

**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:

**THE COMMISSIONER OF COMPETITION**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  <b>FILED / PRODUIT</b> Date: March 6, 2019 CT-2017-008  Bianca Zamor for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	#147

Applicant

– and –

**HUDSON’S BAY COMPANY**

Respondents

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

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**Overview**

1. With few exceptions, Hudson's Bay Company ("**HBC**") challenges the admissibility of all of the Commissioner of Competition's (the "**Commissioner**") evidence on various grounds, too numerous to list in this overview. HBC: (a) mischaracterizes the purpose for which the Commissioner tenders the expert report of Theodore L. Banks (the "**Banks Report**") and then directs a challenge against a false premise; (b) misunderstands Rule 72 of the *Tribunal Rules*<sup>1</sup> (the "**Tribunal Rules**") and the evidentiary presumptions created under subsection 69(2) of the *Competition Act*<sup>2</sup> (the "**Act**"); and, (c) glosses over the various exceptions to the hearsay rule

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<sup>1</sup> *Competition Tribunal Rules*, SOR/2008-141, Rule 72, Commissioner's Book of Authorities, at Tab 5.

<sup>2</sup> *Competition Act*, RSC, 1985, c. C-35, ss. 69(2), Commissioner's Book of Authorities, at Tab 3.

which allow the Witness Statement of Senior Competition Law Officer Adam Zimmerman (the “**Zimmerman Statement**”) and the Banks Report to be admitted into evidence.

2. HBC fails to identify prejudice in any of the matters that it has identified in its written submissions. There is no procedural unfairness resulting from the Rule 72 Notice or the evidence that the Commissioner has filed. HBC has been provided with ample notice on the documents that the Commissioner intends to call into evidence and the documents that qualify under subsection 69(2) of the Act and that can be admitted for their truth and content. In fact, HBC has been provided with more than the forty-five days provided for in Rule 72. HBC has been afforded with every opportunity to respond to the Commissioner’s case. HBC filed materials on March 1, 2019, responding to the Commissioner’s case.

3. HBC mischaracterizes the purpose for which the Commissioner tenders the Banks Report. The Commissioner tenders the Banks Report to provide evidence about corporate practices and corporate procedures relating to compliance programs and their effectiveness in reaching compliance. Expert evidence is necessary because management science/organizational science relating to compliance programs and commercial practices of corporations in relation to compliance are beyond the experience of the Tribunal. Expert evidence is necessary in this case to: (a) understand HBC’s compliance program and its overall approach relative to prevailing corporate practices and, more specifically, to assessing whether the HBC compliance program meets certain recognized standards; (b) understand whether there was due diligence on the part of HBC; and (c) fashion an appropriate remedy.

4. The Zimmerman Statement contains admissible evidence, specifically statements based on direct observations, statements concerning the content of documents and transcripts that may be used by the Commissioner in this proceeding. HBC ignores subsection 69(2) of the Act, which allows a document to be admitted for the truth of its content, without further proof. HBC also ignores that Senior Competition Law Officer Zimmerman, as a trained investigator, is entitled to provide lay opinion and draw factual inferences. Under these exceptions the hearsay rule is summarily dismissed. The remainder of the complaints, for which there are many, are baseless and are addressed in the chart found in Annex B to this factum.

5. The Commissioner has reviewed the Zimmerman Statement and the Banks Report as against HBC's complaints. The Commissioner has made discreet amendments in answer to HBC's complaints. The Commissioner has amended fifty paragraphs in the Zimmerman Statement. This includes the removal of seven entire paragraphs and various sentences or discreet words as well as minor revisions to a handful of other paragraphs that do not introduce new evidence into the Zimmerman Statement. As it relates to the Banks Report, Mr. Banks has made four amendments to his report, although none of which were requested by HBC. This includes the removal of two paragraphs and two sentences. A copy of the proposed amendments to the Zimmerman Statement and Banks Report are produced in Annex A and C to this factum. The Commissioner has also included Annex B and D to this factum, which contains charts addressing each of HBC's complaints. The Commissioner's minor changes should fully dispose of HBC's complaints.

6. In the case of the Rule 72 Notice, HBC's position has no merit. The issue for the Commissioner is that the Amended Scheduling Order required him to serve the Rule 72 Notice before receiving HBC's Response. Accordingly, the Commissioner listed the documents he intends to lead in chief and reserved his rights with respect to the rest of the documents that are admissible for the truth of their content pursuant to subsection 69(2) of the Act. HBC demands that the Tribunal limit the Commissioner's documentary evidence to what he filed with his evidence in chief, but that position is clearly wrong and creates an obvious unfairness to the Commissioner. Rule 70 of the Tribunal Rules expressly allows the Commissioner to include "additional reply documents" as part of his Reply. The matter can be easily resolved by the Commissioner serving an amended Rule 72 Notice on March 22, 2019, when he provides his Reply. The delivery of an amended Rule 72 Notice on March 22, 2019 fully answers HBC's objection and aligns with the forty-five day notice period set out in Rule 72 of the Tribunal Rules.

7. HBC ignores the confidentiality requirements that have been imposed by the Tribunal. Paragraph 15 of the Amended Confidentiality Order (the "**Confidentiality Order**") requires that the parties file a public version of all motion records with the Tribunal. Paragraph 15 is found in the Confidentiality Order because the principle of open courts is inextricably tied to the s. 2 (b) Charter right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice. Without notice to either the Tribunal or the Commissioner, HBC

filed its motion materials in confidential form. It was only when it was called out by Tribunal staff that HBC gave notice to the Tribunal and the Commissioner of its intention to proceed behind a veil of secrecy. The open court principle is not one of convenience. HBC filed motion materials and it is required to provide a public version, regardless of the outcome of the motion. The Commissioner has a public mandate and making a proceeding public is part of that mandate. The confidentiality claims asserted by HBC is a recurrent theme and is addressed in the cross-motion that was filed by the Commissioner, returnable on March 12, 2019.

## **PART I – THE FACTS**

### *Procedural Background*

8. The Commissioner commenced this proceeding on February 22, 2017 seeking relief against HBC pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the Act, subsequently issued an Amended Notice of Application on February 26, 2018.

9. The Commissioner contends that HBC: (a) contravened subsection 74.01(3) of the Act by improperly using ordinary selling price (“**OSP**”) representations; and (b) contravened paragraph 74.01(1)(a) of the Act by using the terms “clearance” and “end of line” in certain promotional advertisements for mattresses.

10. The Tribunal issued an Amended Scheduling Order.

11. Pursuant to the Amended Scheduling Order, on December 19, 2018, the Commissioner served: (a) the Zimmerman Statement; (b) the Banks Report; and (c) the expert report of Joel Urbany (the “**Urbany Report**”). On January 4, 2019, the Commissioner delivered the Rule 72 Notice, which contained three Appendices. The Appendices consisted of the following:

- a) Appendix A lists documents attached to the Zimmerman Statement, the Banks Report and the 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 by HBC under a Section 11 Order issued by the Federal Court of Canada (T-88-15); and

c) Appendix C lists 4,176 documents described as “representations and court documents”. These are public documents, such as HBC flyers and court documents involving HBC.

12. In the cover letter to the Rule 72 Notice and in subsequent emails, the Commissioner advised HBC that the documents identified in Appendix A to the Rule 72 Notice would be relied upon by the Commissioner to present his case in chief, but that he could call on additional documents in reply evidence. Under the Amended Scheduling Order, the Commissioner is required to file the Rule 72 Notice prior to HBC filing its evidence on March 1, 2019 and prior to the Commissioner filing his reply evidence.

13. On February 7, 2019, the Commissioner also served a Supplemental Witness Statement from Senior Competition Law Officer Zimmerman (the “**Supplemental Zimmerman Statement**”).

14. An amended Rule 72 Notice was served by the Commissioner on February 22, 2019. Some documents were added to Appendix A, namely the documents in the Supplemental Zimmerman Statement, and some documents that do not fall under subsection 69(2) of the Act were removed from Appendix B and C of that notice.

15. HBC demands that the Commissioner should provide an exhaustive list of documents with his case in chief and be precluded from including additional documents with his Reply.

16. The Commissioner proposes to resolve this matter by serving a further amended Rule 72 Notice on March 22, 2019 with his Reply. All documents identified in Appendix A will be the evidence that the Commissioner will lead in chief. Should the Commissioner wish the Tribunal to receive additional documents into evidence at the hearing he would apply for leave in accordance with Rule 71 of the Tribunal Rules.

### ***The Banks Report***

17. The Commissioner has served the Banks Report. Mr. Banks is a corporate compliance expert. He has specialized expertise pertaining to commercial standards for compliance programs. Mr. Bank’s qualifications are not in issue and are, in any event, a matter for the trier of fact to decide. While HBC contends that Mr. Banks is biased, no submissions have been made

on this point and the Commissioner is at a loss as to whether an alleged bias is still at issue. There is no evidence in support of these submissions, which the Commissioner contends are premature and are best left to the trier of fact.<sup>3</sup>

18. The Commissioner has tendered the Banks Report to provide evidence about corporate practices and procedures relating to compliance programs. The practices and procedures companies ordinarily adopt when establishing and implementing compliance programs are beyond the experience of the Tribunal. The Banks Report discusses the principles and processes responsible corporations follow when establishing and implementing effective compliance programs. Mr. Banks opines that there are commercial standards and evaluates HBC's conduct in relation to these accepted standards.

19. While HBC does not want evidence about industry standards respecting corporate compliance programs to be available to the Tribunal, the practical steps ordinarily taken by responsible corporations when implementing compliance programs are relevant factors for the Tribunal in assessing due diligence and good faith. After all, HBC has in its Reply to the Application raised a due diligence defence.

20. HBC mischaracterizes the purpose for which the Commissioner tenders the Banks Report. The purpose of the Banks Report is not to establish that HBC has contravened paragraph 74.01(1)(a) and subsection 74.01(3) of the Act or to provide an opinion about domestic law. Rather, the Commissioner has tendered the Banks Report to provide evidence about commercial practices and procedures relating to compliance programs.

21. Mr. Banks has removed certain paragraphs from his report in order to allay HBC's stated concerns.

22. However, in response to paragraph 26 of the HBC factum, HBC misreads paragraphs 73-77 of the Banks Report. Mr. Banks opines that [REDACTED]

[REDACTED] Mr. Banks does not say [REDACTED] as

<sup>3</sup> *White Burgess Langille Inman v Abbott and Halibuton Co.*, 2015 SCC 23, at paras. 47-49 and 53, Commissioner's Book of Authorities, at Tab 47.  
<sup>4</sup> Banks Reports, paras. 73-77.



contended by HBC. This is not an inference that can be made from these words. This aspect of the Banks Report is relevant in assessing the effectiveness of HBC's compliance program.

23. As it relates to paragraphs 27 and 28 of the HBC factum, [REDACTED]

[REDACTED] Experts are permitted to make assumptions of fact or law. HBC can cross-examine on this point or, ultimately, if the Tribunal does not agree that [REDACTED] it will affect the probative value of the expert report. In any event, the Banks Report is not about the law, rather it is about the formal program specifying an organization's policies, procedures, and actions within a process to help prevent and detect violations of laws and regulations.

24. In response to paragraph 29 of the HBC factum, Mr. Banks has amended his report and deleted paragraph 135 and a third of paragraph 138. As for paragraph 136, the statement that

[REDACTED] is not problematic. Firstly, Mr. Banks was asked to assume that *Sears* was the state of the law. Secondly, Mr. Banks is opining on [REDACTED]

### *The Zimmerman Statement*

25. The Commissioner delivered the Zimmerman Statement, a sworn witness statement, to HBC. The Zimmerman Statement is based on direct observation, statements concerning the content of documents and transcripts, , admissions of HBC, and in certain sentences lay opinion, which Mr. Zimmerman as an investigator is entitled to do.

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<sup>5</sup> Banks Reports, paras. 136.

26. Senior Competition Law Officer Zimmerman is the lead investigator. The Bureau conducts investigations in teams. The evidence is gathered, inventoried and assessed by the investigative team as a whole. Paragraph 4 of the Zimmerman Statement [REDACTED]

27. The Zimmerman Statement makes reference to a number of documents, including transcripts from the section 11 examinations, transcripts from an examination for discovery, answers to undertakings, documents appended to the HBC Affidavit of Documents or produced in response to a Section 11 Order and documents gathered by Senior Competition Law Officer Zimmerman during the course of the investigation.

28. Paragraphs 6-10 of the Zimmerman Statement [REDACTED] HBC has not identified these paragraphs as being subject to challenge on this motion, either in its factum or the chart thereto.

29. The Zimmerman Statement relies [REDACTED]

30. HBC counsel has consented to the filing of the section 11 transcripts.<sup>7</sup>

31. The Zimmerman Statement was reviewed by the Commissioner, with a view to assessing the HBC complaints. The Commissioner has amended 50 paragraphs in the document. The

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<sup>6</sup> Motion Record, Tab 2.

<sup>7</sup> Motion Record, Tab 3 and 4.

amendments are minor and include the removal of seven paragraphs, the removal of sentences and words as well as a handful of minor revisions that do not introduce new evidence into the Zimmerman Statement. A copy of the proposed amendments to the Zimmerman Statement is found at Annex A of this factum. The Commissioner provides an explanation for each of the HBC complaints in Annex B to this factum.

32. HBC makes sweeping generalizations on the Zimmerman Statement that are unwarranted or not applicable to the entirety of the document. In paragraph 32 of its Factum, HBC lists nine examples from the Zimmerman Statement that it disputes. Of those nine examples, the Commissioner has either removed or reworded (again without introducing new evidence) these paragraphs. As for the remainder of these paragraphs, namely paragraphs 127, 135 and 148, the Commissioner disagrees with HBC's assessment on the admissibility of this evidence.

33. HBC has a reaction to the use of the word "good faith" in the Zimmerman Statement, inferring in all cases where the term is used that the Commissioner is making conclusions on a state of mind. HBC misreads the evidence. In response to paragraph 33 of the HBC factum, in paragraph 390 Mr. Zimmerman states

[REDACTED]

34. The Zimmerman Statement makes a number of statements in relation to HBC's pricing strategy, all of which are admissible evidence. However, in one paragraph, the Commissioner includes the words [REDACTED] to the end of a sentence. HBC contends that these words are an attempt to draw a legal conclusion on the HBC pricing strategy. The Commissioner disagrees. The statement simply provides that [REDACTED]

[REDACTED] This is a factual statement that is supported by the evidence. Although the Commissioner disagrees with HBC's assessment of paragraph 235 of

the Zimmerman Statement, these words have been deleted to appease HBC and to remove any possible ambiguity. The paragraph now reads as follows:



35. As it relates to paragraph 35 of the HBC factum, the entire paragraph 241 has been deleted.

36. The suggestion in paragraph 36 of the HBC factum that the Zimmerman Statement cannot rely on sworn evidence is unexplained by HBC. There is no reason why Senior Competition Law Officer Zimmerman cannot rely on the sworn evidence of a witness, especially in a context where the witness confirms that the evidence binds the corporation. The Zimmerman Statement can rely on examination transcripts.

37. As for the suggestion that the Zimmerman Statement “reads like an advocacy piece”, this is a bald statement that ignores the substance of the witness statement. Senior Competition Law Officer Zimmerman has set out admissible evidence in an organized fashion for the convenience of the Tribunal. In so doing, the Commissioner is being absolutely open with HBC about the evidence he has filed. The approach taken by the Commissioner in this case is much more transparent than merely filing transcripts and books of section 69 documents. HBC obtained an organized outline of the evidence five months in advance of the oral hearing, and six months in advance of closing arguments. It knows the case against it.

38. In response to paragraph 39 of the HBC factum, portions of paragraph 384 of the Zimmerman Statement have been deleted. Certain references to the *Sears* decision have been removed.

39. In paragraphs 40 and 41 of the HBC factum, HBC takes issue with paragraphs 447 – 480 of the Zimmerman Statement, suggesting that the Commissioner is not entitled to lead evidence in respect of the remedy. HBC qualifies this part of the Zimmerman Statement as “legal submissions”. The Commissioner contends that he is entitled to lead evidence in respect of the various factors that are to be considered by the Tribunal in levying an administrative monetary

penalty. For instance, the frequency and duration of the conduct at issue, for which there is clear evidence, is relevant, admissible and necessary.

40. To the extent that HBC has identified legitimate concerns, the Commissioner has amended the Zimmerman Statement. The remainder of the Zimmerman Statement is legally sound, well supported by a record and there is therefore no reason for this Tribunal to strike it out.

## **PART II – THE ISSUES**

41. The issues for determination by the Tribunal are:

- a) Whether the Banks Report should be struck, either in part or in whole, with leave to amend?
- b) Whether the Zimmerman Statement should be struck in part or in whole?
- c) Whether Schedule B and C to the amended Rule 72 Notice should be struck? and
- d) Whether HBC should be exempt from the confidentiality obligations of the Amended Confidentiality Order which requires it to file a public version of its motion materials with the Tribunal?

## **PART III – THE LAW**

### *No Breach of Procedural Fairness – General*

42. The Competition Tribunal is an adjudicative tribunal that was created under the *Competition Tribunal Act*<sup>8</sup> (the “**Tribunal Act**”) to hear and dispose of applications made under Part VII.1 of the Act. The Tribunal is afforded with certain evidentiary and procedural privileges which make the adjudicative process more flexible than that of a traditional proceeding before a superior court with inherent jurisdiction.

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<sup>8</sup> *Competition Act*, RSC, 1985, c. C-35, ss. 69(2), Commissioner’s Book of Authorities, at Tab 3.

43. The Tribunal, for instance, must apply section 69 of the Act and Rule 72 of the Tribunal Rules, which allow the Commissioner to rely on a document for the truth of its content if certain conditions are met. This statutory presumption should not offend the Tribunal. Rules providing adjudicative tribunals with flexibility in evidentiary matters are by no means unique.<sup>9</sup> A strict application of the rules of evidence are often seen as a technical impediment to the fair resolution of a dispute, as is recognized by subsection 9(2) of the Tribunal Act.<sup>10</sup> Of course, a tribunal has the discretion to give evidence the weight that it deserves.

44. There is no unfairness to subsection 69(2) of the Act. While HBC has referred to a case to suggest that the provision cannot be used in a criminal context given that it would destroy the presumption of innocence found in a number of *Charter* provisions, this case does not apply in a civil proceeding.<sup>11</sup> A statutory presumption is nothing more than something that is taken to be true for its content, unless shown otherwise by a respondent. If the documents meet the requirements of subsection 69(2) of the Act, it becomes a statutory exception to the hearsay rule, subject to the respondent destroying that evidentiary presumption by leading evidence to the contrary or through cross-examination.<sup>12</sup>

45. The case law is replete with examples where subsection 69(2) of the Act has been applied. For example, in *R. v. Howard Smith Paper Mills Ltd.*,<sup>13</sup> the Supreme Court held that the plain language of the provision is such that where a document of the character mentioned states, for

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<sup>9</sup> Consider, for example, section 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s.15 which applies to most statutory tribunals in Ontario, provides that a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court, (a) any oral testimony; and (b) any document or thing, relevant to the subject-matter of the proceeding and may act on such evidence. See Commissioner's Book of Authorities, at Tab 6. The effect of section 15 is to allow hearsay evidence in a tribunal context: *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 16(c), Commissioner's Book of Authorities, at Tab 1; *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. C-18.3, s. 34, Commissioner's Book of Authorities, at Tab 2; *Transportation Appeal Tribunal of Canada Act*, S.C. 2001, c. 29, s. 15, Commissioner's Book of Authorities, at Tab 7. An additional list of statutes is included at the Motion Record, Tab 1.

<sup>10</sup> "All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit." *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), s. 8(1), Commissioner's Book of Authorities, at Tab 4.

<sup>11</sup> *R. v. Durward*, 2014 ONSC 4194 at para. 75, Commissioner's Book of Authorities, at Tab 26. Section 11 of the *Charter* only applies to criminal offences and *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at pages 28 and 30, Commissioner's Book of Authorities, at Tab 10 or *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at pages 1002-3, Commissioner's Book of Authorities, at Tab 14 for the proposition that corporations do not have individual rights protected under section 7.

<sup>12</sup> *R. v. McGavin Bakeries Ltd.* (1951), 100 C.C.C. 215 (Alta. S.C.) at para. 32, Commissioner's Book of Authorities, at Tab 37.

<sup>13</sup> *R. v. Howard Smith Paper Mills Ltd.*, [1957] S.C.R. 403 at para. 61, Commissioner's Book of Authorities, at Tab 33.

example, that two participants agreed upon a thing, that is *prima facie* evidence against both notwithstanding that the statement may appear in a document which is an "inter-office memorandum" which never left the premises of the participant in whose possession or on whose premises ("used or occupied") it was found. If that "inter-office memorandum" is taken out of context or if it does not accurately reflect the facts, the respondent may cross-examine, which deals with any perceived unfairness. In this case, HBC was provided with the Zimmerman Statement and the Banks Report on December 19, 2018, giving it ample time to respond to the evidence and prepare for the cross-examination of Senior Competition Law Officer Zimmerman and Mr. Banks.

46. The evidentiary presumption created under subsection 69(2) of the Act also applies to all documents as a whole. In *R. v. Albany Felt Co. of Canada*,<sup>14</sup> for example, the Quebec Court of Appeal held, under what was then the *Combines Investigation Act*, that the word "document", now expressed as "record" in the current Act, includes several individual documents taken as a whole. A factual conclusion can therefore be made based on several documents that fall under subsection 69(2) of the Act. Each separate piece of paper need not record by itself something "as having been done, said or agreed upon" so long as some of the documents seized, when read together, show that something was "done, said or agreed upon".

47. The evidentiary presumption found in subsection 69(2) of the Act stands independently of the Tribunal Rules. Rule 72, in particular, provides that the Commissioner is required to 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 72 has nothing to do with whether the document is admissible under subsection 69(2) of the Act for the truth of its content nor does it place any limits on the number of documents that can be referenced in the Rule 72 Notice. Rule 72 is intended to assist a party in responding to the statutory presumption created under subsection 69(2) of the Act.

48. Having said that, the Tribunal must allow Rule 72 to be applied in a manner that will not create unfairness. A tribunal proceeding that is adjudicative in nature attracts a high degree of

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<sup>14</sup> *R. v. Albany Felt Co. of Canada* (1982), 143 D.L.R. (3d) 691 (Q.C.A.) at paras. 17-22 (esp. para. 20), Commissioner's Book of Authorities, at Tab 22.

procedural fairness for both parties.<sup>15</sup> The Rule 72 Notice must not be used as an instrument to gain strategic advantage.

***The Banks Report is Admissible***

49. The Banks Report is admissible expert evidence. The practices and procedures that corporations ordinarily adopt when establishing and implementing compliance programs are beyond the experience of the Tribunal and are necessary to consider in coming to a proper conclusion about HBC's compliance program and its overall approach relative to prevailing commercial practices. This is necessary evidence that speaks to, for example, whether the HBC compliance program meets commercial standards; whether good faith is established; whether HBC exercised due diligence; and, the remedy that this Tribunal may be required to fashion.

50. HBC mischaracterizes the purpose for which the Commissioner tenders the Banks Report. The purpose of the Banks Report is not to provide an opinion about domestic law. The Commissioner has tendered the Banks Report to provide evidence about commercial practices and procedures relating to compliance programs. The Banks Report addresses the practices and procedures that corporations adopt when establishing and implementing compliance programs. Corporate compliance is not about domestic law, but rather it is about an organization's policies, procedures, and actions within a process to help prevent, detect and address actual or potential violations of laws and regulations.

51. Expert evidence on this topic is necessary because the practices and procedures that corporations ordinarily adopt when establishing and implementing compliance programs are beyond the experience of the Tribunal and are relevant to consider. A compliance program that does not meet commercial standards speaks to "due diligence" and the remedy that the Tribunal may have to dispense.

52. There are ample cases that provide that expert evidence regarding commercial standards can be admitted in connection with due diligence defences, not to mention cases that require experts to provide evidence to establish the professional standard in a given profession: (a) Court

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<sup>15</sup> *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24, at para. 29, Commissioner's Book of Authorities, at Tab 45.



admitting expert evidence with respect to a due diligence defence about industry standards on the design, implementation and review of health and safety systems in the civil engineering sector of Ontario's construction industry;<sup>16</sup> (b) Court admitting and considering expert evidence regarding the standards of geological practice in connection with a due diligence defence and whether such red flags should have been apparent to an experienced geologist;<sup>17</sup> (c) Court considering evidence of industry standards in the context of a due diligence defence;<sup>18</sup> (d) Court admitting expert evidence regarding international standards affecting securities regulators relative to the performance of their regulatory missions, including evidence about international standards adopted under the auspices of the International Organisation of Securities Commissions and their application to *l'Autorité des marchés financiers*;<sup>19</sup> (e) Court admitting expert evidence on conventions of commercial transactions including the differences between "sign and close" and "sign then close" and conventional uses of an "escrow closing" and essential preconditions;<sup>20</sup> (f) Court admitting expert evidence concerning acceptable architectural practice and architectural and engineering requirements;<sup>21</sup> (g) Court admitting expert evidence about the norms of practice of a prudent and cautious notary in the same circumstances;<sup>22</sup> (h) Court admitting expert evidence relating to professional standards of government lawyers as they related to the facts of the case;<sup>23</sup> (i) Court admitting expert evidence regarding the standards of dental hygienists that was necessary for a cause of action;<sup>24</sup> and (j) Court holding plaintiffs will have "no hope of success" without expert evidence regarding standards for doctors.<sup>25</sup>

53. There is nothing improper in Mr. Banks providing expert opinion evidence on compliance standards by corporations. These are standards that cut across different jurisdictions and stand independently of the laws under which they operate.

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<sup>16</sup> *R. v. Coco Paving Inc.* (2016), 2 C.E.L.R. (4th) 312 (Ont. C.J.) at paras. 60, 65 and 71-72, Commissioner's Book of Authorities, at Tab 23.

<sup>17</sup> *R. v. Felderhof*, 2005 ONCJ 530, at paras. 2, 58, 59, and 60, Commissioner's Book of Authorities, at Tab 29.

<sup>18</sup> *R. v. Gonder* (1981), 62 C.C.C. (2d) 326 (Yuk. Terr. Ct.) at paras. 3 and 15, Commissioner's Book of Authorities, at Tab 31.

<sup>19</sup> *Pellemans c. Lacroix*, 2009 QCCS 5674, at paras. 7, 8, 24 and 30-35, Commissioner's Book of Authorities, at Tab 21.

<sup>20</sup> *Wallace v. Allen*, [2007] O.J. No. 879 (S.C.J.) at para. 8, Commissioner's Book of Authorities, at Tab 46.

<sup>21</sup> *792132 Ontario Inc. v. Ernest A. Cromarty Inc.* (2004), 36 C.L.R. (3d) 1 (Ont. C.A.) at paras. 15 and 20, Commissioner's Book of Authorities, at Tab 8.

<sup>22</sup> *Roberge v. Bolduc*, [1991] 1 S.C.R. 374 at paras. 161-167, Commissioner's Book of Authorities, at Tab 42.

<sup>23</sup> *New Brunswick v. Rothmans Inc.*, 2009 NBQB 60 at paras. 48-50, Commissioner's Book of Authorities, at Tab 19.

<sup>24</sup> *Guerrero v. Trillium Dental Centre*, 2014 ONSC 3871 at para. 7, Commissioner's Book of Authorities, at Tab 13.

<sup>25</sup> *Kim v. Choi*, 2012 ONSC 6627 at para. 73, Commissioner's Book of Authorities, at Tab 16.

54. Mr. Banks



55. HBC refers to the Tribunal's decision in this proceeding dated December 7, 2017 to suggest that the door has closed for the Commissioner on this argument.<sup>26</sup> Here, the Tribunal decided whether HBC should have to produce additional documents based on the Tribunal's interpretation of the Commissioner's Notice of Application prior to its amendment. No estoppel is available to HBC because, contrary to the requirements set out in *Danyluk v. Ainsworth Technologies Inc.*,<sup>27</sup> the Tribunal's earlier decision considered a different question and was not a final decision.


56. Clearly, an evaluation of the evidence submitted at trial is fundamentally different from the interpretation of relevance, as defined by a pleading. The logical construction of a pleading only resolves the meaning of the words pled. A trial on the other hand decides facts, and does so based on the evidence submitted at trial. Logic on its own is insufficient to determine matters of fact. By way of illustration, the application of a policy may indeed lead to systematic contraventions of the law, as a matter of logic, depending on the facts. For example, if a driver's "policy" is only to operate his or her vehicle with the "cruise control" set to 140 km/h, the driver will be speeding whenever the speed limit is 100 km/h. That is, if the premises of this statement are true, the inference that the driver is speeding is also true as a matter of formal logic (*modus tollens*). In any event, Mr. Banks provides an opinion on a different issue than was decided. He states at paragraph 21:



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<sup>26</sup> *The Commissioner of Competition v Hudson's Bay Company*, 2017 Comp Trib 19, Commissioner's Book of Authorities, at Tab 43.

<sup>27</sup> *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at pg. 462, Commissioner's Book of Authorities, at Tab 12.



57. The Tribunal's December 7, 2017, decision is also not a final decision concerning relevance in this proceeding. In its decision dated February 22, 2018,<sup>28</sup> the Tribunal permitted the Commissioner to amend his Notice of Application, which he did. The Commissioner's Amended Notice of Application broadened the scope of relevance in this proceeding. The amendment resulted in HBC more than doubling the number of documents it produced to the Commissioner in this litigation. HBC asks the Tribunal to err in contending there should be an estoppel. The Commissioner is entitled to a decision on the merits based on the evidence at trial.

58. Additionally, Mr. Banks does not "find" facts, as HBC suggests. The purpose of the Banks Report is to provide evidence about commercial practices and procedures relating to compliance programs. In so doing, the Commissioner has asked Mr. Banks to make assumptions about the law for the purposes of giving an opinion on commercial practices and procedures and HBC's overall approach relative to prevailing commercial practices. The admission of an expert report making assumptions, including assumptions about the law, is entirely permissible.<sup>29</sup> In *Kalish v. Rosenbaum*, the Court noted that:

In order to give his opinion that Rosenbaum fell below the standard of practice in this case, Carter had to testify as to the underlying assumptions he was making about certain points of law. Although he was not called to give expert evidence about the relevant domestic law applicable to this case, nor would such evidence be admissible, his views as to the governing law inevitably emerged. This was the only way that counsel could establish or challenge the basis for his opinions about the standard of practice applicable to this case.

59. The weight the Tribunal should give to Mr. Banks' evidence about prevailing commercial practices and procedures will depend, to some extent, upon whether the assumptions the Commissioner stipulated for the purposes of seeking Mr. Banks' opinion are consistent with the Tribunal's findings. If the assumption that he has made about the state of the law is incorrect, the probative value of the Banks Report may suffer.

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<sup>28</sup> *The Commissioner of Competition v Hudson's Bay Company*, 2018 Comp Trib 4, Commissioner's Book of Authorities, at Tab 44.

<sup>29</sup> *Kalish v. Rosenbaum* (2009), 100 O.R. (3d) 169 at paras. 42-47 (S.C.J.) (Admitting expert evidence of a lawyer about the standard of practice in real estate matters), Commissioner's Book of Authorities, at Tab 15.

60. HBC is improperly speculating about why Mr. Banks included in the following statements in his Report:



HBC contends that Mr. Banks is simply adopting the argument of the Commissioner's counsel. There is no factual basis to make this assertion. Permitting Mr. Banks to testify is the only proper procedure for testing HBC's unsubstantiated aspersion.

61. Mr. Banks is entitled to rely on section 69 of the Act with respect to documents and to rely on transcripts of the examinations taken in connection with this proceeding.<sup>30</sup> The complaint that he should have interviewed HBC executives in reaching his conclusion is to ignore subsection 69(2) of the Act and clearly goes to weight, not necessity or bias. In any event, defence medicals in Ontario are, for the most part, conducted on medical charts, without the medical doctor ever meeting the plaintiff. If this presents a problem for HBC, there is no better equalizer than a cross-examination.

*The Zimmerman Statement is Admissible*

62. The HBC complaints are addressed in detail in Annex B to this factum. However, the general propositions of law relied upon by the Commissioner in relation to these complaints are provided below under a separate heading.

*Subsection 69(2) of the Act Presumptions are Ignored*

63. As discussed above, subsection 69(2) of the Act allows the Commissioner to tender evidence for the truth of its content, without further proof. This has been largely ignored by

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<sup>30</sup> *R. v. Howard Smith Paper Mills Ltd.*, [1957] S.C.R. 403 at para. 61, Commissioner's Book of Authorities, at Tab 33; *R. v. Albany Felt Co. of Canada* (1982), 143 D.L.R. (3d) 691 (Q.C.A.) at paras. 17-22 (esp. para. 20), Commissioner's Book of Authorities, at Tab 22; *R. v. Encyclopaedia Britannica Publications Ltd.* (1975), 28 C.P.R. (2d) 201 (B.C.P.C.) at para. 6, Commissioner's Book of Authorities, at Tab 27; *R. v. McGavin Bakeries Ltd.* (1951), 100 C.C.C. 215 (Alta. S.C.) at para. 32, Commissioner's Book of Authorities, at Tab 37.

HBC, who contends that it should be applied on a limited basis, without once explaining why the statutory presumption should not apply to all documents that were within HBC's possession and that formed part of its Affidavit of Documents. Both Messrs. Zimmerman and Banks were entitled to rely on all documents for the truth of their content.

*The Commissioner is entitled to rely on Transcripts*

64. The Commissioner is entitled to rely on the transcripts and to include them in the Zimmerman Statement. There is no legal impediment to including them in an affidavit. HBC does not provide a single explanation as to why this is not permissible in law.

65. These transcripts contain the evidence of HBC employees and former employees. Some of these transcripts bind the corporation. HBC's own corporate witness agreed with this proposition at the outset of the examinations for discovery. HBC's counsel did not raise any objections to the corporate witness's response either at the time or subsequently.

66. The state of the law is clear. The position taken by HBC is contradicted by *Canada (Commissioner of Competition) v. Air Canada*,<sup>31</sup> where the Tribunal concluded that parts of an examination for discovery of an adverse party or of a person examined on behalf of an adverse party may be introduced as its own evidence at trial by a party.

*Headings*

67. HBC adopts the unique view that headings in an affidavit are evidence. They are not evidence. The headings were inserted to give the document structure. A heading is not evidence nor is there any case to suggest otherwise. The headings can be largely ignored and is certainly not a basis to strike out the affidavit.

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<sup>31</sup> *Canada (Commissioner of Competition) v. Air Canada* (2003), 24 C.P.R. (4th) 383 (Comp. Trib.) at para. 23, Commissioner's Book of Authorities, at Tab 11.

*Admissions and Statements Against Financial Interests*

68. An admission by a party to a proceeding can be used in evidence by an opposing party,<sup>32</sup> as can statements against a person's financial interests.<sup>33</sup> HBC ignores these exceptions to the hearsay rule.<sup>34</sup>

*Lay Opinion Evidence of Senior Competition Law Officer Zimmerman is Admissible*

69. A number of concerns raised by HBC, as they relate to the Zimmerman Statement, are addressed by the lay opinion exception to the hearsay rule. Senior Competition Law Officer Zimmerman, as an investigator is entitled to provide opinions based on his professional experience in certain areas absent being qualified as an expert witness. He does so only on rare occasion.<sup>35</sup> This exception to the hearsay rule is dismissed summarily by HBC.

70. With the advent of *R. v. Graat*<sup>36</sup> the Supreme Court of Canada affirmed that lay-witnesses could, depending on the nature of a statement, provide opinion evidence. Lay opinion, being an opinion of a person who is not qualified as an expert, can be admissible in trial where the opinion constitutes a "compendious statement" of the observations of a witness in relation to matters of common experience where no special knowledge is required and the opinion is so close to fact that it is impossible to separate the two. This is an exception to the rule that non-experts cannot give opinion evidence.

71. Lay opinion evidence has been admitted by the courts in respect of such things as assessing the condition of things – e.g., worn, shabby, used or new.<sup>37</sup> Investigators are afforded with wide latitude when providing lay opinion evidence.<sup>38</sup> Indeed, investigators may in certain

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<sup>32</sup> *R. v. Evans*, [1993] 3 SCR 653 at 664, Commissioner's Book of Authorities, at Tab 28; *R. v. Terry*, [1996] 2 SCR 207 at para. 30, Commissioner's Book of Authorities, at Tab 39.

<sup>33</sup> *R. v. Demeter*, [1978] 1 S.C.R. 538, at pg. 4, Commissioner's Book of Authorities, at Tab 25.

<sup>34</sup> See e.g., HBC's criticism of para. 165 of the Zimmerman Statement.

<sup>35</sup> See Zimmerman Statement, paragraphs 110, 112 and 144. These paragraphs also reference the evidence of documents and transcripts.

<sup>36</sup> *R. v. Graat*, [1982] 2 S.C.R. 819, at pg. 835-837 and 841, Commissioner's Book of Authorities, at Tab 32.

<sup>37</sup> *Ibid.*

<sup>38</sup> *R v Lee*, 2010 ABCA 1, per curiam (2:1), at paras. 25, 30-31, Commissioner's Book of Authorities, at Tab 36; *Kon Construction Ltd. v. Terranova Developments Ltd.*, 2015 ABCA 249 at paras. 21, 35, 38 and 40 42, Commissioner's

circumstances provide opinions based on their professional experience in certain areas absent being qualified as an expert witness.<sup>39</sup> A number of the matters to which Senior Competition Law Officer Zimmerman deposes to constitute lay opinion evidence. For instance, as a trained senior competition law investigator, Senior Competition Law Officer Zimmerman is entitled to provide a lay opinion on whether the lettering, colouring and overall style of the clearance advertisements on all products is identical to that used in sleep set “end of line” representations. These are observations that investigators can make given their experiences.<sup>40</sup> This, of course, is ignored by HBC in its complaints.

72. While HBC contends that Senior Competition Law Officer Zimmerman has no personal knowledge of the matters to which he deposes to and that the exception to the hearsay rule does not therefore apply, this is incorrect. The investigative team, including Senior Competition Law Officer Zimmerman, has reviewed all HBC documents and has conducted the investigation, including interviews and prolonged flyer research, giving Senior Competition Law Officer Zimmerman personal knowledge. As it relates to the documents, they all fall within subsection 69(2) of the Act and Senior Competition Law Officer Zimmerman was entitled to accept the statements contained in these documents as true, all of which forms part of his personal knowledge.

*Senior Competition Law Officer Zimmerman, as an investigator, is entitled to draw Inferences from the Evidence*

73. Senior Competition Law Officer Zimmerman, as a trained investigator, is entitled to draw inferences from the evidence. He is an experienced investigator and can speak to a number of matters contained in his affidavit. This is an exception to the hearsay rule that is generally afforded to investigators and police officers.

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Book of Authorities, at Tab 17; *R. v. Ilina*, 2003 MBCA 20 at paras 76-79, Commissioner’s Book of Authorities, at Tab 34; and *R. v. Gavin*, 2018 PECA 6 at para. 46, Commissioner’s Book of Authorities, at Tab 30.

<sup>39</sup> *Ontario (Ministry of Transportation) v. Bat Trucking Inc.* 2008 ONCJ 701, at para. 9, Commissioner’s Book of Authorities, at Tab 20.

<sup>40</sup> *Assoc. des parents de l’école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2012 BCSC 1614, at para. 27, Commissioner’s s Book of Authorities, at Tab 9.

74. In the case *R. v Woodcock*,<sup>41</sup> the Court concluded that lay opinion evidence based on observations of events that they were investigating and inferences drawn from those observations by experienced investigators are admissible as evidence. There is a recognition by the law that investigators have the experience and training to see things and draw inferences from those observations that the less experienced will neither see nor appreciate.<sup>42</sup>

*Senior Competition Law Officer Zimmerman is entitled to provide summary of facts in his Witness Statement and even a conclusory statement*

75. A number of the paragraphs of the Zimmerman Statement where HBC has expressed concern are paragraphs that contain a summary of the evidence that is contained in the preceding or following paragraphs. There is nothing improper with providing such a summary of evidence, so long as there are facts in support of the summary and that it is understood that the paragraph is a summary. Subsection 69(2) of the Act allows an investigator to make factual conclusions on the totality of the documents, read as a whole.<sup>43</sup> The case law also provides that based on these documents, Senior Competition Law Officer Zimmerman is entitled to provide a conclusory statement.<sup>44</sup>

76. The issue of whether an affidavit could contain a summary of the facts was discussed in *R. v. Sanghera*,<sup>45</sup> where the Court adopted the reasoning of Mr. Justice Hill, in *Re Criminal Code*<sup>46</sup> where it was said that a summary or overview facilitates the court in engaging in a neutral, independent and critical review of the record. Thus, to the extent that there are paragraphs that contain a summary of the evidence, these paragraphs are saved if the evidence that precedes it or that follows it lends support to it.

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<sup>41</sup> 2010 ONSC 671 at para 11, Commissioner's s Book of Authorities, at Tab 40.

<sup>42</sup> *R v. Klymchuk* (2005), 203 C.C.C. (3d) 341 (Ont. C.A.), at para. 58, Commissioner's Book of Authorities, at Tab 35.

<sup>43</sup> *R. v. Albany Felt Co. of Canada* (1982), 143 D.L.R. (3d) 691 (Q.C.A.) at paras. 17-22 (esp. para. 20), Commissioner's Book of Authorities, at Tab 22.

<sup>44</sup> *R. v. Colpitts*, 2016 NSSC 48, at paras. 7, 18, 25 and 26, Commissioner's Book of Authorities, at Tab 24.

<sup>45</sup> *R. v. Sanghera*, 2012 BCSC 388 at paras. 25-28, Commissioner's Book of Authorities, at Tab 38.

<sup>46</sup> *Re Criminal Code*, [1997] O.J. No 4393 (Gen Div.) at para. 10, Commissioner's Book of Authorities, at Tab 41.



***The Rule 72 Notice was Proper***

77. Rule 72 of the Tribunal Rules must not be applied in a manner that would result in procedural unfairness to either party. The Commissioner provided HBC with an amended notice under Rule 72. All of the documents in the amended Rule 72 Notice meet the requirements of subsection 69(2) of the Act. The Notice identifies the documents that the Commissioner intends to call into evidence (Appendix A of the notice) and other documents that the Commissioner may call into evidence (Appendix B and C of the notice). While HBC demands that the Commissioner provide an exhaustive list of documents prior to the delivery of the HBC evidence on March 1, 2019 and prior to the Commissioner filing reply evidence on March 22, 2019, this would result in procedural unfairness to the Commissioner.

78. There is no basis in law to strike out any part of the notice provided under Rule 72. The documents all meet the requirements of subsection 69(2) of the Act. The dispute relates to the documents identified in Appendix B and C of the Commissioner's Rule 72 Notice. The Commissioner may need to call these documents into evidence in preparing his reply evidence or in impeaching the HBC witnesses. HBC cannot request that the evidentiary door be immediately closed on the Commissioner and that he be locked into a narrow set of documents at this stage.

79. HBC also misunderstands the application of subsection 69(2) of the Act and Rule 72 of the Tribunal Rules. Subsection 69(2) of the Act does no more than create an evidentiary presumption if certain conditions are satisfied.<sup>47</sup> The onus lies on the Commissioner to prove that the conditions have been satisfied. The documents can then be admitted into evidence without further proof and is *prima facie* proof that the participant had knowledge of the document and its content and that anything said or agreed on by any participant was done, said or agreed on as recorded in the document. The presumption is rebuttable.<sup>48</sup>

80. Subsection 69(2) of the Act applies to the totality of all the documents that are to be called into evidence by the Commissioner. Each document need not record by itself something "as having been done, said or agreed upon". Each document is not to be assessed individually in

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<sup>47</sup> *R. v. Howard Smith Paper Mills Ltd.*, [1957] S.C.R. 403 at para. 61, Commissioner's Book of Authorities, at Tab 33.

<sup>48</sup> *R. v. Encyclopaedia Britannica Publications Ltd.* (1975), 28 C.P.R. (2d) 201 (B.C.P.C.) at para. 6, Commissioner's Book of Authorities, at Tab 27.

making a presumption under this provision. Rather, the Tribunal is entitled to consider the totality of all documents that form part of the notice under Rule 72 and read them together in assessing whether a presumption can be made that something was “done, said or agreed upon” by a respondent.<sup>49</sup>

81. HBC misreads Rule 72. Rule 72 does not place limitations on the number of documents that can be referenced in the corresponding notice. Also, the fact that a document is listed in the notice does not make it admissible. The Commissioner must still show that the conditions in subsection 39(2) have been satisfied. The notice is provided to allow a respondent to prepare his or her case and rebut the statutory presumption from the documents listed in the notice.

82. In any event, Rule 70 of the Tribunal Rules expressly allow the Commissioner to include “additional reply documents” as part of his Reply.

83. In this case, the Commissioner will serve a further amended Rule 72 Notice on March 22, 2019, along with his Reply evidence. HBC will be apprised of all documents that the Commissioner intends to call into evidence without further proof on this date. There will be no surprises. The notice will be delivered within the 45 day period prescribed under the Tribunal Rules and thus, there will be no unfairness to HBC. The request by HBC in this motion, that the Commissioner be locked into specific evidence prior to March 22, 2019, would result in procedural unfairness to the Commissioner.

84. HBC misinterprets Rule 72. Rule 72 concerns the process by which documents are admitted into evidence at the hearing in accordance with the presumption set out in section 69 of the Act. Rule 72, unlike Rule 68 is not a pre-hearing disclosure rule and is not found in that portion of the Tribunal Rules.

85. Should the Commissioner wish the Tribunal to receive additional documents into evidence at the hearing, leave of the Tribunal will be sought in accordance with Rule 71 of the Tribunal Rules.

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<sup>49</sup> *R. v. Albany Felt Co. of Canada* (1982), 143 D.L.R. (3d) 691 (Q.C.A.) at paras. 17-22 (esp. para. 20), Commissioner’s Book of Authorities, at Tab 22.

***HBC Continues to Flaunt the Amended Confidentiality Order***

86. HBC continues to flaunt its obligations under the Amended Confidentiality Order which requires it to file a public version of its motion materials.

87. In response to paragraphs 91-101 of the HBC factum, HBC misrepresents the sequence of events that led to these motions. The Commissioner raised his intention to bring a motion to address the confidentiality claims made on the evidence at the same time that HBC expressed its intention to bring a motion to strike the Zimmerman Statement and the Banks Report. Despite repeated requests by the Commissioner that HBC advise on the confidentiality claims that it was asserting on the Zimmerman Statement, HBC has refused to respond. The motivation is clear. HBC is forestalling the Commissioner's motion.

88. The terms of the Amended Confidentiality Order are also clear. Paragraph 15 provides that HBC is required to place a public version of all materials filed with the Tribunal on the record. HBC filed a motion with the Tribunal and ignored the clear terms of the Amended Confidentiality Order, without notice to the Commissioner or the Tribunal. Paragraph 15 of the Amended Confidentiality Order provides as follows:

[15] The Parties shall provide the Tribunal with redacted versions of Protected Records at the time any such Records are introduced into evidence or otherwise placed on the record, which redacted versions shall be marked "Public" on the face of the document and shall form part of the public record in this Proceeding. Each Protected Record shall identify the portions of the document which have been redacted from the "Public" version, by highlighting such portions in the Protected Record.

89. Tribunal registry staff contacted HBC counsel and inquired as to why their motion materials were only filed in confidential form. It was only with this communication, after HBC filed its motion materials, that HBC disclosed to the Tribunal and to the Commissioner that it would not comply with the terms of the Amended Confidentiality Order and that it would not file a public version of the motion materials.

90. There is nothing that prevented HBC from making confidentiality claims on the Zimmerman Statement when it filed its motion materials. HBC did so for the Banks Report and in the Urbany Report.

91. A Direction was issued by the Tribunal setting a timetable for the motions scheduled for March 12, 2019. The oral direction from the Tribunal prior to the issuance of the Order was that the Commissioner was entitled to assume that HBC was claiming confidentiality over all materials filed with the motion, unless HBC indicated otherwise. Again, HBC had ample opportunity to indicate which parts of the Zimmerman Statement it believes are confidential and yet it continues to refuse to provide such clarification in this motion. Instead, HBC continues to flaunt the Amended Confidentiality Order.

92. The demand that the Tribunal address confidentiality claims at a later point in time, after this motion is decided, misses an important point. The Tribunal process and, more broadly, the administration of justice, requires that parties adhere to the open court principle, which is fundamental to the survival of liberal democratic institutions. The public must be given access to the Tribunal proceedings, subject to certain narrow exceptions, namely *bona fide* confidentiality claims. The Amended Confidentiality Order and the open court principle is not one of convenience, as contended by HBC, but rather one of great principle.

93. While HBC would find it more convenient not to deal with confidentiality claims at this time, it remains that it has filed materials with the Tribunal where it is required under both the Amended Confidentiality Order and the open court principle that enshrines it to make a public version available. The Tribunal should not be asked to adjudicate such important issues behind a veil of secrecy.

94. By its own admission, the first 100 paragraphs of the Zimmerman Statement are not of concern to HBC. The concerns raised by HBC relate to certain paragraphs that HBC itself has identified in Appendix B of its Factum. There is no reason why HBC could not have turned its mind to the Zimmerman Statement and applied confidentiality claims over these pages. HBC must be made to file a public version of its materials. The broad confidentiality claims advanced by HBC in these proceedings are part of the Commissioner's cross-motion, returnable on March 12, 2019.

**PART IV- ORDER SOUGHT**

95. The Commissioner respectfully requests that the Tribunal dismiss the HBC motion with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**DATED AT GATINEAU, QUÉBEC, this 6th day, March, 2019.**

*for.*   
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Counsel to the Commissioner of Competition

# ANNEX A

**PUBLIC**

## **ANNEX A**

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# ANNEX B



ANNEX B – Zimmerman Witness Statement

Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC’s Objection	Commissioner’s Response
	5	The use of discovery and section 11 evidence to make factual findings, draw inferences or provide opinion evidence is improper throughout the witness statement.	<p><b><u>Regarding documents</u></b></p> <p>Section 69 of the Act provides that a document in the possession of HBC is <i>prima facie</i> proof (among other things) that HBC had knowledge of the document and its contents; and anything recorded as having been done, said or agreed on by HBC was done, said or agreed on as recorded with the authority of HBC. With respect to section 69 see:</p> <p><i>R. v. Howard Smith Paper Mills Ltd.</i>, [1957] S.C.R. 403 at para. 61 (“It is, in my opinion, the plain language of this legislation that where a document of the character mentioned states, for example, that two participants agreed upon a thing, that is prima facie evidence against both notwithstanding that the statement may appear in a document which is an ‘inter-office memorandum’ which never left the premises of the participant in whose possession or on whose premises (“used or occupied”) it was found”).</p> <p><i>R. v. Albany Felt Co. of Canada</i> (1982), 143 D.L.R. (3d) 691 (Q.C.A.) at paras. 17-22 (esp. para. 20) (“I am of opinion that each separate piece of paper need not record by itself something ‘as having been done, said or agreed upon’ so long as some of the documents seized, when read together, show that something was ‘done, said or agreed upon’”).</p> <p><i>R. v. Encyclopaedia Britannica Publications Ltd.</i> (1975), 28 C.P.R. (2d) 201 (B.C.P.C.) at para. 6 (“It is not incumbent on the</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>Crown to produce further proof by producing the authors of such documents and presenting these persons for cross-examination by the defendant.”).</p> <p><i>R. v. McGavin Bakeries Ltd.</i> (1951), 100 C.C.C. 215 (Alta. S.C.) at para. 32 (“When bare possession of a document is established, the section is absolute and the governing consideration is that it affixes probative value to that document, making it <i>prima facie</i> evidence that the participant had knowledge of it and of its contents, as well as of the other matters specified in subclauses (ii) and (iii). This leaves untouched, of course, the right of any one entitled to do so, to rebut the presumptions of fact thus established.”).</p> <p><b><u>Regarding discovery transcripts</u></b>            Discovery transcripts may be used as evidence (<i>Canada (Commissioner of Competition) v. Air Canada</i> (2003), 24 C.P.R. (4th) 383 (Comp. Trib.) at para. 23 (“Parts of an examination for discovery of an adverse party or of a person examined on behalf of an adverse party may be introduced as its own evidence at trial by a party”)).</p> <p>HBC’s discovery representative agreed her statements would bind the company without any objection from her counsel. See Discovery Transcript references. See Motion Record, Tab 2.</p> <p><b><u>Regarding section 11(1)(a) transcripts</u></b>            Competition Tribunal rule 73 allows for the use of transcripts of section 11(1)(a) examinations and HBC’s counsel has agreed to the use of these transcripts. See Motion Record, Tab 3.</p> <p>The Commissioner relied on HBC’s representation that section</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>11(1)(a) transcripts could be used in conducting examinations for discovery and HBC's counsel refused to allow HBC's representative to answer questions the Commissioner asked during section 11(1)(a) examinations. See excerpts from the transcripts Motion Record, Tab 4.</p> <p><b><u>Regarding lay opinions</u></b></p> <p>It is permissible for an investigator to provide lay opinions. See e.g., <i>R. v. Gavin</i>, 2018 PECA 6 at para. 46 (“case law reveals an expanding number of cases where lay opinion evidence has been admitted. The list of acceptable lay opinion evidence is not closed, and certain categories have emerged over time. “If the witness stands in a better position than the trier of fact to come to an opinion, has the capacity to come to the opinion, and the opinion is simply a compendious and accurate way in which to convey his or her evidence, then the opinion will generally be admissible.”).</p> <p><i>R. v. Ilina</i>, 2003 MBCA 20 at paras 76-79 (see esp. para. 77 referring to E. G. Ewaschuk, <i>Criminal Pleadings &amp; Practice in Canada</i>, “A ‘conclusory’ opinion may be given by a lay or non-expert witness, as an exception to the general rule, when the opinion constitutes a ‘compendious statement’ of the facts the witness observed if the facts involve matters of common experience and it is difficult to transmit the basis of the opinion).</p> <p>Jurisprudence affirms the admissibility of investigator to synthesize a review of thousands of pages of seized documentation. See e.g., <i>R. v. Colpitts</i>, 2016 NSSC 48 at paras. 7-26 and <i>R. v. Woodcock</i>, 2010 ONSC 671 at para. 11 (“Opinion evidence based on observations of the crime scene and inferences drawn from those observations by experienced crime scene</p>

**PUBLIC**

Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>investigators is commonly placed before juries. These opinions are not generally based on any novel science or theory, but on well accepted practices and the appreciation that experience and training can educate individuals to see things and draw inferences from those observations that the uneducated will neither see nor appreciate." quoting <i>R. v. Klymchuk</i> (2005), 203 C.C.C. (3d) 341 (Ont. C.A.)).</p> <p>The rationale for allowing a witness to summarize is even more compelling in a <i>Competition Act</i> case because of section 69. An investigator who has spent a significant amount of time reading HBC's documents is well-placed to state what is and is not found in multiple documents, which are presumptively true.</p>
[REDACTED]	24 (second sentence)	Legal argument	[REDACTED]
[REDACTED]			
[REDACTED]			
[REDACTED]	71	Fact finding Argument	Statements concerning the content of documents and transcripts.

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
[REDACTED]	79	Argument Fact finding	Statement concerning the content of documents and transcripts.
	98-101	Fact finding Opinion	<p>Para. 98 – Statements concerning the content of documents.</p> <p>Para. 99 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Para. 100 - Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 101 - Statements concerning the content of transcripts.</p>
[REDACTED]	108-109	Fact finding Argument/advocacy	<p>Para. 108 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 109 – Statements concerning the content of documents and transcripts. The Commissioner will remove the following – [REDACTED]</p>
			[REDACTED]

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
	110	Speculation Opinion	Para. 110 – Lay Opinion. Statements concerning the content of documents.
	111	Argument/advocacy	Para. 111 – Statements concerning the content of transcripts.
	112	Speculation Opinion Argument/advocacy	Para. 112 – Statements based on direct observation. Statements concerning the content of documents and transcripts. Lay Opinion.
	113	Argument	Para. 113 – Statements concerning the content of transcripts.
[REDACTED]	119-121	Opinion Factual findings	Para. 119 – Statements concerning the content of documents and transcripts. The Commissioner will reword the first sentence to *
			[REDACTED]
			Para. 120 – Statements concerning the content of documents. The Commissioner will amend the first sentence to add [REDACTED]
			Para. 121 – Statements concerning the content of documents and transcripts. The Commissioner will amend the first sentence to *
			[REDACTED]

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
	122-123	Argument/advocacy	<p>Para. 122 – Statement concerning the content of the documents and transcripts.</p> <p>Para. 123 – Statements concerning the content of documents. The Commissioner will remove the following – [REDACTED]</p>
	127-148	<p>Argument/advocacy</p> <p>Fact finding</p> <p>[REDACTED]</p>	<p>Paras. 127-133 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 134 – Statements based on direct observation. Statements concerning the content of documents and transcripts. The Commissioner will remove the following – [REDACTED]</p> <p>Para. 135 – Statements based on direct observation.</p> <p>Para. 136 – Statements concerning the content of transcripts.</p> <p>Para. 137 – Statements concerning the content of documents and transcripts. The Commissioner will reword the following – [REDACTED]</p> <p>Para. 138-140 – Statements concerning the content of documents.</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>Para. 141 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Paras. 142-143 – Statements concerning the content of documents.</p> <p>Para. 144 – Statements based on direct observation. Statements concerning the content of documents and transcripts. Lay Opinion. The Commissioner will make the following amendment – “For HBC, promoting a significant “save story” is a goal part of its marketing.”</p> <p>Para. 145 – Statements concerning the content of documents.</p> <p>Para. 146 – Statements concerning the content of documents and transcripts. The Commissioner will remove the following [REDACTED]</p> <p>Para. 147 – Statements concerning the content of documents. The Commissioner will reword the following [REDACTED]</p> <p>Para. 148 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p>
	150-153	Argument/advocacy Fact finding	<p>Para. 150 – Statements concerning the content of documents.</p> <p>Para. 151 – Statements concerning the content of documents.</p> <p>Para. 152 – Statements based on direct observation.</p>



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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>Statements concerning the content of documents and transcripts.</p> <p>Para. 153 – Statements based on direct observation. Statements concerning the content of documents.</p>
	154-315	<p>Argument/advocacy Fact finding Inferences Legal conclusions.</p>	See below.
	154-160	<p>Argument/advocacy Fact finding</p>	<p>Para. 154 – Statements based on direct observation. The Commissioner will reword the following –</p>
			<p>Para. 155 – The Commissioner will remove the following –</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>Para. 156 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Paras. 157-158 – Statements concerning the content of transcripts.</p> <p>Para. 159 – Statements concerning the content of documents.</p> <p>Paras. 160 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p>
	161-166	<p>Argument/advocacy Fact finding Hearsay</p>	<p>Para. 161 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 162 – Statements concerning the content of documents.</p> <p>Para. 163 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 164 – Statements concerning the content of documents.</p>
			<p>Para. 165 – Statements based on direct observation. Statements of HBC are an admission against interest (an exception to the hearsay rule). See <i>R. v. Terry</i>, [1996] 2 SCR 207 at para. 28 (“An admission against interest made by the accused is admissible as a recognized exception to the hearsay rule, provided that its probative value outweighs its prejudicial effect”).</p> <p>Para. 166 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p>
	167-184	Argument/advocacy	Para. 167 – Statements based on direct observation.

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
<p>[REDACTED]</p>		Fact finding	<p>Statements concerning the content of documents and transcripts.</p> <p>168 – Statements based on direct observation. Statements concerning the content of documents and transcripts. The Commissioner will remove the following [REDACTED]</p> <p>Para. 169 – Statements concerning the content of transcripts.</p> <p>Para. 170-184 – Statements concerning the content of documents and transcripts.</p>
<p>[REDACTED]</p>	186-195	Argument/advocacy Fact finding	<p>Paras. 186-192 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 193 – Statements concerning the content of transcripts.</p> <p>Para. 194 – Statements concerning the content of documents.</p> <p>Paras. 195 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p>
<p>[REDACTED]</p>	196-209	Argument/advocacy Fact finding	<p>Para. 196 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Paras. 197-201 – Statements concerning the content of transcripts.</p> <p>Para. 202 – Statements concerning the content of transcripts. The Commissioner will remove the following [REDACTED]</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>Para. 203 – Statements concerning the content of documents and transcripts.</p> <p>Paras. 204-206 – Statements concerning the content of transcripts.</p> <p>Paras. 207 – Statements concerning the content of documents.</p> <p>Para. 208 – Statements concerning the content of documents and transcripts.</p> <p>Para. 209 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p>
	210-218	Argument/advocacy Fact finding	<p>Para. 210 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 211– Statements concerning the content of transcripts.</p> <p>Para. 212 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 213-217 – Statements concerning the content of transcripts.</p> <p>Para. 218 – Statements based on direct observation. Statements concerning the content of documents.</p>
	219-224	Argument/advocacy Fact finding	<p>Para. 219 – Statements based on direct observation. Statements concerning the content of documents and transcripts</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
[REDACTED]			<p>Paras. 220-223 – Statements concerning the content of documents and transcripts.</p> <p>Para 224 – Statements concerning the content of documents and transcripts.</p> <p>The Commissioner will remove the following – [REDACTED]</p>
[REDACTED]	225-233	Argument/advocacy Fact finding	<p>Paras. 225-228 – Statements concerning the content of documents and transcripts.</p> <p>Paras. 229-231 – Statements concerning the content of documents and transcripts.</p> <p>Para. 232 – Statements concerning the content of documents.</p> <p>Para 233 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>The Commissioner will remove the following – [REDACTED]</p>
[REDACTED]	235-241	Argument/advocacy Fact finding Inferences	<p>Para. 235 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>The Commissioner will reword and remove the following – [REDACTED]</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
		Legal conclusions	<p>[REDACTED]</p> <p>Paras. 236-238 – Statements concerning the content of transcripts.</p> <p>Para. 239 – Statements concerning the content of documents.</p> <p>Para. 240 – Statements concerning the content of transcripts.</p> <p>The Commissioner will remove the following – [REDACTED]</p> <p>[REDACTED]</p> <p>Para. 241 – The Commissioner will remove the following – [REDACTED]</p> <p>[REDACTED]</p>
[REDACTED]	242-252	Argument/advocacy Fact finding Inferences	<p>Para. 242 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 243 – Statements concerning the content of documents.</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>Para. 244 – Statements concerning the content of transcripts.</p> <p>Para. 245 – Statements concerning the content of documents and transcripts.</p> <p>Para. 246 – Statements concerning the content of documents.</p> <p>Paras. 247-248 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Para. 249 – Statements concerning the content of transcripts. The Commissioner will remove the following – “Ms. Jelley acknowledged in her Section 11 Examination that working documents related to price setting had not been produced,  [REDACTED]</p> <p>Para 250 – Statements concerning the content of documents.</p> <p>Para. 251 – Statements concerning the content of transcripts.</p> <p>Para. 252 – Statements based on direct observation. Statements concerning the content of documents and transcripts. The Commissioner will remove the following –  [REDACTED]</p>
	253-254	Argument/advocacy	Paras. 253-254 – Statements concerning the content of documents.

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
<div style="background-color: black; width: 100%; height: 100%;"></div>	255-264	Argument/advocacy Opinion Fact finding Inferences and legal conclusions	<p>Para. 255 – Statements concerning the content of documents and transcripts.</p> <p>Paras. 256-258 – Statements concerning the content of documents.</p> <p>Para. 259 – Statements concerning the content of transcripts.</p> <p>Para. 260 – Statements concerning the content of transcripts.            The Commissioner will remove the following – <div style="background-color: black; width: 100%; height: 1em;"></div></p> <p>Paras. 261-262 – Statements concerning the content of transcripts.</p> <p>Para. 263 – Statements concerning the content of documents.</p> <p>Para. 264 – Statements based on direct observation.</p>
<div style="background-color: black; width: 100%; height: 100%;"></div>	265	Argument/advocacy	Para 265 – Statements based on direct observation.
<div style="background-color: black; width: 100%; height: 100%;"></div>	266-271	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> <li>• Speculation</li> </ul>	<p>Para. 266 – Statements concerning the content of documents and transcripts.</p> <p>Paras. 267-268 – Statements concerning the content of transcripts.</p> <p>Para. 269 – Statements based on direct observation. Statements concerning the content of transcripts.</p> <p>Para. 270 - Statements concerning the content of documents and transcripts. The Commission will amend and remove the following – <div style="background-color: black; width: 100%; height: 1em;"></div></p>



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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>[REDACTED]</p> <p>Para. 271 – Statements based on direct observation. The Commissioner will remove the following – [REDACTED]</p>
[REDACTED]	272-290	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> <li>• Speculation</li> </ul>	<p>Para. 272 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 273 – Statements based on direct observation. Witness's observations and the conduct of the investigation.</p> <p>Paras. 274-277 – Statements concerning the content of transcripts.</p> <p>Para. 278 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 279 – Statements based on direct observation. Statements concerning the content of transcripts.</p> <p>Paras. 280-281 – Statements concerning the content of documents and transcripts.</p> <p>Para. 282 – Statements concerning the content of documents. The Commissioner will remove the following – [REDACTED]</p>
			[REDACTED]

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>Para. 283 – Statements concerning the content of documents.</p> <p>Para. 284 – Statements concerning the content of transcripts.</p> <p>Para. 285 – Statements concerning the content of documents and transcripts.</p> <p>Para. 286 – Statements concerning the content of documents. The Commissioner will remove the following – [REDACTED]</p> <p>Para. 287 – Statements concerning the content of documents.</p> <p>Paras. 288-289 – Statements concerning the content of documents and transcripts.</p> <p>Para. 290 – Statements based on direct observation. The Commissioner will remove the following – [REDACTED]</p>
[REDACTED]	292-302	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	<p>Para. 292 – Statements based on direct observation.</p> <p>Para. 293 – Statements concerning the content of documents.</p> <p>Para. 294 – Statements concerning the content of documents and</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>transcripts.</p> <p>Paras. 295-296 – Statements concerning the content of documents.</p> <p>Para. 297-299 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Para. 300 – Statements concerning the content of transcripts.</p> <p>Para. 301 – Statements concerning the content of documents.</p> <p>Para. 302 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p>
	304, 306-315	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	<p>Para. 304 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 306 – Statements concerning the content of documents.</p> <p>Para. 307 – Statements concerning the content of documents and transcripts.</p> <p>Paras. 308-309 – Statements concerning the content of documents.</p> <p>Paras. 310-311 – Statements concerning the content of documents and transcripts.</p> <p>Para. 312 – Statements concerning the content of documents.</p> <p>Paras. 313-314 – Statements concerning the content of documents and transcripts.</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			Para. 315 – Statements based on direct observation. Statements concerning the content of documents and transcripts.
[REDACTED]	319-324	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	<p>Para. 319 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 320 – Statements based on direct observation.</p> <p>Para. 321 – Statements based on direct observation. The Commissioner will remove the following [REDACTED]</p> <p>Para. 322 – Statements based on direct observation.</p> <p>Para. 323 – The Commissioner will remove the following [REDACTED]</p> <p>Para. 324 – Statements based on direct observation. The Commissioner will remove the following [REDACTED]</p>
[REDACTED]	325-333	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	Para. 325 – Statements concerning the content of transcripts. The Commissioner will remove the following [REDACTED]

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
[REDACTED]			[REDACTED]
			<p>Paras. 326-327 – Statements concerning the content of transcripts.</p> <p>Para. 328 – Statements concerning the content of transcripts. The Commissioner will remove the following [REDACTED]</p> <p>Para 329 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Paras. 330-333 – Statements concerning the content of documents.</p>
[REDACTED]	339-340 342-350	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	<p>Paras. 339-340 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Paras. 342-343 – Statements concerning the content of transcripts.</p> <p>Paras. 344-347 – Statements concerning the content of documents.</p> <p>Para. 348 – Statements concerning the content of transcripts.</p> <p>Para. 349 – Statements concerning the content of documents.</p> <p>Para. 350 – Statements concerning the content of documents. The Commissioner will remove the following [REDACTED]</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
	351-359	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	<p>Para. 351 – Statements based on direct observation.</p> <p>Para. 352 – Statements concerning the content of documents.</p> <p>Para. 353 – Statements concerning the content of transcripts.</p> <p>Para. 354 – Statements based on direct observation.</p> <p>Para. 355 – Statements based on direct observation. Statements concerning the content of transcripts.</p> <p>Para. 356 – Statements based on direct observation. The Commissioner will remove the following [REDACTED]</p> <p>Para. 357 – Statements concerning the content of documents. The Commissioner will reword and remove the following – [REDACTED]</p> <p>Para. 358 – Statements concerning the content of documents and transcripts.</p> <p>Para. 359 – Statements concerning the content of documents. The Commissioner will remove the following [REDACTED]</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
[REDACTED]	361-363	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	<p>Paras. 361-362 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Para. 363 – The Commissioner will remove the following [REDACTED]</p>
[REDACTED]	365, 367-368	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	<p>Para. 365 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Para. 367 – Statements concerning the content of documents.</p> <p>Para. 368 – Statements concerning the content of transcripts.</p>
[REDACTED]	369-371	<ul style="list-style-type: none"> <li>• Advocacy/argument</li> <li>• Fact finding and opinion</li> </ul>	<p>Paras. 369-371 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p>
[REDACTED]			

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
[REDACTED]	375-378	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	<p>Para. 375 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 376 – Statements concerning the content of documents.</p> <p>Para. 377 – Statements concerning the content of transcripts.</p> <p>Para. 378 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p>
[REDACTED]	379 383-389	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	<p>Para. 379 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Para. 383 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Para. 384 – Statements based on direct observation. Statements concerning the content of documents. The Commissioner will remove the following [REDACTED]</p> <p>Para. 385 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Para. 386 – Statements based on direct observation.</p> <p>Para. 387 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 388 – Statements concerning the content of transcripts.</p>



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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>Para. 389 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p>
	390, 393-407	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	<p>Para. 390 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 393 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Para. 394 – Statements concerning the content of transcripts.</p> <p>Para. 395 – Statements concerning the content of documents and transcripts.</p> <p>Paras. 396-397 – Statements concerning the content of transcripts.</p> <p>Paras. 398-399 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Paras. 400-401 – Statements concerning the content of transcripts.</p> <p>Para. 402 – Statements concerning the content of documents and transcripts.</p> <p>Para. 403 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 404 – Statements concerning the content of documents.</p> <p>Paras. 405-406 – Statements concerning the content of documents and transcripts.</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>Para. 407 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p>
<div style="background-color: black; width: 100%; height: 100%;"></div>	410-413	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	<p>Para. 410 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 411 – Statements based on direct observation. Statements concerning the content of documents. The Commissioner will remove the following <div style="background-color: black; width: 150px; height: 1.2em; display: inline-block;"></div></p> <p>Para. 412 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 413 – Statements based on direct observation.</p>
<div style="background-color: black; width: 100%; height: 100%;"></div>	414-427	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	<p>Para. 414 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 415 – Statements concerning the content of documents.</p> <p>Para. 416 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 417 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Para. 418 – Statements concerning the content of transcripts.</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>Paras. 419-421 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Para. 422 – Statements concerning the content of transcripts.</p> <p>Paras. 423-426 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Para 427 – Statements based on direct observation. Statements concerning the content of documents and transcripts. The Commissioner will remove the following [REDACTED]</p>
[REDACTED]	428, 430-432,434	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	<p>Para. 428 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 430 – Statements concerning the content of transcripts.</p> <p>Para. 431 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para. 432 – Statements concerning the content of transcripts.</p> <p>Para. 434 – Statements concerning the content of documents and transcripts.</p>
[REDACTED]	436-440	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	<p>Para. 436 – Statements based on direct observation. Statements concerning the content of documents.</p> <p>Para. 437 – Statements concerning the content of documents and</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>transcripts.</p> <p>Para. 438 – Statements concerning the content of documents.</p> <p>Para. 439 – Statements based on direct observation.</p> <p>The Commissioner will remove the following [REDACTED]</p>
[REDACTED]	445-480	<ul style="list-style-type: none"> <li>Legal argument</li> </ul>	
[REDACTED]	447	<ul style="list-style-type: none"> <li>Argument/advocacy</li> </ul>	<p>Para. 447 – Statements concerning the content of documents.</p> <p>The Commissioner will remove the following [REDACTED]</p>
[REDACTED]	448-452	<ul style="list-style-type: none"> <li>Argument/advocacy</li> </ul>	<p>Para. 448 – Statements based on direct observation.</p> <p>Statements concerning the content of documents.</p> <p>Para. 449 – Statements concerning the content of transcripts.</p> <p>Paras. 450-452 – Statements based on direct observation.</p>

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			Statements concerning the content of documents.
[REDACTED]	453-454	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> </ul>	Paras. 453-454 – Statements based on direct observation. Statements concerning the content of documents.
[REDACTED]	455-457	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> <li>• Opinion</li> </ul>	Para. 455 – Statements based on direct observation. Statements concerning the content of documents and transcripts.
			Paras.456-457- Statements concerning the content of documents and transcripts.
[REDACTED]	459-468	<ul style="list-style-type: none"> <li>• Argument/advocacy</li> <li>• Fact finding</li> <li>• Opinion</li> </ul>	Para. 459 – The Commissioner will remove the following [REDACTED]
			Para. 460 – Statements based on direct observation. Statements concerning the content of documents.  Para. 461 – Statements based on direct observation.  Para. 462 – Statements based on direct observation. The Commissioner will remove the following [REDACTED]
			Paras. 463-466 – Statements based on direct observation. Statements concerning the content of documents and transcripts.

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Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>Para. 467 – Statements concerning the content of transcripts.</p> <p>Para. 468 – Statements based on direct observation. Statements concerning the content of documents.</p>
[REDACTED]	469	<ul style="list-style-type: none"> <li>Argument/advocacy</li> </ul>	<p>Para. 469 – Statements based on direct observation. Statements concerning the content of documents. The Commissioner will amend the following [REDACTED]</p>
[REDACTED]			[REDACTED]
[REDACTED]	470-472	<ul style="list-style-type: none"> <li>Argument/advocacy</li> </ul>	<p>Paras. 470-472 – Statements based on direct observation. Statements concerning the content of documents.</p>
[REDACTED]	473	<ul style="list-style-type: none"> <li>Argument/advocacy</li> </ul>	<p>Para. 473 – Statements based on direct observation. Statements concerning the content of documents.</p>
[REDACTED]	474-480	<ul style="list-style-type: none"> <li>Argument/advocacy</li> </ul>	<p>Para. 474 – The Commissioner will remove the following [REDACTED]</p>
[REDACTED]			<p>Para. 475 – Statements based on direct observation.</p> <p>Para. 476 – Statements concerning the content of documents. The Commissioner will remove following [REDACTED]</p>

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<b>Heading (or subheading) from Witness Statement</b>	<b>Paragraph Numbers</b>	<b>HBC's Objection</b>	<b>Commissioner's Response</b>
			<p>[REDACTED]</p> <p>Para. 477 - Statements concerning the content of documents.</p> <p>Para. 478 – Statements based on direct observation. Statements concerning the content of documents and transcripts. The Commissioner will remove the following [REDACTED]</p> <p>[REDACTED]</p> <p>Para. 479 – Statements based on direct observation. Statements concerning the content of documents and transcripts.</p> <p>Para 480 – The Commissioner will remove the following [REDACTED]</p> <p>[REDACTED]</p>

# ANNEX C



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## **ANNEX C**

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# ANNEX D

ANNEX D – Ted Banks Expert Report

Para of HBC's Factum	Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
25			<p>The Banks Report creates a fictitious legal standard, the “consensus principles” which are apparently internationally recognized standards for compliance programs that indicate a company’s level of sincerity in complying with the law of their respective jurisdiction.</p> <p>Notwithstanding the fact that this is not the legal test the Commissioner must meet to prove his claims against HBC, the Banks Report still applies these “consensus principles” to HBC as a means of raising the inference that HBC did not comply with the Act.</p>	<p>HBC misunderstands or mischaracterizes the purpose for which the Commissioner tenders the Banks Report. The purpose of the Banks Report is not to provide an opinion about domestic law.</p> <p>Rather, the Commissioner has tendered the Banks Report to provide evidence about commercial practices and procedures relating to compliance programs. The Banks Report addresses the practices and procedures companies adopt when establishing and implementing compliance programs.</p> <p>Expert evidence is necessary in this case to: (a) understanding HBC’s compliance program and its overall approach relative to prevailing corporate practices and, more specifically, to assessing whether the HBC compliance program meets certain standards; (b) understanding whether there was due diligence on</p>

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Para of HBC's Factum	Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
				<p>the part of HBC; and (c) fashioning an appropriate remedy.</p> <p>Expert evidence on this topic is necessary because the practices and procedures companies ordinarily adopt when establishing and implementing compliance programs are beyond the experience of the Tribunal and are necessary to consider in coming to a proper conclusion about HBC's compliance program and its overall approach relative to prevailing commercial practices.</p> <p>Expert evidence regarding commercial standards been admitted in connection with due diligence defences. For example, see:</p> <p><i>R. v. Coco Paving Inc.</i> (2016), 2 C.E.L.R. (4th) 312 (Ont. C.J.) at paras. 60, 65 and 71-72 (Admitting expert evidence with respect to a due diligence defence about on industry standards on the design, implementation and review of health and safety systems in the</p>

**PUBLIC**

Para of HBC's Factum	Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
				<p>civil engineering sector of Ontario's construction industry); and</p> <p><i>R. v. Felderhof</i>, 2005 ONCJ 530 and 2007 ONCJ 345 (Admitting and considering expert regarding the standards of geological practice in connection with a due diligence defence and whether such red flags should have been apparent to an experienced geologist).</p> <p>See also: <i>R. v. Gonder</i> (1981), 62 C.C.C. (2d) 326 (Yuk. Terr. Ct.) at paras. 3 and 15 (Considering evidence of industry standards in the context of a due diligence defence).</p> <p>The admission of expert evidence concerning commercial standards is consistent with extensive case regarding evidence of commercial standards more generally. For example, see:</p> <p><i>Pellemans c. Lacroix</i>, 2009 QCCS 5674 (Admitting expert evidence regarding international standards affecting securities regulators</p>

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Para of HBC's Factum	Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
				<p>relative to the performance of their regulatory missions, including evidence about international standards adopted under the auspices of the International Organisation of Securities Commissions and their application to l'Autorité des marchés financiers);</p> <p><i>Taubner Estate (Re)</i>, 2010 ABQB 60 at 328-332 (Admitting expert evidence on corporate and commercial transactions and in particular the incorporation of companies, their constating documents and the purchase and sale of private companies);</p> <p><i>Newman v. T.D. Securities Inc.</i> (2007), 26 B.L.R. (4th) 270 at para. 17 (Ont. S.C.J.) (Admitting expert evidence regarding the standards for retail financial advisors);</p> <p><i>Wallace v. Allen</i>, [2007] O.J. No. 879 (S.C.J.) at para. 8 (Admitting expert evidence on conventions of commercial transactions including the differences between “sign and</p>

**PUBLIC**

Para of HBC's Factum	Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
				<p>close” and “sign then close” and conventional uses of an “escrow closing” and essential preconditions);</p> <p><i>Kimvar Enterprises Inc. v. Nextnine Ltd.</i>, [2010] O.J. No. 5467 at paras. 47-57 (Admitting expert evidence concerning the creation of a right of way);</p> <p><i>R. v. Christakos</i>, [2005] O.J. No. 5693 (S.C.J.) at paras. 13-14 (Admitting expert evidence on rules of navigation.);</p> <p><i>792132 Ontario Inc. v. Ernest A. Cromarty Inc.</i> (2004), 36 C.L.R. (3d) 1 (Ont. C.A.) at paras.15 and 20 (Admitting expert evidence concerning acceptable architectural practice and architectural and engineering requirements);</p> <p><i>Roberge v. Bolduc</i>, [1991] 1 S.C.R. 374 at paras. 161-167 (Admitting expert evidence about the norms of practice of a prudent and cautious notary in the same circumstances);</p>

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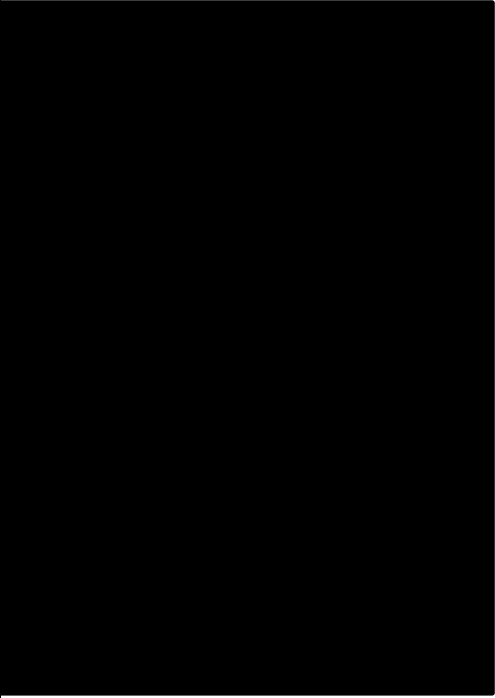
Para of HBC's Factum	Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
				<p><i>New Brunswick v. Rothmans Inc.</i>, 2009 NBQB 60 at paras. 48-50 (Admitting expert evidence relating to professional standards of government lawyers as they related to the facts of the case);</p> <p><i>Guerrero v. Trillium Dental Centre</i>, 2014 ONSC 3871 at para. 7 (Admitting expert evidence regarding the standards of dental hygienist was necessary for a cause of action); and</p> <p><i>Kim v. Choi</i>, 2012 ONSC 6627 at para. 73 (Holding plaintiffs will have “no hope of success” without expert evidence regarding standards for doctors).</p>
24, 63		16, 139	<p>This is an argument that the Commissioner's counsel has already made to the Tribunal on multiple occasions.</p> <p>The Tribunal noted the lack of logic in the Commissioner's position, and the lack of any evidence to support the contravention of the Act any</p>	<p>HBC refers to the Tribunal's decision at 2017 Comp Trib 19. Here, the Tribunal decided whether HBC should have to produce additional documents based on the Tribunal's interpretation of the Commissioner's Notice of Application prior to its amendment.</p> <p>No estoppel is available to HBC</p>



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Para of HBC's Factum	Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			<p>HBC in respect of any other product (let alone "all products").</p> <p>Mr. Banks, who is seemingly willing to "find" facts in favour of the Commissioner at will, offers no such evidence in the Banks Report.</p>	<p>because, contrary to the requirements set out in <i>Danyluk v. Ainsworth Technologies Inc.</i>, [2001] 2 SCR 460, the Tribunal's earlier decision considered a different question and was not a final decision.</p> <p>An evaluation of the evidence submitted at trial is fundamentally different from the interpretation of relevance, as defined by a pleading. The logical construction of a pleading only resolves the meaning of the words pled. A trial on the other hand decides facts, and does so based on the evidence submitted at trial. Logic on its own is insufficient to determine matters of fact. By way of illustration, the application of a policy may indeed lead to systematic contraventions of the law, as a matter of logic, <i>depending on the facts</i>. For example, if a driver's "policy" is only to operate his or her vehicle with the "cruise control" set to 140 km/h, the driver will be speeding whenever the speed limit is 100 km/h. That is, if the premises of</p>

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<b>Para of HBC's Factum</b>	<b>Heading (or subheading) from Witness Statement</b>	<b>Paragraph Numbers</b>	<b>HBC's Objection</b>	<b>Commissioner's Response</b>
				<p>this statement are true, the inference that the driver is speeding is also true as a matter of formal logic (<i>modus tollens</i>).</p> <p>In any event, Mr. Banks provides a different opinion. He states at paragraph 21:</p>  <p>The decision at 2017 Comp Trib 19</p>

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Para of HBC's Factum	Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
				<p>is also not a final decision concerning relevance in this proceeding. In its decision at 2018 Comp Trib 4, the Tribunal permitted the Commissioner to amend his Notice of Application, which he did. The Commissioner's Amended Notice of Application broadened the scope of relevance in this proceeding. The amendment resulted in HBC roughly doubling the number of documents it produced to the Commissioner in this litigation.</p> <p>HBC asks the Tribunal to err in contending there should be an estoppel. The Commissioner is entitled to a decision on the merits based on the evidence at trial.</p> <p>Additionally, Mr. Banks does not "find" facts', as HBC suggests. The purpose of the Banks Report is set out above in response re paragraph 25, above.</p>
27	"...from paragraphs to 51 and 78 through 84, the Banks Report outlines the relevant section of		Inappropriate interpretations of the statute and analysis of case law.	See the Commissioner's response to HBC's criticism of paragraph 25 (above).

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<b>Para of HBC's Factum</b>	<b>Heading (or subheading) from Witness Statement</b>	<b>Paragraph Numbers</b>	<b>HBC's Objection</b>	<b>Commissioner's Response</b>
	<p>the Act (s. 74.01(1)(a) and s.74.01(3)) and inappropriately offers interpretations of the statute and analysis of case law”.</p>			<p>The Commissioner has asked Mr. Banks to make assumptions about the law for the purposes of giving an opinion on commercial practices and procedures and HBC's overall approach relative to prevailing commercial practices.</p> <p>The admission of an expert report making assumptions, including assumptions about the law, is entirely permissible. See e.g., <i>Kalish v. Rosenbaum</i> (2009), 100 O.R. (3d) 169 at paras. 42-47 (S.C.J.) (Admitting expert evidence of a lawyer about the standard of practice in real estate matters. In so doing, the Court noted at para. 43 “In order to give his opinion that Rosenbaum fell below the standard of practice in this case, Carter had to testify as to the underlying assumptions he was making about certain points of law. Although he was not called to give expert evidence about the relevant domestic law applicable to this case, nor would such evidence be admissible, his views as to the</p>

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				<p>governing law inevitably emerged. This was the only way that counsel could establish or challenge the basis for his opinions about the standard of practice applicable to this case”).</p> <p>The weight the Tribunal should give to Mr. Banks' evidence about prevailing commercial practices and procedures will depend (amongst other things) upon whether the assumptions the Commissioner stipulated for the purposes of seeking Mr. Banks' opinion are consistent with Tribunal's findings.</p>
60-62		68, 71	<p>Mr. Banks is simply following the lead and adopting the argument of the Commissioner's counsel, who asked HBC's witness on discovery whether she thought the Code of Conduct would have been more effective had it devoted more than one word to advertising.</p> <p>In its answers to discovery undertakings, under</p>	<p>HBC is improperly speculating about why Mr. Banks included certain statements in his Report. Permitting Mr. Banks to testify is the only proper procedure for testing HBC's unsubstantiated aspersion.</p>

**PUBLIC**

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			<p>advisements and refusals, HBC provided context for the HBC Code of Business Conduct in response to that patent misuse of it by the Commissioner's counsel, which Mr. Banks has tellingly ignored.</p>	
28			<p>Assertion of a legal conclusion</p>	<p>See the Commissioner's response to HBC's criticism of paragraphs 25 and 27 (above).</p>
57-58		101	<p>The meaning of good faith is 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.</p>	<p>See the Commissioner's response to HBC's criticism of paragraphs 25 and 27 (above).</p>
29(a)			<p>The Banks Report makes sweeping legal and factual conclusions.</p>	<p>The Commissioner agrees to the removal of this sentence.</p>

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<b>Para of HBC's Factum</b>	<b>Heading (or subheading) from Witness Statement</b>	<b>Paragraph Numbers</b>	<b>HBC's Objection</b>	<b>Commissioner's Response</b>
29(b), 57-59			<p>The Banks Report makes sweeping legal and factual conclusions.</p> <p>The meaning of good faith is 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.</p> <p>This improper conclusion is simply a function of Mr. Banks' legal opinion that HBC</p>	See the Commissioner's response to HBC's criticism of paragraphs 25 and 27 (above).

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Para of HBC's Factum	Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
			[REDACTED]	
29(c), 57-58	[REDACTED]		<p>The Banks Report makes sweeping legal and factual conclusions.</p> <p>The meaning of good faith is 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.</p>	See the Commissioner's response to HBC's criticism of paragraphs 25 and 27 (above).
29(d)	[REDACTED]		The Banks Report makes sweeping legal and factual conclusions.	The Commissioner agrees to the removal of this sentence.
59	Various portions of the report – “...the Banks Report also seeks to impugn HBC more broadly, arguing that, based “on the evidence”, HBC	64, 73, 113, 123, 136	<ul style="list-style-type: none"> <li>• It is astounding that Mr. Banks would purport to offer such an opinion given that               <ul style="list-style-type: none"> <li>a) he doesn't claim to</li> </ul> </li> </ul>	Mr. Banks is entitled to rely on section 69 of the Act with respect to documents and to rely on transcripts of the examinations taken in connection with this proceeding.



Para of HBC's Factum	Heading (or subheading) from Witness Statement	Paragraph Numbers	HBC's Objection	Commissioner's Response
	<p>failed to create a " [REDACTED] "</p>		<p>have spoken to anyone at HBC about HBC's corporate culture or compliance</p> <p>b) he has offered his conclusion before HBC has even presented its evidence in this proceeding</p>	<p>See e.g., <i>R. v. Howard Smith Paper Mills Ltd.</i>, [1957] S.C.R. 403 at para. 61;</p> <p><i>R. v. Albany Felt Co. of Canada</i> (1982), 143 D.L.R. (3d) 691 (Q.C.A.) at paras. 17-22 (esp. para. 20)</p> <p><i>R. v. Encyclopaedia Britannica Publications Ltd.</i> (1975), 28 C.P.R. (2d) 201 (B.C.P.C.) at para. 6;</p> <p><i>R. v. McGavin Bakeries Ltd.</i> (1951), 100 C.C.C. 215 (Alta. S.C.) at para. 32</p>
64	[REDACTED]		<ul style="list-style-type: none"> <li>• Mr. Banks concludes the Banks Report by again invading the province of the Tribunal, to offer his opinion on the "optimal remedy" that he claims should be made against HBC in this proceeding, which             <ul style="list-style-type: none"> <li>a) was not even sought by the Commissioner in his Application</li> </ul> </li> </ul>	<p>The Commissioner agrees to the removal of this sentence.</p>

**PUBLIC**

<b>Para of HBC's Factum</b>	<b>Heading (or subheading) from Witness Statement</b>	<b>Paragraph Numbers</b>	<b>HBC's Objection</b>	<b>Commissioner's Response</b>
			b) unsurprisingly would involve the adoption of compliance "procedures" recommended by his consulting firm's client, the Bureau.	

**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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