CT-2017-008

THE COMPETITION TRIBUNAL

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

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

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

HUDSON'S BAY COMPANY

Respondents

MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF COMPETITION

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TABLE OF CONTENT

I – OVERVIEW 2

II – FACTS 3

The Supplemental Witness Statement 3

HBC's Confidentiality Claims 4

III – THE ISSUES 5

IV- SUBMISSIONS

Tribunal should allow the Supplemental Witness Statement to be filed 5

Admissibility of Evidence Appended to the Supplemental Witness Statement 7

Applicable Hearsay Exceptions 8

(i) Subsection 69(2) of the Competition Act

(ii) Public Document Exception

(iii) Declarations Made in the Course of a Business Duty

(iv) Government Books - Section 26 of the Canada Evidence Act

(v) Business Records – Section 30 of the Canada Evidence Act

(vi) Principled Exception to the Hearsay Rule

1) Reliability

2) Necessity

3) Probative Value Outweighs Prejudicial Effect

Confidentiality Claims of HBC are Improper and Excessive 17

Banks Report

Urbany Report

Witness Statement of Adam Zimmerman

V – ORDER SOUGHT 23

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MEMORANDUM OF FACT AND LAW
OF THE COMMISSIONER OF COMPETITION
(Motion for leave to file Supplemental Witness Statement and Motion to lift HBC Confidentiality Claims)

PART I - OVERVIEW

1. The interests of justice dictate that the Commissioner of Competition (the "**Commissioner**") be permitted to file the Supplemental Witness Statement of Adam Zimmerman (the "**Supplemental Witness Statement**")[1] with the Competition Tribunal (the "**Tribunal**") and that the public be entitled to see behind the veil of confidentiality claims asserted by the Hudson's Bay Company ("**HBC**") over the Commissioner's witness statement and expert reports. HBC refuses to consent to allowing the Commissioner to file the Supplemental Witness Statement with the Tribunal. Further, it asserts confidentiality claims over the Commissioner's witness statement and expert reports that are not consistent with the open court principle.

2. As provided for in the Amended Scheduling Order, the Commissioner served the witness statement of Adam Zimmerman (the "**Zimmerman Witness Statement**") along with two expert reports (collectively the "**Commissioner's Materials**") on HBC on December 19, 2018. On February 7, 2019, the Commissioner served on HBC the Supplemental Witness Statement which contains information of 40 previous criminal misleading advertising convictions of HBC and its affiliates. With one exception, all exhibits appended to the Supplemental Witness Statement are public documents. The only exception is an internal HBC Memorandum which was seized as part of a search by the Commissioner of HBC premises and which also falls within subsection 69(2) of the *Competition Act* (the "**Act**").

3. The information in the Supplemental Witness Statement relates to previous convictions for misleading advertising and deceptive marketing practices under the Act and under the *Combines Investigation Act* and would be of assistance to the Tribunal in assessing the quantum of the administrative monetary penalty ("**AMP**") that may be levied against HBC. Information concerning prior convictions is also relevant to the Tribunal's assessment of whether HBC exercised due diligence, particularly in light of HBC's assertions in the pleadings that it had "…a clear, **continuous** and unequivocal commitment to compliance" (emphasis added). The convictions are also admissible under various exceptions to the hearsay rule. The Supplemental Witness Statement, while not served within the timeline provided in the Amended Scheduling

[1] Supplemental Witness Statement of Adam Zimmerman, Commissioner's Motion Record, at Tab 2.

Order was served within the timelines provided in the *Tribunal Rules*. In any event, HBC is acutely aware of any previous convictions and the information contained in the documents should come as no surprise to the company. There is no resulting prejudice to HBC with the filing of the Supplemental Witness Statement.

4. HBC has also made confidentiality claims on the Commissioner's Materials that cannot be sustained. The open court principle demands that HBC be made to lift a number of confidentiality claims from the Zimmerman Witness Statement, the expert report of Theodore Banks (the "**Banks Report**") and the expert report of Dr. Joel Urbany (the "**Urbany Report**"). If the Commissioner is to meet his public mandate, the public must be allowed to know the facts. For the purposes of this Motion, the Commissioner is requesting that the Tribunal adjudicate on a certain number of HBC's confidentiality claims and, depending on the outcome of this exercise, that HBC be made to revisit all confidentiality claims.

PART II - THE FACTS

The Supplemental Witness Statement

5. The Amended Scheduling Order[2] required the Commissioner to serve witness statements and expert reports on HBC by December 19, 2018. Consistent with this, the Commissioner served the Zimmerman Witness Statement, the Banks Report and the Urbany Report on HBC on that date.

6. On February 7, 2019, the Commissioner served the Supplemental Witness Statement on HBC. The content of the Supplemental Witness Statement relates to previous criminal convictions of HBC and its affiliates for misleading advertising and deceptive marketing practices. HBC takes issue with the delivery of the Supplemental Witness Statement in so far as it fell outside of the time period provided for in the Amended Scheduling Order and, in any event, that it contains irrelevant and inadmissible hearsay evidence.

[2] Amended Scheduling Order, Commissioner's Motion Record, at Tab 5.

7. The documents attached to the Supplemental Witness Statement include:(a) an internal HBC Memorandum; (b) Annual Reports prepared and published by a Government of Canada department, (c) Misleading Advertising Bulletins prepared and published by the Competition Bureau or its predecessor; (d) Government of Canada News Releases; and (e) transcripts of court proceedings before the Ontario Superior Court and an Agreed Statement of Facts forming part of a court record. With the exception of the document listed in (a), all exhibits appended to the Supplemental Witness Statement are public documents.

8. The Supplemental Witness Statement contains information in relation to corporate convictions of HBC and its affiliates. The information is within the corporate knowledge of HBC and nothing contained in the Supplemental Witness Statement would come as a surprise to the corporation.

HBC's Confidentiality Claims

9. On May 8, 2018, the Tribunal issued an Amended Confidentiality Order[3] that addresses the designation of information as confidential in this proceeding. Paragraph 2 of the Amended Confidentiality Order describes categories of records that may be designated as protected records. The disclosure of protected records could cause specific and direct harm and therefore confidentiality may be claimed over them. However, regardless of the designation that is assigned to a document, the Amended Confidentiality Order does not change the common law requirements for asserting confidentiality over a record.[4]

10. The Zimmerman Witness Statement, the Banks Report and the Urbany Report all contain information that was obtained from HBC. HBC has made a number of confidentiality claims over the information contained in the Commissioner's Materials.

11. In the case of the Zimmerman Witness Statement, despite having it for over two months, HBC has yet to provide its proposals on what aspects of the witness statement should be

[3] Amended Confidentiality Order, Commissioner's Motion Record, at Tab 6.
[4] Amended Confidentiality Order, dated May 8, 2018, para. 14(e), Commissioner's Motion Record, at Tab 6.

classified as confidential. HBC has indicated that it did not expect to start work in this regard until after March 1st and would not commit to a completion date.

12. In the case of the Banks Report and the Urbany Report, HBC provided redacted versions to the Commissioner of the reports only (not the attached exhibits) in which it identified confidential information which HBC proposed would be protected under the Amended Confidentiality Order.[5]

13. The Commissioner maintains that HBC's confidentiality claims are excessive and improper as well as being inconsistent with the open court principle.

PART III – THE ISSUES

14. The issues are as follows:

a) Should the Commissioner be permitted to file the Supplemental Witness Statement with the Tribunal?

b) Is HBC entitled to make confidentiality claims over certain information and records contained in the Zimmerman Witness Statement, the Banks Report and the Urbany Report?

PART IV - SUBMISSIONS

Tribunal should allow the Supplemental Witness Statement to be filed

15. The information in the Supplemental Witness Statement is relevant and admissible. Its content relates to previous criminal convictions of HBC and companies under its control for misleading advertising and deceptive marketing offences which is relevant to these proceedings.

[5] Banks Report (with HBC confidentiality claims and Commissioner's mark-up), Commissioner's Motion Record, at Tab 3; Urbany Report (with HBC confidentiality claims and Commissioner's mark-up), Commissioner's Motion Record, at Tab 4.

16. Subsection 74.1(5) of the Act[6] sets out aggravating or mitigating factors that are to be taken into account when determining the quantum of an AMP under paragraph 74.1(1)(c) of the Act. Among the factors enumerated are the likelihood of self-correction and the history of compliance with the Act by the person against whom the order is made. As such, evidence of previous non-compliance would be of assistance to the Tribunal in fashioning a remedy under section 74.1 of the Act.

17. The information in the Supplemental Witness Statement is relevant to the Tribunal in assessing whether or not HBC exercised due diligence. In particular, HBC has asserted at paragraphs 46, 51, 91 of its Amended Response that, contrary to the Commissioner's allegations, it had "…a clear, **continuous** and unequivocal commitment to compliance" (emphasis added). A lengthy number of prior convictions is entirely relevant in the Tribunal's assessment of that claim.

18. Although the Supplemental Witness Statement was served outside the time-frame provided for under the Amended Scheduling Order, it was served within the time provided for under the *Tribunal Rules*. Rule 68 of the *Tribunal Rules* requires that a witness statement be served 60 days prior to the date of hearing, a time-line that was satisfied by the Commissioner. Service of a witness statement within the time period provided for under the Tribunal Rules cannot constitute procedural unfairness.

19. The HBC convictions for deceptive savings claims are also well within the knowledge of the company. The late filing of this document would not prejudice HBC. The information would come as no surprise to the company.

20. The Tribunal is also master of its own proceeding and is entitled to allow the filing of the Supplemental Witness Statement. The Tribunal has the authority to amend the Amended Scheduling Order and allow for the late filing of these materials.

[6] *Competition Act*, R.S.C., 1985, c. C-34, at ss. 74.1(5), Commissioner's Book of Authorities, at Tab 1.

Admissibility of Evidence Appended to the Supplemental Witness Statement

21. All of the documents appended to the Supplemental Witness Statement are admissible under the various exceptions to the hearsay rule. The appended documents consist of:

a) an internal HBC Memorandum seized by the Commissioner as part of a search of HBC premises in an earlier investigation;
b) Annual Reports prepared and published by a Government of Canada department;
c) Misleading Advertising Bulletins prepared and published by the Competition Bureau or its predecessor;
d) Government of Canada News Releases; and
e) transcript of a court proceeding before the Ontario Superior Court, an Agreed Statement of Facts forming part of a court record and Reasons for Judgment in a proceeding before the Ontario Court of Justice.

22. There is no doubt that an out-of-court statement, whether oral or in writing, will constitute hearsay evidence when (a) it is adduced to prove the truth of its contents, and (b) there is no opportunity for a contemporaneous cross-examination of the declarant. The principles governing hearsay evidence were articulated in *R. v. Mapara* [7] as follows:

a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place;
b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance;
c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case; and
d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

[7] *R. v. Mapara*, 2005 SCC 23 (CanLII), [2005] 1 S.C.R. 358 at para. 15, Commissioner's Book of Authorities, at Tab 3.

23. The central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. The Tribunal's function is to guard against the admission of hearsay evidence which is unnecessary in the context of the issue to be decided, or the reliability of which is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the ultimate trier of fact.[8]

24. However, when considering whether certain hearsay evidence should be admissible, the purpose of the rules of evidence must be kept in mind, namely to ensure that they facilitate rather than impede the goals of truth seeking, judicial efficiency and fairness in the adversarial process.

Applicable Hearsay Exceptions

25. There are a number of hearsay exceptions that apply in this case, including subsection 69(2) of the Act, sections 26 and 30 of the *Canada Evidence Act*, public document exception, declaration made in the course of a business duty and principled exception to the hearsay rule. Each is discussed under separate heading.

(i) Subsection 69(2) of the Competition Act

26. Subsection 69(2) of the Act is a statutory exception to the hearsay rule which allows documents that originate from a participant (that is, any person against who proceedings have been instituted under the Act) to be admitted into evidence. The internal HBC Memorandum dated March 13, 1989, that is appended to the Supplemental Witness Statement, was seized by the Commissioner in a search conducted of HBC's premises during the course of an earlier investigation. This is an HBC corporate document which is, pursuant to the Act, admissible for truth and content.

[8] *R. v. Khelawon*, 2006 SCC 57 (CanLII), [2006] 2 S.C.R. 787 at paras. 2 and 3, Commissioner's Book of Authorities, at Tab 4.

27. Paragraph 69(2)(c) of the Act provides that in any proceedings before the Tribunal under or pursuant to the Act, a record proved to have been in the possession of a participant or on premises used or occupied by a participant is to be admitted into evidence without further proof and is prima facie proof that (i) the participant had knowledge of the record and its contents and (ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded.

28. The internal HBC Memorandum emanated from HBC and was clearly within its possession. Paragraph 69(2)(c) of the Act has therefore been triggered and the document is admissible for the truth of its content, without further proof. For the purposes of this provision, the Commissioner is only required to prove that the document was in HBC's possession on a balance of probabilities.[9]

29. To the extent that the internal HBC Memorandum is inaccurate or that it is not complete, HBC may lead evidence to bring clarification. Paragraph 69(2)(c) of the Act does not result in unfairness, other than to bring some flexibility to the manner in which a document must be proved by the Commissioner in a Tribunal proceeding, which is expected from an adjudicative tribunal proceeding.

(ii) Public Document Exception

30. The Annual Reports, the Misleading Advertising Bulletins, News Releases and court filings attached to the Supplemental Witness Statement are all public documents that fall within the common law exception to the hearsay rule. These records are admissible for the truth of their content before the Tribunal.[10]

31. The four requirements for this exception to the hearsay rule are:

a) the subject matter of the statement must be of a public nature;

[9] *F.H. v. McDougall*, [2008] 3 S.C.R. 41 at para. 40, Commissioner's Book of Authorities, at Tab 5.
[10] *Professional Institute of the Public Service of Canada v. Canada (Attorney-General)*, [2005] O.J. No. 5775 (Sup. Ct.), Commissioner's Book of Authorities, at Tab 6; *Athabaska Airways Ltd. v. Canada* (1994), 89 F.T.R. 286 (Fed. T.D.), Commissioner's Book of Authorities, at Tab 7; *R. v. Kaipiainen*, [1954] O.R. 43 (C.A.), Commissioner's Book of Authorities, at Tab 8.

b) the statement must have been prepared with a view to being retained and kept as a public record;

c) it must have been made for a public purpose and available to the public for inspection at all times; and,

d) it must have been prepared by a public officer in pursuance of his or her duty.[11]

32. As stated by Laskin J.A. in *R v. AP*:[12]

> At common law statements made in public documents are admissible as an exception to the rule against hearsay evidence. This exception is "founded upon the belief that public officers will perform their tasks properly, carefully, and honestly." in Sopinka et al. *The Law of Evidence in Canada* (1992), p. 231. Public documents are admissible without proof because of their inherent reliability or trustworthiness and because of the inconvenience of requiring public officials to be present in court to prove them. Rand J. commented on the rationale for the public document exception to the hearsay rule in *Finestone v. The Queen* (1953), 1953 CanLII 81 (SCC), 107 C.C.C. 93 at 95 (S.C.C.):
>
> > The grounds for this exception to the hearsay rule are the inconvenience of the ordinary modes of proof and the trustworthiness of the entry arising from the duty, and that they apply much more forcefully in the complex governmental functions of today is beyond controversy.

33. The Annual Reports, the Misleading Advertising Bulletins, New Releases and court filings, which make up the bulk of the exhibits to the Supplemental Witness Statement meet all four requirements and therefore fall within the common law exception. They are inherently reliable and trustworthy sources of information and are admissible without further proof for truth and content.

(iii) Declarations Made in the Course of a Business Duty

34. The Annual Reports, the Misleading Advertising Bulletins, News Releases and court filings are all declarations made in the course of a business duty. All of the documents were produced by public servants during the course of a business duty that is statutorily mandated. This is another exception to the hearsay rule.

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[11] Sopinka, John, Lederman, Sidney N., Bryant, Alan W. *The Law of Evidence in Canada 3rd* ed. (Butterworths: Toronto, 2009) at para.6.295, Commissioner's Book of Authorities, at Tab 24.
[12] *R v AP*, [1996] OJ No 2986 (QL) (CA) at para 14, Commissioner's Book of Authorities, at Tab 9.

35. At common law, statements made by a deceased person under a duty to another person to do an act and record it in the ordinary practice of the declarant's business or calling are admissible in evidence, provided they were made contemporaneously with the facts stated and without motive or interest to misrepresent the facts. This exception to the hearsay rule was broadened in *Ares v. Venner*,[13] where the Court held that nurses' notes were admissible without the necessity of the original makers of the notes being called as witnesses. The rationale for the expanded exception has been explained as follows:

> … First, there was the consideration of mercantile convenience. To call all the persons responsible for keeping a record in a large institution was too inconvenient and might in fact serve to disrupt the business of that institution by taking a multitude of witnesses away from their work. Secondly, one had to consider the expense to the litigants in seeking out and subpoenaing all relevant witnesses. Thirdly, the cost to the public and the great length of time that would be consumed at trial by the testimony of witnesses called merely to prove a business record had to be considered. Fourthly, with records of a hospital, involving the health of patients, it could be taken for granted that nurses would make every effort to keep accurate notes. The nurses had no interest, apart from their duty, in keeping the notes and, therefore, in all likelihood, the notes were an impartial and trustworthy record of the patients' condition. Furthermore, nothing was to be gained by calling the nurses themselves. In all probability, they would have no independent memory, apart from the notes that they made, and, therefore, the notes as evidence were superior to the testimony of the nurses. All of these factors gave rise to a circumstantial guarantee of trustworthiness which justified the reception of the document without the necessity of calling the declarants.[14]

36. This same reasoning applies to many of the public documents appended to the Supplemental Witness Statement. They were prepared by public servants in the normal course of their duties as public servants. These public servants had every interest in making certain that the information that they were reporting to Parliament in the Annual Reports, Bulletins, News Releases or in the court filings, for instance, was truthful and accurate. These documents fall within the *Ares v. Venner* exception to the hearsay rule.

(iv) Government Books - Section 26 of the Canada Evidence Act

[13] *Ares v. Venner*, 1970 CanLII 5 (SCC), [1970] S.C.R. 608, Commissioner's Book of Authorities, at Tab 10.
[14] *Ault et al.v. AG Canada*, 2007 CanLII 55358 (ON SC) at para 24, Commissioner's Book of Authorities, at Tab 11.

37. The Annual Reports, the Misleading Advertising Bulletins, and Government of Canada News Releases are all records that fall within subsection 26(1) of the *Canada Evidence Act* and are therefore admissible. The information in each of these types of records was recorded in the usual and ordinary course of business.[15]

38. Subsection 26(1) of the *Canada Evidence Act*[16] provides that a copy of any entry in any book kept in any department or office of the Government of Canada is to be admitted as evidence of that entry, and of the matters, transactions and accounts therein recorded, if it is proved by affidavit that the book was, at the time of the making of the entry, one of the ordinary books kept and that the entry was made in the usual and ordinary course of business and that the copy is a true copy thereof.

39. In this case, notice of the Commissioner's intention to call on this evidence was provided through the Supplemental Witness Statement.

(v) Business Records – Section 30 of the Canada Evidence Act

40. Section 30 of the *Canada Evidence Act* also applies to this litigation. All documents attached to the Supplemental Witness Statement qualify as a business records and are therefore admissible.

41. Under the *Canada Evidence Act*, where oral evidence on a point would be admissible, subsection 30(1) provides that "a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible".[17] The internal HBC Memorandum, the Annual Reports, the Misleading Advertising Bulletins and the News Releases are all business records that fall within this provision.

42. Subsection 30(6) of the *Canada Evidence Act* provides that for the purpose of determining the probative value to be given to information contained in any record admitted

[15] *R. v. Kayaitok*, 2013 NUCJ 16, at para. 97, Commissioner's Book of Authorities, at Tab 12.
[16] *Canada Evidence Act*, R.S.C., 1985, c. C-5, at ss. 26(1), Commissioner's Book of Authorities, at Tab 2.
[17] *Canada Evidence Act*, R.S.C., 1985, c. C-5, at ss. 30(1), Commissioner's Book of Authorities, at Tab 2.

under section 30, the court may examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

43. The Supplemental Witness Statement makes clear that its attached exhibits are business records. As it relates to the internal HBC Memorandum, it was obtained through an investigation of HBC conducted by the Commissioner. This is sufficient to meet the requirements of subsection 30(6).

44. The admission of the records under section 30 of the *Canada Evidence Act* is *prima facie* proof of the truth of the contents.[18] The admission of these records does not preclude other evidence or inferences that raise a reasonable doubt about the reliability of the contents of the records. It is open to HBC to show that these convictions did not occur.

(vi) Principled Exception to the Hearsay Rule

45. In the event that none of the statutory or common law exceptions to the hearsay rule are found to apply, the principled exception to the hearsay rules applies to the Annual Reports, the Misleading Advertising Bulletins, the News Releases and the Court filings.

46. Under the principled approach to the admissibility of hearsay evidence, hearsay evidence will be admitted if 1) it has a sufficient degree of reliability, either due to the circumstances in which it came about or because circumstances are such that its reliability can be adequately tested through means other than contemporaneous cross-examination, and 2) if it is necessary to get at the truth. This is subject to the Tribunal's discretion to exclude hearsay evidence where 3) its probative value is outweighed by its prejudicial effect.

[18] *R v Smith*, 2011 ABCA 136 (CanLII), at paras 24, 33 and 46, Commissioner's Book of Authorities, at Tab 13.

1) Reliability

47. In *Ethier v. Canada (RCMP Commissioner)*[19], the question arose as to the admissibility of documents obtained by the Applicant from the Public Service Commission, one of the respondents, following a request under the *Access to Information Act*, R.S.C. 1985, c. A-1. The documents consisted of file notes and memoranda relating to an investigation undertaken by the Public Service Commission at the Applicant's request, and contemporary official documents generated by the Public Service Commission or the RCMP. Both categories of documents related to the very matters before the Court. The Federal Court of Appeal, in overturning the Trial Division's ruling that the documents were inadmissible, made the following comments regarding the reliability of the documents (at p. 661):

> …the documents in question meet the first criterion of reliability. We, of course, say nothing of the weight they should have at this stage, but on a *prima face* basis we think that the manner in which they were generated is such as to "substantially negate the possibility that the declarant was untruthful or mistaken" [*R. v. Smith*, 1992 CanLII 79 (SCC), [1992] 2 S.C.R. 915 at 933]. These are the respondents' own documents created during an internal investigation into alleged improprieties in the appointment process. To the extent that they are advanced by the appellant to support his case, it is almost inconceivable that the various declarants would have said anything that was untrue. As to the possibility of mistake, while it is always present, we can see nothing in the circumstances which would lead us to believe that it is realistic in this case, at least in so far as the preliminary question of admissibility is concerned, to say that the declarants erred.

48. In *Professional Institute of the Public Service of Canada v. Canada (Attorney-General),*[20] Panet J. was asked to rule on the admissibility of a broad range of government documents, including policy papers, budget papers, policy circulars, news releases, reports, briefing papers, notes, minutes, agendas, internal memoranda and correspondence. In ruling that these documents were admissible to prove the truth of their contents, Panet J. made the following comments about the criterion of reliability (at para. 70):

[19] *Ethier v. Canada (RCMP Commissioner)*, 1993 CanLII 2935 (FCA), [1993] 2 F.C. 659 (C.A.), Commissioner's Book of Authorities, at Tab 14.
[20] *Professional Institute of the Public Service of Canada v. Canada (Attorney-General)*, [2005] O.J. No. 5775 (Sup. Ct.), Commissioner's Book of Authorities, at Tab 6.

> As to the criterion of reliability, it is evident that these documents were prepared by senior or knowledgeable officials within departments or agencies of the federal government. They describe or explain the operation of the Superannuation Plans and these accounts. In many cases, they were for the purpose of conveying information to Ministers and senior government officials or other departments of government. In my view, it is reasonable to expect that a high premium would be placed on their accuracy. There is also the expectation of candor, given the circumstances and the fact that there was no litigation existing at the time. This evidence has the "circumstantial guarantee of trustworthiness".

49. These comments apply equally well to the documents that are the subject of this motion. All these documents were written by public servants pursuant to their duties and responsibilities as public servants. With many of the documents, such as the Annual Reports, a number of public servants worked together in the preparation of or vetting of the document to ensure accuracy and clarity for the tabling before Parliament.

50. The purpose for which the documents were prepared and the fact that the documents were prepared during the course of duty and responsibilities as public servants provide circumstantial guarantees of trustworthiness to such an extent that the statements in these documents can be considered highly reliable.

2) Necessity

51. In *Ethier v. Canada (R.C.M.P. Commissioner)*[21], with regard to the criterion of necessity, the Federal Court of Appeal stated (at p 661):

> …it was hardly realistic to expect appellant's solicitor to approach the various declarants and seek affidavits from them, assuming that he could have done so without committing a serious breach of professional ethics. [The production of the documents], by means of the supplementary affidavit, was clearly the most practical and convenient way to bring them forward without putting in jeopardy any of the respondents' rights to reply or explain if they wished to do so.

52. In *Professional Institute of the Public Service of Canada v. Canada (Attorney-General),*[22] Panet J. stated the following in regard to the criterion of necessity (at paras. 73-75):

[21] *Ethier v. Canada (RCMP Commissioner)*, 1993 CanLII 2935 (FCA), [1993] 2 F.C. 659 (C.A.), Commissioner's Book of Authorities, at Tab 14.
[22] *Professional Institute of the Public Service of Canada v. Canada (Attorney-General)*, [2005] O.J. No. 5775 (Sup. Ct.), Commissioner's Book of Authorities, at Tab 6.

> In the present circumstances, given the range of the documents and the lengthy period over which they were created it may be difficult, or indeed impossible, for the Plaintiffs to locate all of the authors of the documents. In such event, those documents or some of them might never be made available at the trial of these actions. In some cases, even if the author was available, the attendance in court would be needless and a waste of the court's time where that person's evidence would be simply to give evidence on a matter that could reasonably be confirmed by hearsay evidence.
>
> There is therefore the advantage of efficiency and expediency with respect to the proposed evidence.
>
> Further, in all cases, these are Crown documents that were prepared contemporaneously and at times when the Plaintiffs were not present. It would be somewhat unfair to require the Plaintiff to call witnesses to tender in evidence these documents prepared by them, who it may be expected, might be witnesses adverse to the position of the Plaintiffs. It is open to the Defendant to call the authors of the documents or other officials to explain the statements made in these documents.

53. With the exception of the internal HBC Memorandum, the same can be said of the documents at issue in this motion. Requiring the Commissioner to locate each and every person that was responsible for the preparation of the Annual Report over the course of 40 years, for instance, would be unreasonable.

54. The Tribunal must also keep in mind the goal of securing the most expeditious and least expensive determination of this Application. This is in fact the very mandate of the Tribunal. It is much more efficient to adduce the evidence contained in the documents through admitting the documents themselves, rather than calling numerous witnesses to reiterate what is contained in many of these documents. There would be no end to Tribunal proceedings if it were otherwise. It is always open to HBC to call evidence to provide clarification or further explanation. HBC knows, or has had the opportunity of determining, whether the need exists for a witness to clarify or explain what is contained in, for example, the Annual Reports. The Commissioner cannot put the same quality of evidence before the Tribunal in as efficient a fashion through any means other than through the admission of the documents to prove the truth of their contents.

3) Probative Value Outweighs Prejudicial Effect

55. The probative value of the documentary evidence is very high. The records detail HBC's criminal convictions. This information will assist the Tribunal in fashioning a remedy. Furthermore, there is no harm or prejudicial effect to admitting the documents. A cost benefit analysis favors allowing the documents to be admitted for the truth of their content.

56. It is hard to identify any prejudicial effect of admitting the documents in question into evidence to prove the truth of their contents. All were prepared by public officials in the course of their duties and responsibilities. The documents can be admitted in a quick, cost-effective manner. HBC has knowledge of the convictions. Nothing should come as a surprise.

Confidentiality Claims of HBC are Improper and Excessive

57. The open court principle demands that some of HBC's confidentiality claims be lifted as the claims are excessive. They do not meet the requirements of paragraph 2 of the Amended Confidentiality Order or the common law. The law requires that this information be made public.

58. The Commissioner is mandated by statute to administer and enforce the Act.[23] Where necessary, the Commissioner may commence legal proceedings before the Tribunal or courts on behalf of the public to obtain remedies for non-compliance with the Act.[24] The Commissioner enforces the Act in the public interest.

59. This case raises important issues for Canadians with respect to the advertising of consumer products. If successful, the case will likely have significant ramifications for other Canadian retailers engaged in similar reviewable conduct. Preventing this type of reviewable conduct is within the mandate of the Commissioner and in the public interest.

[23] *Competition Act*, R.S.C., 1985, c. C-34, Commissioner's Book of Authorities, s. 7, at Tab 1.
[24] *Canada (Director of Investigation and Research) v. Southam Inc.* [1991] CCTD No. 16 at p. 14 [Southam], Commissioner's Book of Authorities, at Tab 15.

60. HBC has asserted claims of confidentiality over information contained in the Banks Report, the Urbany Report and Zimmerman Witness Statement. HBC maintains that the disclosure of this information which includes the exhibits and the transcripts attached to the Commissioner's Materials would cause specific and direct harm to HBC if made publicly available. HBC has provided no explanation in this regard.

Banks Report

61. As it relates to the Banks Report, the Commissioner takes issue with all of the confidentiality claims proposed by HBC. The Banks Report does not contain information that, if disclosed to the public, would cause specific and direct harm to HBC. While the specifics of HBC's confidentiality claims are described in Annex B to this factum, HBC seeks to claim confidentiality over such things as:

a) Information that is in the public domain;

b) Information that HBC has disclosed in its own pleadings;

c) Information sourced from the Sears decision:

d) Information sourced from the Bureau;

e) Information available from the HBC website, including information sourced from Annual Reports; and,

f) References to a generic HBC compliance advertising manual that is of general application.

Urbany Report

62. In the case of the Urbany Report, the Commissioner takes issue with some of the confidentiality claims. The Urbany Report does not contain information that, if disclosed to the public, would cause specific and direct harm to HBC. While the specifics of the confidentiality claims are described in Annex C to this factum, HBC seeks to claim confidentiality over such things as:

a) Documents that were not classified as confidential in any of HBC's Affidavits of Documents;

b) Information that is general knowledge;

c) Information that is disclosed in the HBC pleading;

d) Information relating to expert methodology and not commercial information;

e) Titles in the report that has no commercial information; and

f) Information that references the wording contained in an HBC advertisement that has been made public.

Witness Statement of Adam Zimmerman

63. HBC has refused to advise the Commissioner what portions of the Zimmerman Witness Statement contains confidential business information. The motion record filed by HBC requesting that the Zimmerman Witness Statement be struck in its entirety was filed in confidential form only. This contravenes paragraph 15 of the Amended Confidentiality Order, which requires parties to file redacted versions of protected records. The contention that all of the Zimmerman Witness Statement contains confidential information is simply untenable.

64. The open court principle is fundamental to the Canadian legal system. Accordingly, documents and information for use in legal proceedings should only be kept from the public where it is necessary to protect values of super-ordinate importance.[25] The party who seeks to deny public access to court documents or proceedings bears a heavy onus to prove that denying such access is in the public interest.[26]

65. In *Sierra Club of Canada v. Canada (Minister of Finance)*[27], the Supreme Court of Canada set out a two-part test for determining when the open court principle should give way to considerations of "super-ordinate importance". The Court held that confidentiality should only be granted where: (a) such an order is necessary to prevent a serious risk to an important interest in the context of litigation because reasonably alternative measures will not prevent the risk; and (b) the salutary effects of the order preventing public disclosure outweigh the deleterious effects.[28]

66. Applying this test, HBC has not discharged the necessary burden to withhold evidence of their business practices from public disclosure and scrutiny. The public is entitled to access information that is not commercially sensitive and that would not cause specific and direct injury to HBC.

67. A commercial interest is important if the interest can be expressed as a public interest in confidentiality.[29] However, HBC's discomfort with the release of information is not sufficient to suppress the disclosure of evidence.

68. Documents cannot therefore be kept from the public under the auspices of protecting important commercial interests when the information sought to be protected is merely

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[25] *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 SCR 175, at p. 8, Commissioner's Book of Authorities, at Tab 16; *Fairview Donut Inc. et al., v. The TDL Group Corp. et al*., 2010 ONSC 789 at paras. 33 and 35 ("Fairview Donut"), Commissioner's Book of Authorities, at Tab 17.
[26] *Ontario Council of Hospital Unions v. Ontario (Minister of Health)*, [2007] OJ No. 411, at para. 77, Commissioner's Book of Authorities, at Tab 18.
[27] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, Commissioner's Book of Authorities, at Tab 19.
[28] *Ibid*, at paras. 53-55.
[29] *Ibid*, at para. 55, *Latvian House Toronto Ltd. v. Fraternity "Lidums"*, 2012 ONSC 1195, at para. 14, [*Latvian*] Commissioner's Book of Authorities, at Tab 20.

embarrassing to a party or would harm the business's private commercial interests.[30] Rather, to qualify for protection, the commercial interest must transcend the company's private interests and truly be considered a matter of public interest.[31]

69. As Justice Spence explained in *Publow v. Wilson*[32], the commercial interest must be public in nature to maintain public confidence in the justice system. He states:

> The disclosure of internal corporate information in the course of legal proceedings may almost always have the potential for harm to the company concerned and perhaps to others as well. This consequence of the resort to the courts is not limited to corporate parties in commercial matters; individuals may suffer from the public disclosure which ordinarily accompanies litigation. If the prospect of harm were a sufficient basis for preventing disclosure, a great many litigants might justifiably seek to have their proceedings shielded from public view, whether through a sealing order, on order for in camera proceedings or otherwise. Widespread granting of such orders could tend to diminish public confidence in the administration of justice.[33]

70. Similarly, in *Boeing Satellite Systems International Inc. v. Telesat Canada*[34], the court explained that there are limited circumstances when the commercial interest will be sufficiently serious to justify protecting the information from public disclosure in a legal proceeding:

> It is not sufficient that the parties have agreed between themselves to keep the particulars of their contractual and business relationship confidential in the absence of cogent evidence of potential serious harm resulting from public access to the information. In my opinion, outside the realm of confidential technical, scientific or financial information, it will be the rare case where a confidentiality order is justified in a commercial dispute.[35]

71. In this case, the parties and the Tribunal have agreed to an Amended Confidentiality Order where a party is allowed to designate certain information as confidential and the protective measures that may apply to that information. There is no doubt that HBC benefits from

[30] *Southam*, at p. 14, Commissioner's Book of Authorities, at Tab 15.
[31] *Sierra, supra* note 27 at para. 55, *Latvian, supra*, note 29 at para. 14.
[32] *Publow v. Wilson* [1994] OJ No. 3036 (Gen. Div.), Commissioner Book of Authorities, Tab 21.
[33] *Ibid*, at para. 18.
[34] *Boeing Satellite Systems International Inc. v. Telesat Canada* [2007] OJ No. 945 (SCJ), [*Telesat*] Commissioner's Book of Authorities, at Tab 22.
[35] *Ibid*, at para. 17.

confidentiality claims in certain instances; however, the claims made are not consistent with the Amended Confidentiality Order and the state of the law which favours public disclosure.

72. Paragraph 2 of the Amended Confidentiality Order was intended to capture the state of the law and only allow commercial information that would give rise to specific and direct commercial harm to be protected. In this case, a great deal of the information where confidentiality claims have been made by HBC do not satisfy the terms of the Amended Confidentiality Order or the legal test provided by the common law. HBC has over-reached in the extreme.

73. The over-reaching is in relation to the protection of HBC's private interest that it presumably alleges may be harmed from public disclosure. For instance, the application and administration of an advertisement compliance manual that is generic and of a general application is not information that should be kept from the public. This interest does not rise to the level of seriousness that would justify overriding the public's interest in open court proceedings.

74. Not allowing the information to be made public would have significant deleterious effects on the public interest in open and accessible court proceedings.[36]

75. The deceptive marketing practices at issue harm consumers. Consumers need to know that they are being deceived and that sales at regular prices rarely occur. The proceedings, both as it relates to interlocutory matters and the eventual hearing, must be sufficiently transparent so that the public can determine for themselves whether HBC knows the extent and the manner in which they engage in the deceptive marketing practices at issue.[37]

76. The public has an interest in determining that the Tribunal's eventual decision on the alleged deceptive conduct was made after a proper inquiry into the evidence. The public's ability to determine this will be compromised if information about HBC is kept out of the public

[36] *Himel v. Greenberg*, 2010 ONSC 2325 at paras 46 – 48, Commissioner's Book of Authorities, at Tab 23.
[37] *Telesat*, *supra* note 34, at para. 15; *Southam*, *supra* note 30, at p. 14.

record.[38] The public will not be able to understand and scrutinize the Tribunal's decision which is not in the interest of justice.

77. The Act specifically contemplates the publication of a notice of the findings of the Tribunal when there is a finding of reviewable conduct.[39] Part VII.1 of the Act was designed specifically with communicating to the public in mind.

78. Any salutary effects identified by HBC are at best hypothetical as they fail to identify any real or substantial risks to important commercial interests. The disclosure of say, an advertisement compliance manual of generic application can hardly be said to cause specific and direct commercial harm if made public.

79. The deleterious effects of HBC's overly broad application of confidentiality claim clearly outweigh any potential salutary effects. HBC has failed to discharge their heavy onus to demonstrate that the information they seek to keep confidential should be kept from the public.

80. HBC has made claims that are far beyond what is acceptable under both the common law and the terms of the Amended Confidentiality Order. Protecting such information does not rise to the level of seriousness that would justify undermining the open court principle and the Commissioner's enforcement of the Act through these proceedings. The claims of confidentiality by HBC are improper.

PART V – ORDER SOUGHT

81. The Commissioner respectfully requests:

a) An Order allowing the Commissioner to serve on HBC the Supplemental Witness Statement outside of the time period provided for in the Amended Scheduling Order, and allowing such materials to be filed with the Tribunal;

[38] *Fairview Donut*, supra note 25.
[39] *Competition Act*, R.S.C., 1985, c. C-34, at s. 74.1(1)(b), Commissioner's Book of Authorities, at Tab 1.

b) An Order removing certain confidentiality claims made by HBC and identified by the Commissioner in Annex A attached hereto on documents and statements contained in the Zimmerman Witness Statement, the Banks Report and the Urbany Report including the exhibits and transcripts referenced in these statements, and allowing such statements, and allowing such documents and statements to form part of the public record in proceedings before the Tribunal;

c) An Order requiring HBC to review the balance of the confidentiality claims made to date on the Zimmerman Witness Statement, the Supplemental Witness Statement, the Banks Report and the Urbany Report, including any confidentiality claims made on the exhibits and transcripts attached thereto, within a period of (7) seven days following the issuance of an Order of the Tribunal, and requiring HBC to remove any such confidentiality claims that do not fall within the confines of the Amended Confidentiality Order;

d) An Order requiring HBC to review the balance of the confidentiality claims made to date on all records produced by HBC beyond those referred to in paragraph c), within a period of thirty (30) days following the issuance of an Order of the Tribunal, and requiring HBC to remove any such confidentiality claims that do not fall within the confines of the Amended Confidentiality Order;

e) An Order requiring HBC to report to the Tribunal and the Commissioner on the review performed under paragraphs c) and d), and granting leave to the Commissioner to bring a motion before the Tribunal, on a date to be determined, to challenge any such remaining confidentiality claims made by HBC over any of the materials;

f) Costs of this motion; and,

g) Such further and other relief as counsel may request and the Tribunal deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED AT GATINEAU, QUÉBEC, this 27th day of February, 2019.

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ANNEX A

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ANNEX B

Expert Report of Theodore L. Banks

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ANNEX C

Expert Report of Dr. Joel Urbany

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ANNEX D

Witness Statement of Adam Zimmerman

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CT-2017-008

THE COMPETITION TRIBUNAL

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

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

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

HUDSON'S BAY COMPANY

Respondent

MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF COMPETITION

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