

**FILED / PRODUIT**

Date: December 18, 2020

CT- 2019-005

Annie Ruhlmann for / pour  
REGISTRAR / REGISTRAIRE

T-2019-005

OTTAWA, ONT.

Doc. # 197

**THE COMPETITION TRIBUNAL**

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

**AND IN THE MATTER OF** the acquisition by Parrish & Heimbecker, Limited of certain grain elevators and related assets from Louis Dreyfus Company Canada ULC;

**AND IN THE MATTER OF** an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

– and –

**PARRISH & HEIMBECKER, LIMITED**

**Respondent**

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**MEMORANDUM OF FACT AND LAW OF THE  
COMMISSIONER OF COMPETITION TO DESIGNATE THE IDENTITIES OF  
THE COMMISSIONER'S FARMER WITNESSES AS CONFIDENTIAL**

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**PART I: OVERVIEW**

1. The Commissioner of Competition (the “**Commissioner**”) seeks an order designating information that could identify farmers who have provided witness statements filed by the Commissioner (the “**Farmer Witnesses**”) as “Confidential - Level B” pursuant to the Confidentiality Order issued by Justice Gascon on March 4, 2020 (the “**Confidentiality Order**”).
2. Disclosing the identities of the Farmer Witnesses poses a serious threat to their commercial interest as they will be at risk of retaliation from Parrish & Heimbecker (“**P&H**”). The Farmer Witnesses sell significant amounts of their grain to the only two elevators along an approximately 180 km stretch of the TransCanada Highway in Moosomin, Saskatchewan and Virden, Manitoba now both owned by P&H. The Farmer Witnesses benefit from strong relationships with P&H employees at the elevators that will likely be compromised if such staff know the Farmer Witnesses have testified for the Commissioner in these proceedings against P&H.
3. Prior to the Commissioner’s Notice of Application (“**Application**”) being filed, P&H demonstrated a particular interest in finding out who may have complained to the Competition Bureau. After the Application was filed, P&H considered contacting five farmers located in the corridor referenced in the Application to “discuss their business needs”. This list included one of the Commissioner’s witnesses. This particular farmer, as well as other Farmer Witnesses, have benefitted from good relationships with both the elevators and its staff.
4. Farmers can benefit commercially from these relationships through: (1) being offered preferred access to special pricing opportunities, (2) having P&H customer service representatives (“**CSR**”) more motivated to obtain “extra money” for their farmers; and (3) accepting deliveries during harvest not previously contracted for as a favour to farmers.

5. Protecting the Farmer Witnesses from potential retaliation by P&H is in the public interest to ensure that the Farmer Witnesses can testify freely and openly without worrying that P&H, who the Commissioner alleges has market power, will retaliate.
6. Disclosing the identities of the Farmer Witnesses affects the Tribunal's ability to obtain a complete factual record in this case and in future cases. The Tribunal Rules do not require third parties to provide detailed witness statements to the Tribunal. In this Application, the Commissioner was unable to obtain a witness statement from a farmer who was afraid of the repercussions from testifying. In the future, if third parties believe that the Tribunal will not protect them from possible retaliation by an entity that is alleged to have market power, they may not co-operate to provide witness statements.
7. Granting the order outweighs the deleterious effects, if any, of protecting the identities of the Farmer Witnesses. Public disclosure of this information is not required for P&H to defend this Application. Redacting only information that publicly identifies the Farmer Witnesses is minimally intrusive to the open court principle as the public will be able to access the substantive points made in each farmer's testimony.
8. For the reasons set out below the Tribunal should grant the Commissioner's order with costs.

## **PART II: SUMMARY OF FACTS**

### **A. The Investigation**

9. On August 26, 2019, P&H provided draft notifications to the Commissioner that pursuant to an Asset Purchase Agreement dated



14. On December 10, 2019, P&H completed its acquisition of the ten elevators from LDC (the “**Acquisition**”).<sup>5</sup>

## **B. The Application**

15. The Commissioner filed this Application on December 19, 2019 seeking relief against P&H pursuant to section 92 of the *Competition Act*.<sup>6</sup>
16. Parrish & Heimbecker likely caused a substantial lessening of competition (“**SLC**”) by acquiring a grain elevator in Virden, Manitoba from LDC (the “**Virden Elevator**”). The Acquisition eliminated the competition that had existed between the Virden Elevator and P&H elevator in Moosomin, Saskatchewan (the “**Moosomin Elevator**”).<sup>7</sup>
17. The Commissioner has alleged that the relevant markets in this Application are the supply of grain handling services for wheat and the supply of grain handling services for canola for the aggregated locations of farmers that benefited from competition between the Virden and Moosomin elevators.<sup>8</sup>
18. As a result of the Acquisition, these farmers are likely to pay more to obtain grain handling services for wheat and canola from these two elevators. The consequence is less money in the pockets for these farmers when they sell their wheat or canola.<sup>9</sup>

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<sup>5</sup> Notice of Application of the Commissioner, Statement of Grounds and Material Facts (“**SGMF**”) at para. 2, Motion Record, Tab 3.

<sup>6</sup> RSC 1985, C C-34 as amended, Commissioner’s Book of Authorities (“**BOA**”), Tab 1.

<sup>7</sup> *SGMF*, *supra note 5*, at para. 3.

<sup>8</sup> *Ibid.* at para 21.

<sup>9</sup> *Ibid.* at para. 1.

19. To remedy this likely substantial lessening of competition, the Commissioner seeks an order requiring P&H to divest either one of the Virden Elevator or the Moosomin Elevator.<sup>10</sup>
20. P&H denies these allegations. P&H alleges that the product market is the sale of wheat and canola and the relevant geographic market is at least the western Canadian growing region. As a result, P&H alleges that the Acquisition will not result in a substantial lessening of competition.<sup>11</sup>
21. P&H also relies on the efficiencies defence arguing that the Acquisition's efficiencies are greater than and offset any alleged anti-competitive effects.<sup>12</sup> The Commissioner denies that efficiencies, if any, outweigh or offset the anticompetitive effects of the Acquisition.<sup>13</sup>

### C. The Confidentiality Order

22. The Confidentiality Order, issued March 4, 2020, allows either P&H or the Commissioner to designate information in records as confidential.<sup>14</sup>
23. The Confidentiality Order creates two levels of confidentiality: Level A and Level B. Records that are designated as "Confidential Level A" can only be viewed by P&H's counsel and its experts.<sup>15</sup> Records that are designated as "Confidential Level B" can be viewed by five P&H designated representatives after they have signed a "Confidentiality Undertaking".<sup>16</sup>

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<sup>10</sup> SGMF, *supra* note 5, at para. 1.

<sup>11</sup> Response of Parrish & Heimbecker, Limited ("**P&H Response**"), Motion Record of the Commissioner, Tab 4, at paras 17 - 20.

<sup>12</sup> P&H Response, *supra* note 11, at para. 37.

<sup>13</sup> Reply of the Commissioner of Competition ("**Reply**"), Motion Record, Tab 5, at paras. 8 – 10.

<sup>14</sup> BOA, *supra* note 6, Tab 3.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

24. The Confidentiality Order is silent on what constitutes Level A or Level B confidential information but does identify records with types of information that could cause specific and direct harm.<sup>17</sup>
25. The Confidentiality Order does not “abrogate or derogate any legal onus, burden or requirement applicable to a sealing order” and the Tribunal may determine whether a record should be protected.<sup>18</sup>
26. While the identities of the Farmer Witnesses have been disclosed to P&H on a “Confidential – Level B” basis the Confidentiality Order protects the Farmer Witnesses from retaliation by P&H. The five individuals at P&H who are permitted to view “Confidential – Level B” information are executives<sup>19</sup> who have signed undertakings that they will only use this information for the purposes of responding to the Commissioner’s Application and will only share the information with those permitted to see it pursuant to the Confidentiality Order.<sup>20</sup> Without that undertaking, P&H’s executives would be free to direct their staff to retaliate. Further, these P&H executives do not work at the elevators and hence do not have business relationships with the Farmer Witnesses.

**D. Both the Commissioner and P&H redact identifying information from their farmer witness statements**

27. Pursuant to the Amended Scheduling Order issued on April 21, 2020, the Commissioner served on September 4, 2020, among other evidence, witness statements from the five Farmer Witnesses. At the request of the Farmer Witnesses, their statements were designated as

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<sup>17</sup> BOA, *supra* note 6, Tab 3.

<sup>18</sup> *Ibid.*

<sup>19</sup> Email to Competition Tribunal from Davit Akman, dated July 10, 2020, Kelly Affidavit, *supra* note 1, Exhibit D.

<sup>20</sup> Confidentiality Order, Confidentiality Undertaking, para 1 and 2. BOA *supra* note 6, Tab 3.

Confidential Level B.<sup>21</sup> Pursuant to the Confidentiality Order, public versions of the statements have been filed with the Tribunal. The public versions of these statements redacts information that could identify the Farmer Witnesses.<sup>22</sup> The majority of the information provided in the Farmer Witnesses' statements remains public.

28. Pursuant to a further revised scheduling order issued October 9, 2020, P&H filed its witness statements including three from farmers. P&H designated the witness statements from its farmers as Confidential Level B.<sup>23</sup> The public version of these witness statements redacted more information than was redacted from the public version of the statements from the Farmer Witnesses.<sup>24</sup>

#### **E. P&H changes its position on protecting farmer identities**

29. Further to a direction from the Tribunal asking the parties to request to designate as Confidential Level B any information that could identify a witness who is reasonably concerned about public disclosure, the Commissioner canvassed each of the Farmer Witnesses to see if they remained concerned about their identifying information being disclosed. Based on those conversations, their concerns were summarized in an email sent to the Tribunal on November 27, 2020.<sup>25</sup>
30. On the same day, P&H notified the Tribunal that it would now make the identities of its three farmer witnesses public.<sup>26</sup>

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<sup>21</sup> BOA, *supra note* 6, Tab 4.

<sup>22</sup> *Ibid.*, Tab 3.

<sup>23</sup> P&H Farmer Witness Statements, Confidential Level B, PMGC00009\_00000002, PMGC00009\_00000005, PMGC00009\_00000008, Kelly Affidavit, *supra note* 1, Exhibit E.

<sup>24</sup> P&H Farmer Witness Statements, Public, PMGC00014\_00000001, PMGC00014\_00000003, PMGC00014\_00000007, *Ibid.*, Exhibit F.

<sup>25</sup> Letter to Justice Gascon from Jonathan Hood, dated November 27, 2020, *Ibid.*, Exhibit G.

<sup>26</sup> Letter to Justice Gascon from Davit Akman, dated November 27, 2020, *Ibid.*, Exhibit H.



31. On November 30, 2020, P&H wrote to the Tribunal reiterating its position that the Commissioner file a motion on proper materials and on “notice of the media”.<sup>27</sup> In response, the Commissioner said that a proper motion was needed to address the factual and legal disagreements with P&H but noted that the Tribunal and Federal Court Rules do not require notice to the media.<sup>28</sup>
32. On December 1, 2020, the Tribunal directed the Commissioner to bring a formal motion to support his request.<sup>29</sup>

**F. The serious risk to Farmer Witnesses businesses if their identities are disclosed**

33. All of the Farmer Witnesses have provided affidavits in support of the Commissioner’s request. They are unanimously concerned about the impact of the disclosure of their identities on their ability to conduct business with P&H.
34. The Commissioner also spoke with a farmer who is concerned about the Acquisition but was unwilling to testify because he was concerned about the repercussions.<sup>30</sup>
35. Prior to the Acquisition, the Farmer Witnesses relied on the competition between the Virden and Moosomin Elevators. The Farmer Witnesses have all sold significant quantities of wheat or canola to the Virden and Moosomin Elevators which are both now owned by P&H. P&H’s expert has calculated the percentage of observed deliveries by four of the

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<sup>27</sup> Letter to Justice Gascon from Davit Akman, dated November 30, 2020, Kelly Affidavit, *supra note 1*, Exhibit I.<sup>28</sup> Letter to Justice Gascon from Jonathan Hood, dated November 30, 2020, *Ibid.*, Exhibit J.<sup>29</sup> Direction on Confidentiality, BOA, *supra note 6*, Tab 9.<sup>30</sup> Email from Jacqueline Byers to Jonathan Hood, dated August 26, 2020, Kelly Affidavit, *supranote 1*, Exhibit K.



36. The evidence from P&H demonstrates that the Farmer Witnesses are right to be concerned. As described below, P&H contemplated influencing potential witnesses. P&H would only do this if it believed it had the ability to impact a farmer's business. There is ample evidence to demonstrate how P&H rewards loyalty and hence can retaliate against farmers who are disloyal.

**G. P&H contemplates influencing potential witnesses**

37. On January 21, 2020, Anthony Kulbacki, Vice President, Grain Operations, sent an email to Daryl McCharles and Shawn Skolney the regional managers of Manitoba and Southern Saskatchewan, respectively. In this email, Mr. Kulbacki [REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>32</sup>

38. On January 24, 2020, Justin Watson, VP Crop Inputs at P&H, wrote to Anthony Kulbacki and others an email with the subject "[REDACTED]" and states:

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>33</sup>

39. On January 27, 2020, Andrew Klippenstein, now the general manager of the Virden Elevator, writes that he has:

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<sup>32</sup> P&H\_0000683\_LEVEL A, Kelly Affidavit, *supra note 1*, Exhibit L.  
<sup>33</sup> P&H\_0002673\_LEVEL A, page 2, *Ibid.*, Exhibit M.

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>34</sup>

40. [REDACTED]  
[REDACTED]

41. John Heimbecker, President and CEO of P&H, testified during discovery that he was “[REDACTED]”.<sup>35</sup>

42. If there is any doubt that the position a farmer takes in this Application will be noticed by P&H for retaliation, it is dispelled by P&H’s reaction to a letter a farmer, Jason Hooper, sent to The Western Producer that was published online on January 30, 2020. The letter was favourable to the Acquisition. In one of his many reactions via e-mail, Mr. Kulbacki wrote to five P&H employees:

Let’s get a nice bottle of whiskey over to Mr. Hooper !!!.<sup>36</sup>

43. Mr. Kulbacki appears to have even circulated the link to this letter outside P&H. Scott Cunningham’s response to Mr. Kulbacki upon seeing the email was:

Hopefully he gets premiumed up for the upcoming year.<sup>37</sup>

44. A ‘premium’ is a reference to P&H paying a farmer a price higher than the posted price for grain. P&H is not likely to ‘premium up’ farmers who have acted as a witness for the Commissioner in support of competition.

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<sup>34</sup> P&H\_0002673\_LEVEL A, Kelly Affidavit, *supra note 1*, Exhibit M.

<sup>35</sup> RAFK00001\_00000003 at page 249, *Ibid.*, Exhibit N.

<sup>36</sup> P&H\_0003736\_PUBLIC, *Ibid.*, Exhibit O.

<sup>37</sup> P&H\_0003735\_PUBLIC, *Ibid.*, Exhibit P.

**H. P&H's ability to harm farmers**

45. A farmer's relationship with an elevator, usually through an elevator's CSR, directly affects the farmer's ability to do business with the elevator.

[REDACTED]

46. Periodically, elevators will post special prices. While these specials can be widely communicated, sometimes the special is for a short period and a limited amount. For example, [REDACTED]

[REDACTED]

[REDACTED]. All else being equal, a CSR is going to call farmers they have the best relationships with.

47. The concept of giving first priority to specials to loyal customers is also

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>38</sup>

48. [REDACTED]  
[REDACTED]

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<sup>38</sup> P&H\_0006081, Kelly Affidavit, *supra note 1*, Exhibit Q.

[redacted].<sup>39</sup> An elevator's decision to grant this favour will depend on its relationship with the farmer.

49. [redacted].  
Depending on their relationship with the farmer, they may advocate to get a better deal for that farmer. [redacted]

[redacted]

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50. Sam Parrish, Grain Marketing Coordinator, recognized that [redacted].  
[redacted]. He wrote this his response to an email from Scott Beachell about [redacted]

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51. P&H has contemplated influencing witnesses in this proceeding. They have favourably recognized farmers who support it. P&H can retaliate in different ways against disloyal farmers through any of the three mechanisms described above.

<sup>39</sup> P&H\_0001324, Kelly Affidavit, *supra note 1*, Exhibit R.

<sup>40</sup> LDC00009289, *Ibid.*, Exhibit S.

<sup>41</sup> P&H\_0000060, *Ibid.*, Exhibit T.

**PART III: ISSUE IN DISPUTE**

52. This motion raises the issue of whether the Tribunal should designate information that identifies the Farmer Witnesses as Confidential Level B.

**PART IV: SUBMISSIONS**

53. The Tribunal should continue to keep confidential the identities of the Farmer Witnesses to protect their commercial interests from retaliation by P&H. P&H has considered influencing potential witnesses in this case. Protecting the identities of the Farmer Witnesses is important to the public interest in ensuring that the Farmer Witnesses can testify freely and openly without worrying that P&H, who the Commissioner alleges has market power, will retaliate.
54. Pursuant to its power under Rule 66 of the Competition Tribunal Rules,<sup>42</sup> the Competition Tribunal has issued a Confidentiality Order which in this case allowed the Commissioner to protect the identities of the Farmer Witnesses.
55. Competition Tribunal applications regularly address confidential and commercially sensitive information and therefore the Tribunal regularly grants Confidentiality Orders to prevent the public dissemination of confidential and commercially sensitive information – this protection extends to identities of witnesses where disclosure of the identities of witnesses will commercially harm the witnesses. In *The Commissioner of Competition v. CCS* the Tribunal redacted the identities of large oil and gas companies who testified on behalf of the Commissioner from public disclosure to mitigate the risk that CCS would retaliate.<sup>43</sup>

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<sup>42</sup> SOR/2008-141, Rule 66, BOA *supra note 6*, Tab 2.

<sup>43</sup> *The Commissioner of Competition v. CCS*, 2011 Comp. Trib. 5, *Ibid.*, Tab 7.

56. Based on the Supreme Court's decision in *Sierra Club*, there are three issues to be addressed in determining whether to grant the order in the circumstances of the present case: (a) is the confidentiality order necessary to prevent a serious risk to an important interest? (b) are there reasonably alternative measures that will prevent serious risk that would interfere less with the open court principle? and, (c) do the salutary effects of a confidentiality order outweigh such an order's deleterious effects?
57. The test is flexible and contextual and should not be applied mechanistically but always adapted to the circumstances.<sup>44</sup>

**A. The Farmer Witnesses face a serious risk and require protection by the Confidentiality Order**

58. A serious risk is real, substantial and grounded in the evidence. Where the risk is to a commercial interest, it must be to an "important commercial interest" which can be expressed in terms of public interest in confidentiality.<sup>45</sup>
59. In the present case, the order is necessary to prevent a serious risk to the commercial interests of the Farmer Witnesses. Disclosure of their identities is reasonably likely to allow P&H to harm them. The Farmer Witnesses have all provided affidavit evidence expressing their concern that P&H will retaliate. For example, ██████████ testifies that:

I have concerns about P&H being able to identify me as a witness for the Commissioner in these proceedings. There are very few places that I can trade with and I fear being blacklisted by P&H if they know I am a witness. In the event I don't have the option to trade locally, I will have to go further to find another grain

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<sup>44</sup> *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, para 31-33, BOA, *supra note* 6, Tab 9.

<sup>45</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at paras. 54 – 55, *Ibid.*, Tab 8.



company to transact with. I need to be able to trade without any prejudice, which will not be possible if P&H knows that I am a witness for the Commissioner.

I get calls when the buyer thinks that there's something attractive that's available to me from time to time. I'm selling grain to them currently, and the grain buyers that I'm selling to also sell me crop inputs I need for my farm. I worry about the impact that my statement would have on these relationships.<sup>46</sup>

60. [REDACTED] testifies that:

We have one less choice of elevators to sell to as a result of the transaction. If P&H knows that I'm a witness for the Commissioner, then I may have two less choices. I am very concerned that the staff at Moosomin may not contact me for specials or take my targets if they believe that I am acting against P&H.<sup>47</sup>

61. The Farmer Witnesses concerns are justified based on the evidence of P&H's conduct. As described in detail above, that evidence shows: (1) P&H is willing to influence farmers by impacting their businesses, (2) P&H pays attention to who supports them and who speaks out against them; and (3) P&H can and does treat farmers differently.

62. It is in the public interest to protect the economic interests of the third party Farmer Witnesses in this proceeding who have been asked by the Commissioner, a law enforcement officer, to provide testimony in an application brought in the public interest. Protecting the identities of the Farmer Witnesses is important to the public interest in ensuring that the Farmer Witnesses can testify freely and openly without worrying that P&H, who the Commissioner alleges has market power, will retaliate.

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<sup>46</sup> Affidavit of [REDACTED], affirmed December 4, 2020, Motion Record, Tab 6.

<sup>47</sup> Affidavit of [REDACTED] affirmed December 4, 2020, *Ibid.*, Tab 7. Also see the Affidavit of [REDACTED], affirmed December 4, 2020, *Ibid.*, Tab 8, the Affidavit of [REDACTED] affirmed December 4, 2020, *Ibid.*, Tab 9, and the Affidavit of [REDACTED] affirmed December 4, 2020, *Ibid.*, Tab 10.

63. This commercial interest also rises to the level of a public interest because it impacts the Tribunal's ability to receive a full factual record in this case and also cases in the future.
64. Under the Rules, the Commissioner cannot compel these Farmer Witnesses' to provide witness statements. The Rules allow the Commissioner to subpoena the attendance of witnesses and require them to bring documents at their attendance.<sup>48</sup> The subpoena does not require witnesses to create documents that do not exist. Nor can the subpoena be used to compel testimony prior to attendance. Receiving evidence in chief by witness statement, required by the Rules 60 days before the application starts,<sup>49</sup> is a critical component to the efficient adjudication of Tribunal applications.
65. Without protection, the Tribunal should expect that in future cases it may not have a complete factual record because witnesses will not voluntarily provide witness statements when they expect the Tribunal will not protect them from retaliation from an entity alleged to have market power.

**B. There is no reasonable alternative to the order**

66. The second part of the Sierra Club test is met. The Commissioner has not identified a way to disclose the names publicly of the Farmer Witnesses without disclosing them to P&H employees who would consider and enact the retaliation. There are therefore no reasonable alternatives available to protect the identities of the Farmer Witnesses.

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<sup>48</sup> Rule 7, BOA *supra note 6*, Tab 2.

<sup>49</sup> Rule 68, *Ibid.*

**C. The benefits to protecting the identities of the Farmer Witnesses outweigh the potential deleterious effects of the order, if any**

67. The third part of the Sierra Club test also supports granting the Order. The benefits of protecting the identities of the Farmer Witnesses outweigh the potential deleterious effects of the order.
68. Issuing the order protects the economic interests of the Farmer Witnesses and the integrity of the Tribunal process.
69. The potential deleterious effects of the order are limited. The open court principle is important but it is minimally impaired by the order sought. As can be seen by the public versions of the Farmer Witnesses' statements most of the information they provide has been made public. The Commissioner has also committed to releasing public versions of the transcripts of the Farmer Witnesses' testimony. Based on the public versions of their statements, the Commissioner expects only limited redactions to the testimony.
70. In contrast, failing to protect the identities of the farmers will have a deleterious effect on the Tribunal process as described above.
71. While the confidentiality of parties who cooperate with law enforcement cannot be guaranteed, in this case there is no compelling reason for their identities to be broadcast to the public. P&H has not alleged that their identities need to be disclosed to the public so that P&H can respond to the Application.
72. Instead P&H, in its November 30, 2020 letter, cloaks its request by relying on the open court principle as set out in the Supreme Court's decision in

*Edmonton Journal (The) v. Alberta (Attorney General)*.<sup>50</sup> Relying on a case that evaluated legislation that prohibited the media in Alberta from reporting on any divorce proceedings does not assist P&H.

73. P&H's reliance on the open court principle would be more convincing if P&H had not itself taken advantage of the Confidentiality Order. P&H has redacted virtually every piece of testimony its CEO provided during discovery that is cited in the expert reports and along with their internal records.<sup>51</sup> Of course, P&H redacts some information that is legitimately confidential. A significant portion of Mr. Heimbecker's testimony will likely be in camera as it will contain information which would harm P&H if released. P&H wants to deprive the Farmer Witnesses of the very protection provided by the Confidentiality Order P&H itself relies on.
74. In the context where P&H has redacted its own information and, until very recently, maintained the confidentiality of its farmer witnesses, it is reasonable to conclude that in challenging the Confidential Level B designation, P&H seeks to constrain the Farmer Witnesses' ability to testify openly and truthfully in this proceeding.
75. The flexible and contextual application of the Sierra Club test supports granting the order.

#### **PART V: ORDER SOUGHT**

76. The Commissioner respectfully requests that information identifying the Farmer Witnesses be designated as Confidential Level B pursuant to the Confidentiality Order.

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<sup>50</sup> *Edmonton Journal (The) v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, BOA *supra* note 6, Tab 10.

<sup>51</sup> Footnotes 61, 63, 68, 70, 73, 124, 160 from the report of Dr. Nathan Miller are all examples of P&H protecting information which does not warrant protection when the Sierra Club test is applied. Motion Record, Tab 12.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7TH DAY OF  
DECEMBER, 2020



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