



Registry Doc. No.: 182

**Date:** December 15, 2020

**Matter:** CT-2019-005 – *The Commissioner of Competition v Parrish & Heimbecker, Limited*

**Direction to Counsel (from Mr. Justice Gascon, Chairperson)**

**Re:** Motion on confidentiality designations

**FURTHER TO** the Direction issued by the Tribunal on December 1, 2020 with respect to the process to be followed and the timetable for a motion dealing with confidentiality designations (“**Direction**”);

**AND FURTHER TO** the motion record and memorandum of fact and law served and filed by the Commissioner of Competition (“**Commissioner**”) on December 7, 2020, requesting that the identities of five farmer witnesses be designated as confidential “Level B Protected” (as the term is defined in the Confidentiality Order of March 4, 2020) (“**Confidentiality Motion**”);

**AND FURTHER TO** the responding record and memorandum of fact and law served and filed by Parrish & Heimbecker, Limited (“**P & H**”) on December 11, 2020 in response to the Confidentiality Motion;

**AND FURTHER TO** the emails sent by counsel for the Commissioner and for P & H on December 14, 2020;

**AND UPON** considering the following:

1. During the case management conferences leading up to the Direction and to the Confidentiality Motion, the Tribunal has expressed its view that the Confidentiality Motion could be dealt with on the basis of the written record.
2. In his motion materials, the Commissioner has effectively asked that the Confidentiality Motion be dealt with by the Tribunal in writing, on the basis of the written record.
3. In its responding motion materials, P & H has not explicitly indicated its views on whether a hearing would be needed for the Confidentiality Motion or the motion could be decided on the basis of the written record.

4. Counsel for P & H had apparently advised counsel for the Commissioner, on December 11, 2020, that he would provide P & H's position on this issue on Monday, December 14, 2020;
5. In his email of 1:34 p.m. on December 14, 2020, counsel for the Commissioner sent to the Tribunal a written reply to P & H's responding record ("**Reply**"), as he appeared to take for granted that the Confidentiality Motion would be dealt with in writing. At that time, no response had yet been received from counsel for P & H with respect to a hearing;
6. In his email of 2:01 p.m. on December 14, 2020, counsel for P & H indicated that P & H wished to proceed by way of oral hearing, but provided no reasons in support of its position. At that time, counsel for P & H also expressed, for the first time, its intent to cross-examine on the affidavits filed in support of the Commissioner's Confidentiality Motion, pursuant to Rules 83 and 84 of the *Federal Courts Rules*, SOR/98-106 ("**FCR**");
7. On December 1, 2020 in the Direction, the Tribunal had expressly directed that, should a hearing be needed for the Confidentiality Motion, it shall be held by video conference during the week of December 14, 2020, at a time to be determined by the Tribunal at a case management conference;
8. At the case management conference held on December 4, 2020, the Tribunal expressly said that, should a party insist on a hearing, it would have to be likely held on December 15 or 16, 2020.

**AND UPON** considering that P & H has been aware that the Commissioner would be filing affidavits from the farmer witnesses since at least the date of the Direction, and has had the affidavits since December 7, 2020;

**AND UPON** observing that counsel for P & H has waited until after P & H had filed its written submissions in response to the Confidentiality Motion and after the Commissioner had submitted his Reply before expressing P & H's intent to cross-examine the farmer witnesses on their affidavits and before asking for a hearing;

**AND UPON** considering that counsel for P & H was aware, or should have been aware, of the directions of the Tribunal with respect to the contemplated dates for a hearing of the Confidentiality Motion;

**AND UPON** considering the Commissioner's opposition to P & H's request for cross-examination and the fact that, given the lateness of the request made by counsel for P & H, there is no longer sufficient time available to schedule and complete cross-examinations before a contemplated hearing on the Confidentiality Motion;

**AND UPON** considering Rule 34 of the *Competition Tribunal Rules*, SOR/ 2008-141 and Rule 85 of the FCR which provides that a party who intends to cross-examine the deponent of an affidavit shall do so with due diligence;

**AND UPON** finding that, in the circumstances of this case, P & H has not acted with the required due diligence;

**AND UPON** determining that a hearing shall nonetheless be held to hear the parties' oral submissions on the Confidentiality Motion;

**AND UPON** recognizing that, in the circumstances, a case management conference is not possible or necessary to set the date and time for a hearing of the Confidentiality Motion;

**THE TRIBUNAL DIRECTS AS FOLLOWS:**

1. The Commissioner's Reply is accepted for filing.
2. There will be no cross-examinations on the affidavits filed by the Commissioner or P & H prior to the hearing of the Confidentiality Motion.
3. A judicial member is available to hear the Confidentiality Motion on the afternoon of either Wednesday, December 16, 2020 or Thursday, December 17, 2020.
4. Counsel for the parties shall indicate to the Tribunal registry, by Wednesday December 16, 2020 at 9:30 a.m., an agreed-upon time at which they are both available for a two (2)-hour hearing of the Confidentiality Motion on December 16 or 17, 2020, in the afternoon.
5. The hearing of the Confidentiality Motion will be held at the agreed-upon time and date, by way of video conference, for a maximum duration of two (2) hours.
6. Each party shall have a maximum of one (1) hour for its oral submissions, and the Tribunal's chess-clock method of managing the hearing time shall apply to the hearing of the Commissioner's motion.
7. If counsel do not manage to agree on a time and date for the hearing of the Confidentiality Motion within the window identified above by the Tribunal, the Tribunal will decide the time and date of the hearing.

Annie Ruhlmann  
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