks Report.

65. The Commissioner is entitled to be represented by counsel of his choice in this proceeding and to have that counsel present legal arguments in support of the Commissioner's position at the hearing. Had the Commissioner so desired, he could have moved to have Mr. Banks admitted *pro hac vice* in order to appear as counsel in this proceeding. But the law is clear that the Commissioner cannot seek to have an expert witness argue (and decide) his case from the witness box.

66. The reasoning of the Federal Court of Appeal in *Canada (Board of Internal Economy) v. Canada (Attorney General)* at paragraph 30 applies equally in this case:

> In the case at bar, ... I find that the admissibility issue is better resolved at an early stage for two reasons. First, the St-Hilaire affidavit is so clearly out of

[30] *The Commissioner of Competition v Hudson's Bay Company*, 2018 Comp Trib 20 at para 16-18, Respondent's BOA, Tab 9.

> bounds and replete with legal opinion that it ought to be stopped in its tracks. There is simply no point in leaving it on the record, as it is so clearly inadmissible that there is no need to have a full record before coming to a final assessment of its merits. If Rule 81(1) is to have any meaning, it must be enforced in cases such as this one where an affidavit is tendered to provide an expert legal opinion on the very substantive issue that the Court will have to consider.

67. The Banks Report is so deficient that the Tribunal ought to exercise its gatekeeping function to strike the affidavit at this stage.

C. The Zimmerman Statement is Inadmissible and Should be Struck

i. Rules applicable to lay witness statements

68. Tribunal Rule 68(1) requires that, at least 60 days prior to the commencement of the hearing, the Commissioner serve witness statements setting out the lay witnesses' evidence in chief. Tribunal Rule 68(2) provides that **witness statements shall include only "fact evidence that could be given orally by the witness"** [emphasis added] together with admissible documents as attachments or references to those documents. Rule 74(1) provides evidence in chief of each lay witness shall be tendered by way of the statement referred to in rules 68 to 70.

69. As reflected in Rule 68, the evidence of lay witnesses is generally limited to the facts of which they are aware. Legal argument, opinion, factual findings on contested issues, speculation and hearsay are simply not admissible. As with evidence tendered by affidavit:

> The Court may strike affidavits, or portions of them, where they are abusive or clearly irrelevant, *where they contain opinion, argument or legal conclusions,* or where the Court is convinced that admissibility would be better resolved at an early stage so as to allow the hearing to proceed in a timely and orderly fashion (*McConnell v. Canadian Human Rights Commission*, 2004 FC 817, affirmed 2005 FCA 389).[31] [emphasis added]

[31] *Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 CAF 43, para 16, Respondent's BOA, Tab 10 citing *Quadrini v Canada Revenue* Agency, 2010 FCA 47 *[Quadrini]*, para 18.

70. With respect to opinion evidence from lay witnesses, it is admissible in limited circumstances and only if it is based on facts that were actually observed by the witness in question. In *Canada (Commissioner of* Competition*) v. Imperial Brush Co.*, the Tribunal noted that lay opinion evidence may be admissible, if the "witness' testimony is founded on **personal knowledge**"[32] [emphasis added]. None of the opinions provided by Mr. Zimmerman are based on his personal knowledge.

71. It is well established that an affidavit should be struck at a preliminary stage "where it is in the interest of justice to do so ... or in cases where a party would be materially prejudiced where not striking an affidavit or portions of an affidavit would impair the orderly hearing of the application". The principles regarding the Tribunal exercising its gatekeeper function set out above from *Canada (Board of Internal Economy) v. Canada (Attorney General)* apply equally to the lay witness statement at issue.

72. As set out further below, the Zimmerman Statement is so clearly flawed that it ought to be struck in its entirety at this stage of the proceeding. HBC would be materially prejudiced if it has to prepare for the hearing based on a 328-page witness statement that does not in any way comply with the relevant rules on admissible evidence in chief. The length of the hearing will also be impacted as HBC would have to address the many issues with the Zimmerman Statement through lengthy cross-examination and calling of additional witnesses.

ii. The Zimmerman Statement contains improper argument, advocacy and factual findings

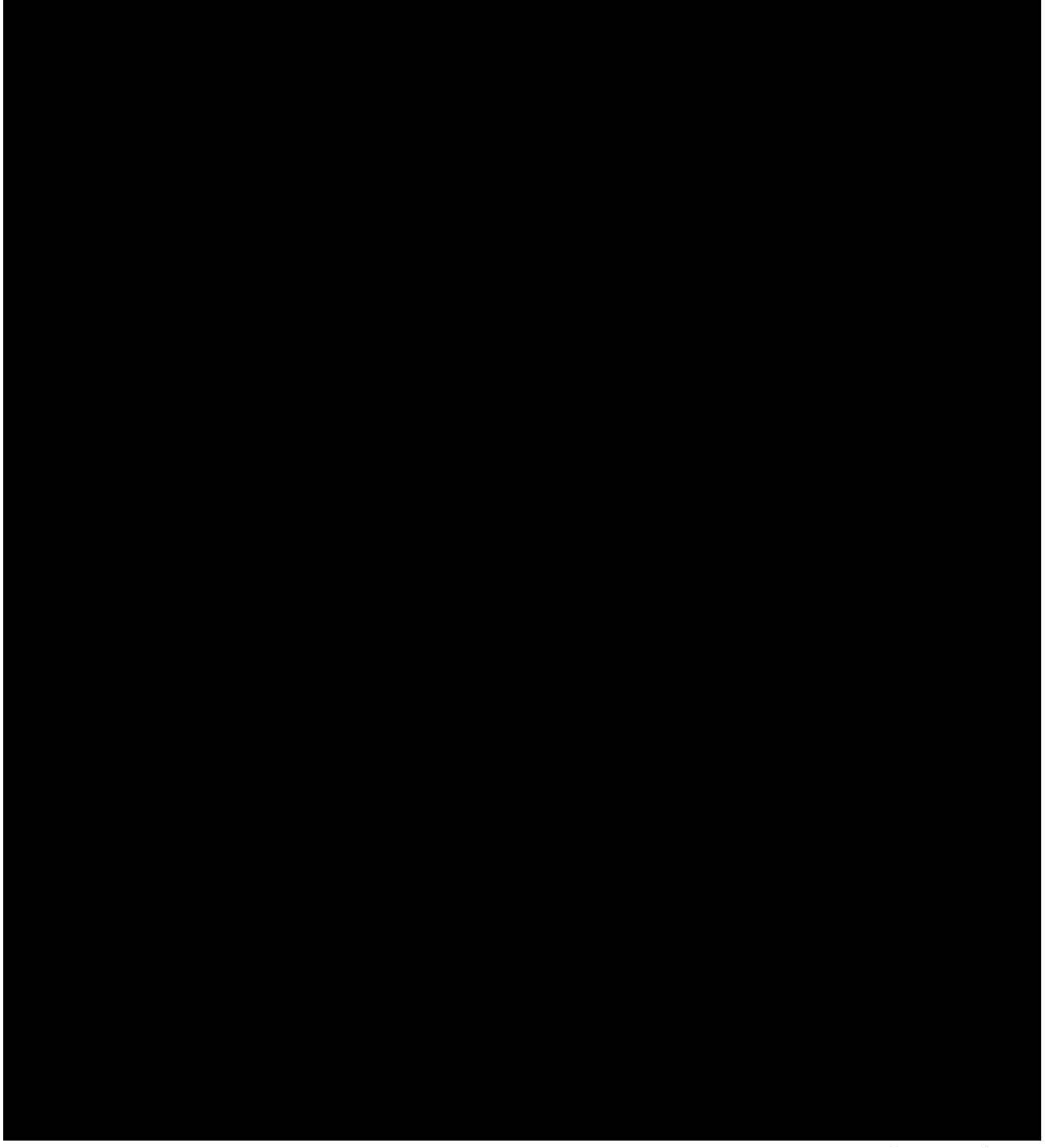
73. As set out above, the Zimmerman Statement improperly contains factual findings and draws inferences from HBC's discovery evidence with respect to every contested issue in this proceeding in the guise of "investigation findings". Indeed, over 140 paragraphs of the

---

[32] *Canada (Commissioner of Competition) v. Imperial Brush Co.*, 2007 Comp. Trib. 22, para 10-11, Respondent's BOA, Tab 11.

Zimmerman Statement consist of quotations from transcripts from the discovery of HBC representatives (including several that are used multiple times). Factual findings are for the Tribunal to make.

74. The Zimmerman Statement also improperly contains legal arguments based on its factual findings. For instance, the Statement provides Mr. Zimmerman's interpretation of the OSP Guidelines and the *Sears* decision and contains 14 pages of argument as to the appropriate remedy in this case should the Commissioner be successful in establishing his case.



76. Accordingly, as set out in Appendix B, the paragraphs in the Zimmerman Statement containing argument, and/or factual findings should be excluded as they are not proper evidence in chief.

iii. The Zimmerman Statement contains improper opinion evidence

77. The Zimmerman Statement contains Mr. Zimmerman's opinions, or speculations, relating to topics including: (a) consumer habits pertaining to comparing mattress prices and making purchase decisions; (b) HBC's efforts to sell mattresses at the OSP along with what HBC knew or ought to have known and what it could have done; (c) HBC's exercise of good faith in pricing as well as its intent in various decision making contexts; and (d) HBC's internal guidelines and practices related to advertising compliance and general due diligence efforts.

78. To the extent Mr. Zimmerman's opinion may be admissible, it must be based on his direct knowledge. None of his opinions are based on facts that are within Mr. Zimmerman's personal knowledge[33].

79. Therefore, as set out in Appendix B, the paragraphs in the Zimmerman Statement containing opinions and/or speculation do not meet the requirements for the admissibility of lay opinion evidence and ought to be struck.

D. Schedule B and C of the Amended Rule 72 Notice Should be Struck

80. Tribunal Rule 72 requires that the Commissioner provide a list of the documents to be admitted in evidence without further proof in accordance with section 69 of the Act:

> The Commissioner shall provide a list of the documents to be admitted in evidence without further proof in accordance with section 69 of the Act at least 45 days before the commencement of the hearing.

---

[33] *Ibid.*

81. The Amended Scheduling Order required the Rule 72 Notice to be delivered on January 4, 2019.

82. Section 69 of the Act applies to the admissibility of documents at trial and presumes that a "participant" has both knowledge of the existence of documents and the truth of their contents for any documents proved to have been in the possession of or on the premises used or occupied by the participant or its agents.

> 69. In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,
>
> [...]
>
> (c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is *prima facie* proof
>
> (i) that the participant had knowledge of the record and its contents,
>
> (ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and
>
> (iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

83. Those presumptions were found to be unconstitutional for criminal proceedings under the Act in *R. v. Durward*[34]. The expeditious and proportionate use of section 69 in civil proceedings is not to seek its application to all of the Respondent's productions on discovery,

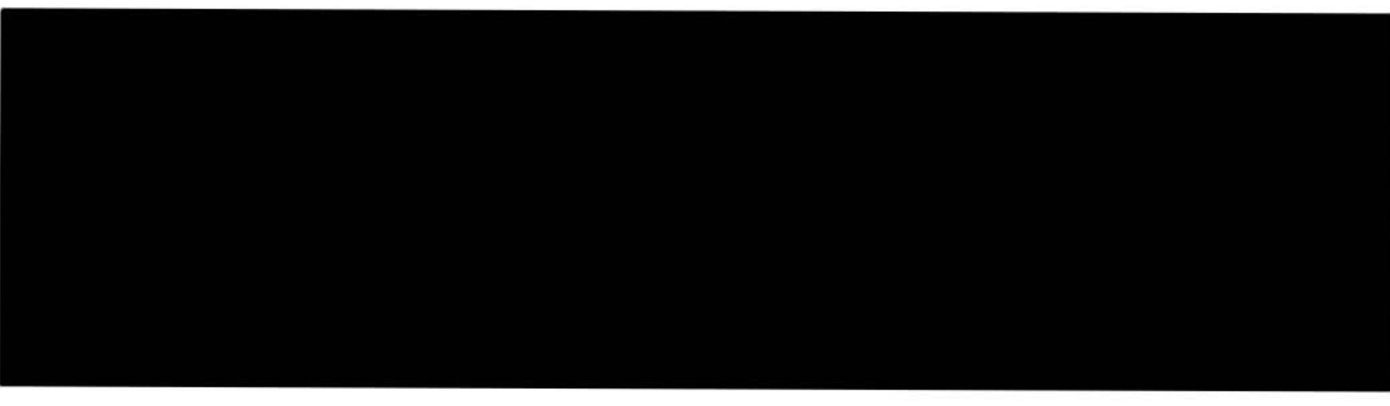
[34] *R v Durward, 2014 ONSC 4194*, para 73, Respondent's BOA, Tab 12.

but rather, to limit the associated factual and legal analysis to the documents that the Commissioner actually intends to tender and rely upon as part of his case at the hearing.

84. The Rule 72 Notice initially listed some 98,752 documents in Appendix B and C as documents the Commissioner intends to admit into evidence without further proof. These documents constitute effectively all of the documents in HBC's affidavit of documents. This Rule 72 Notice is abusive, inconsistent with the purpose of the Rules on pre-hearing disclosure and denies the Respondent procedural fairness by obscuring the case against the Respondent under a mountain of presumptively admissible documents and denying it a meaningful opportunity to respond.

85. In the Amended Rule 72 Notice, served after HBC brought this motion, the Commissioner now states that he intends to proceed on the basis of documents listed at Appendix A, but that he "reserves the right to admit without further proof additional documents in responding to HBC's case such as those which may be included with the Commissioner's Reply and for purposes of cross examination at the hearing".

86. With respect to the over 94,000 documents described in Appendix B, they should not be made subject to a reservation of rights by the Commissioner to rely on a blanket application of the section 69 presumptions. This is not how Rule 72 is written and it cannot have been Parliament's intent that Rule 72 would be used in this way. The Commissioner was required by January 4, 2019 to identify the documents it intends be admitted in evidence without further proof as part of its case. There is no provision for reservations of rights in respect of documents that may be used in reply or on cross-examination.



88. Without knowing exactly what documents the Commissioner intends to rely upon, there could be hundreds, if not thousands of documents that present conflicting information that cannot simultaneously be the position of HBC on any given issue.

89. Furthermore, the Amended Rule 72 Notice is irrelevant as it relates to the documents listed on Appendix C. The documents described in Appendix C were neither in the possession of nor on premises used or occupied by the Respondent or its agents and therefore cannot be subject to a notice pursuant to Rule 72. For example, Appendix C includes public documents or court documents that have never been in the possession of HBC or on premises used or occupied by it. Accordingly, Appendix C to the Amended Rule 72 does not meet the requirement of section 69 of the Act and ought to be struck.

90. Accordingly, Appendix B and C to the Amended Rule 72 Notice ought to be struck.

E. Confidentiality of the Motion Record

91. HBC filed its motion to strike on February 14, 2019 and did so confidentially because the underlying evidence for the motion (the Banks Report, Zimmerman Statement and Rule 72 notice evidence) have not yet been filed. According to the Amended Scheduling Order, April 5, 2019 is the deadline to provide documents to the Tribunal for use at the hearing of the Application (e.g. Briefs of Authorities, witness statements, expert reports and Agreed Books of Documents).

92. Confidentiality should be maintained because the motion itself is based on the argument that parts of the underlying evidence (i.e. portions of the Banks Report, Zimmerman Statement and Rule 72 notice) upon which the Commissioner relies are improper and should be struck in their entirety. Therefore, until the issues raised by the motion are resolved, the motion materials should not form a part of the public record.

93. The Commissioner served the Banks Report on December 19, 2018 subject to an agreement with HBC on which provisions of the report should be deemed confidential. On February 4, 2019, HBC responded to the Commissioner specifying which paragraphs in the Banks Report should be confidential but, to date, has not received a response from the Commissioner.

94. On December 19, 2018, the Commissioner also served the Zimmerman Statement with portions of the document identified as either confidential level A or C in accordance with the Amended Confidentiality Order. The Commissioner requested that HBC advise as to which portions of the statement should be deemed confidential. HBC informed the Commissioner that he should expect a response after March 1 due to the present filing time constraints.

95. HBC submits that substantial portions of the Zimmerman Statement refer to confidential HBC documents and discovery transcripts which reference HBC's confidential business information.

96. As described previously, HBC now also contends the Banks Report should be struck in its entirety because it does not constitute proper evidence.

97. Therefore, in light of the unresolved concerns that HBC has with the evidence underlying the motion record, HBC submits that the motion record should remain confidential until such time as these concerns are addressed by the Tribunal.

98. The Commissioner has indicated an intention to challenge HBC's confidentiality claims but has not yet served a notice of motion or identified which items he intends to challenge.

99. The Commissioner's confidentiality challenge should be addressed after the Tribunal's determination of the admissibility of the underlying evidence contained in HBC's motion record. Even if HBC is unsuccessful in its motion to strike, portions of the motion record still cannot be made public based on the Amended Confidentiality Order.

100. Therefore, the more efficient method of managing the confidentiality matters would be to first address HBC's motion to strike and then allow the parties to decide, based on whatever evidence remains after the Tribunal's decision, what portions of the remaining evidence should be made public and what should be kept confidential (i.e. redacted according to the Amended Confidentiality Order).

101. The Commissioner's push to challenge the confidentiality procedure set out in the Amended Confidentiality Order, along with its dismissive responses to HBC's right to challenge evidence under the Rules, is solely an attempt to pressure or embarrass HBC and not for any proper purpose. The Commissioner should not be permitted to do so based on inadmissible evidence and, in any event, there is no urgency which would justify a denial of HBC's right to be heard by the Tribunal at this juncture.

PART IV - ORDER SOUGHT

102. For foregoing reasons, HBC seeks:

(a) An order striking the Banks Report in whole or in part;

(b) an order striking out the Zimmerman Statement in whole or in part;

(c) an order striking out Schedules B and C of the Rule 72 Notice;

(d) permit the Commissioner to refile its evidence in a manner compliant with the Rules on appropriate terms and with HBC having the right to respond;

(e) HBC's costs of this motion; and

(f) such further and other relief as the Tribunal deems just.

DATED at Toronto, Ontario this 27th day of February, 2019.

for Eliot Kolers

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

PART V - LIST OF AUTHORITIES

Jurisprudence	
1	The Commissioner of Competition v. Hudson's Bay Company, 2018 Comp Trib 6
2	Vancouver Airport Authority v. Commissioner of Competition, 2018 FCA 24
3	Regent Boily v Her Majesty the Queen, 2017 FC 1021
4	Association of Chartered Certified Accountants v The Canadian Institute of Chartered Accountants, 2016 FC 1076
5	R v Mohan, [1994] 2 SCR 9
6	R v. Abbey, 2017 ONCA 640
7	White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23
8	R. c. J. (J.), 2000 SCC 51.
9	The Commissioner of Competition v. Hudson's Bay Company, 2018 Comp Trib 20
10	Canada (Board of Internal Economy) v Canada (Attorney General), 2017 FCA 43
11	Canada (Commissioner of Competition) v. Imperial Brush Co., 2007 Comp. Trib. 22
12	R. v. Durward, 2014 ONSC 4194

APPENDIX A
RELEVANT STATUTES & REGULATIONS

Competition Act, R.S.C. 1985, c. C-34, s. 79

Section 69:

In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,

[...]

(c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is *prima facie* proof

(i) that the participant had knowledge of the record and its contents,

(ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and

(iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

Section 74.01(3)(b):

(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,

[...]

(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.

Section 74.01(1)(a):

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect

Section 74.01(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

Competition Tribunal Rules SOR/2008-141

Rules 68(1) and (2):

(1) The applicant shall, at least 60 days before the commencement of the hearing, serve on every other party and on all intervenors

(a) a list of documents on which the applicant intends to rely at the hearing, noting any waivers of privilege claimed in regard to those documents; and

(b) witness statements setting out the lay witnesses' evidence in chief in full.

(2) Unless the parties otherwise agree, the witness statements shall include only fact evidence that could be given orally by the witness together with admissible documents as attachments or references to those documents.

Rule 72:

The Commissioner shall provide a list of the documents to be admitted in evidence without further proof in accordance with section 69 of the Act at least 45 days before the commencement of the hearing.

Rule 74(1):

The evidence in chief of each lay witness shall be tendered by way of the statement referred to in rules 68 to 70 and consist of their full statement of evidence and relevant documents or references to those documents.