Competition Tribunal Tribunal de la Concurrence

Citation: *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2021 Comp Trib 2
File No.: CT-2019-005
Registry Document No.: 213

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 as amended**.**

AND IN THE MATTER OF a motion by the Commissioner of Competition to designate as confidential the identities of certain witnesses.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Parrish & Heimbecker, Limited
(respondent)

Date of hearing: December 18, 2020
Before: D. Gascon J. (Chairperson)
Date of reasons: January 5, 2021

REASONS FOR ORDER DISMISSING THE COMMISSIONER'S MOTION ON CONFIDENTIALITY DESIGNATIONS

I. INTRODUCTION

[1] On December 7, 2020, the Commissioner of Competition ("**Commissioner**") filed a motion before the Tribunal ("**Motion**") to designate as confidential the identities of five farmer witnesses ("**Farmers**"). The Commissioner brought this Motion in the context of an application he filed against the Respondent Parrish & Heimbecker, Limited ("**P&H**") pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 ("**Act**"), with respect to the acquisition by P&H of a primary grain elevator located in Virden, Manitoba ("**Application**"). The purchase of the Virden elevator was part of a larger transaction whereby P&H acquired ten grain elevators owned by Louis Dreyfus Company Canada ULC in Western Canada ("**Acquisition**"). Each of the Farmers prepared a witness statement on behalf of the Commissioner in anticipation of the hearing of the Application that is scheduled to commence on January 6, 2021, and the Farmers are all expected to testify at the hearing.

[2] The Commissioner claims that disclosing the identities of the Farmers poses a serious threat to their commercial interest as they will be at risk of retaliation from P&H. More specifically, he submits that the Farmers benefit from strong relationships with P&H employees at the grain elevators that will likely be compromised if these employees know that the Farmers have testified for the Commissioner and against P&H in the Application. The Commissioner asks the Tribunal to issue an order designating information that could identify the Farmers as "Confidential - Level B" pursuant to the Confidentiality Order issued by the Tribunal on March 4, 2020 ("**Confidentiality Order**").

[3] The Motion proceeded before me by videoconference on December 18, 2020. After hearing the submissions of the parties, I reserved my decision on the Motion. On December 29, 2020, I dismissed the Commissioner's Motion, with reasons to follow. These are my reasons for dismissing the Motion.

[4] For the reasons detailed below, the Commissioner's Motion fails for lack of supporting evidence. I agree with the parties that the decision of the Supreme Court of Canada ("**SCC**") in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 ("***Sierra Club***") provides the legal framework governing the confidentiality designations sought by the Commissioner on this Motion. However, the principles set out in *Sierra Club* must be adapted to reflect the specific relevant provisions contained in the *Competition Tribunal Rules*, SOR/2008-141 ("**CT Rules**"). Further to my review of the parties' materials, their written and oral submissions and the applicable law, I am not satisfied that the Commissioner has presented clear and convincing evidence sufficient to satisfy the Tribunal, on a balance of probabilities, that the requirements for the confidentiality designations he is seeking are met. Two main (and related) evidentiary findings lead me to this conclusion. First, the "public interest" component of the alleged harm, as claimed and as framed by the Commissioner on this Motion, is not supported by clear, convincing and cogent evidence. Second, even though the deleterious effects on the open court principle that would result from designating the identities of the Farmers as confidential are fairly minimal in light of the public versions of the Farmers' evidence and of the Tribunal's reasons that will be made available on a timely basis, the lack of evidence on the "public interest" component of the alleged harm does not allow me to conclude that the salutary effects

of preventing such harm would outweigh the deleterious effects of the confidentiality designations on the open court principle.

II. BACKGROUND

A. PROCEDURAL HISTORY

[5] The Commissioner filed his Application on December 19, 2019.

[6] On March 4, 2020, the Tribunal issued a Scheduling Order (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 2) governing the timing of various pre-hearing steps, including the service of witness statements, and scheduling the hearing of the Application for November 2020. That same day, the Tribunal also issued the Confidentiality Order (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 3), which incorporated the terms of a draft order filed on consent by the parties.

[7] The Confidentiality Order allows the Commissioner and P&H to designate as protected and confidential certain information contained in "records" produced in the Application. As is often the case in proceedings before the Tribunal, the Confidentiality Order contemplates two levels of confidentiality: Level A and Level B. Records designated by the Commissioner as "Confidential - Level B" can be viewed by counsel for P&H, its experts and five designated representatives of P&H who have signed a confidentiality undertaking.

[8] The Confidentiality Order also allows the Commissioner, at paragraph 5, to "designate as Level B Protected […] any information that could identify a Third Party who is reasonably concerned about the public disclosure of its identity". A "third party" can include a witness scheduled to appear at the hearing. However, any such designation is made without "prejudice to any position or argument [P&H] may take or make in the Proceeding and in any related appeals".

[9] In September and October 2020, the parties served and provided witness statements to the Tribunal, in anticipation of the hearing that was then scheduled to start in November 2020. The Commissioner submitted witness statements for the five Farmers whereas P&H provided three farmer witness statements of its own. At that time, both parties designated the names of these eight farmers, as well as any other identifiable information, as "Confidential - Level B".

[10] On October 28, 2020, counsel for P&H advised the Tribunal of the sudden unavailability of P&H's expert witness and requested a short adjournment of the hearing. The Commissioner consented to a brief adjournment and, further to discussions at a case management conference held on November 12, 2020, the Tribunal scheduled the hearing of the Application for January 2021. At that case management conference, a question arose as to whether, in light of the open court principle, information identifying the eight farmer witnesses had been appropriately redacted from the public versions of their witness statements.

[11] The Tribunal subsequently directed the parties to serve and file any requests to designate as "Confidential - Level B" information that could identify a farmer witness who is reasonably

concerned about the public disclosure of his identity, along with a short summary of the grounds for such requests.

[12] By way of letter dated November 27, 2020, counsel for P&H advised the Tribunal that P&H was no longer requesting that information regarding the identity of its three farmer witnesses be designated as confidential. By way of an email on that same day, counsel for the Commissioner requested that the Tribunal designate as confidential "Level B Protected" any information that could identify the five Farmers. He explained that the Farmers remained concerned about their identities becoming public and that taking a position in the Application against P&H would give rise to significant risk of financial harm to these Farmers. Email exchanges with each of these Farmers were filed in support of the request. Counsel for the Commissioner further requested an opportunity to bring a formal motion if the Tribunal was not prepared to designate the identities as confidential.

[13] On November 30, 2020, counsel for P&H sent a letter to the Tribunal requesting that the Commissioner file a motion, including affidavit evidence, in support of his request. Counsel for P&H noted that, further to the Confidentiality Order, five P&H representatives already knew the identities of the Farmers and that the Commissioner's evidence filed in support of his request had not been sworn. Shortly thereafter, counsel for the Commissioner filed a letter in which he explained that the Farmers' concerns were real and grounded in the evidence that would be filed. On December 1, 2020, the Tribunal directed the Commissioner to file a formal motion with supporting affidavits and other evidence in order for the Tribunal to determine whether the Commissioner's confidentiality requests for the five Farmers should be granted.

[14] On December 7, 2020, the Commissioner filed his Motion in accordance with the Tribunal's Direction of December 1, 2020. Six affidavits were submitted in support of the Commissioner's Motion, including affidavits from each of the five Farmers, as well as an affidavit from Mallory Kelly, a paralegal with the Competition Bureau's Legal Services. In his motion materials, the Commissioner asked that the Motion be dealt with by the Tribunal in writing, on the basis of the written record.

[15] On December 11, 2020, P&H filed its responding motion record, including an affidavit of Kevin Klippenstein, the Chief Financial Officer ("**CFO**") of P&H. In its responding motion materials, P&H did not explicitly indicate its views on whether a hearing would be needed for the Motion or whether the Motion could be decided on the basis of the written record.

[16] On December 14, 2020, the Commissioner submitted a written reply, as no response had yet been received from counsel for P&H with respect to a hearing and counsel for the Commissioner appeared to take for granted that the Motion would be dealt with in writing. Later on that day, counsel for P&H indicated that P&H wished to proceed by way of oral hearing for the Motion. In a Direction issued on December 15, 2020, the Tribunal accepted the Commissioner's written reply for filing and determined that a hearing should nonetheless be held to hear the parties' submissions on the Motion. The Commissioner's Motion was heard on December 18, 2020.

[17] I pause a moment to make the following comment. The Commissioner was visibly displeased with P&H's late decision to change its position on protecting the identities of the

farmer witnesses involved in this proceeding and to challenge the confidential treatment of the Farmers' identities more than three months after their witness statements were first delivered by the Commissioner. From the Tribunal's perspective, it is certainly regrettable that issues such as the confidentiality designations of potential witnesses be brought up so late in the process and so close to the actual hearing of the Application. It forces both the Tribunal and the parties to deal with this matter at a time when everyone should instead be focusing on the preparation of the hearing. Further to its January 2019 Practice Direction on *Timelines and Scheduling for Proceedings before the Tribunal*, and through its active role in the case management of its proceedings, the Tribunal has put in place several mechanisms to streamline the hearing process and to make the management of applications before it more efficient and more effective. To say the least, the timing of this Motion does not sit well with those initiatives. There are practical lessons to be learned for future matters and, going forward, the Tribunal will certainly consider adding, in the pre-hearing processes leading to the hearing of an application, a specific step requiring parties to challenge the confidentiality designations made in witness statements or expert reports at a much earlier date.

[18] That being said, I must point out that, further to paragraph 5 of the Confidentiality Order, P&H had the express right to challenge the Commissioner's provisional designation of information identifying the Farmers as "Level B Protected". The Confidentiality Order provides no time limit for the exercise of that right. In addition, paragraph 7(e) of the Confidentiality Order states that "at any point in the Proceeding, a Party may challenge a claim of confidentiality or level of confidentiality made by another Party". Once P&H determined that it was no longer appropriate to withhold the identities of the farmer witnesses from the public, it was entitled to act as it did – especially in a context where, in P&H's view, keeping the Farmers' identities confidential could adversely affect its right to a fair hearing since the Farmers would not be testifying in a fully open public setting. True, a different timing for challenging the confidential treatment of the Farmers' identities would have been preferable, but P&H cannot be faulted for having exercised its right and having used a procedural means at its disposal.

B. THE COMMISSIONNER'S MOTION

[19] It is important to take a moment to look at the remedy sought by the Commissioner in this Motion and what it means for the Tribunal's process in this Application.

[20] In his Motion, the Commissioner is seeking an order designating as confidential all information contained in the Farmers' witness statements that could identify them. It means that the order that would be imposed by the Tribunal would keep confidential the name and identity of the Farmers, and that the public versions of the Farmers' witness statements would be anonymous.

[21] CT Rule 74(4) provides that, in proceedings before the Tribunal, a witness statement can only be received in evidence at the hearing "if the witness is in attendance and available for cross-examination or questioning by the Tribunal". In other words, the acceptance of a witness statement in evidence is directly related to the appearance of the witness at the hearing before the Tribunal. Therefore, granting the Commissioner's Motion would effectively mean not only that

the Farmers' identities would be designated as confidential in the witness statements but also that the Farmers would be allowed to testify *in camera* and not in a public session of the Tribunal.

[22] The Commissioner's Motion is thus asking the Tribunal to make a confidentiality designation and to order that the portion of the hearing of the Application where the Farmers would testify not be open to the public.

[23] To my knowledge, the Tribunal has not previously dealt with a contested motion seeking such a remedy.

C. PARTIES' SUBMISSIONS

(1) The Commissioner

[24] The Commissioner submits that the principles established by the SCC in *Sierra Club* apply to his Motion. In light of that decision, he claims that the Tribunal must address three issues to determine whether to grant an order designating as confidential information that could identify the Farmers: 1) is the confidentiality order necessary to prevent a serious risk to an important interest?; 2) are there reasonably alternative measures that will prevent serious risk that would interfere less with the open court principle?; and 3) do the salutary effects of a confidentiality order outweigh such an order's deleterious effects?

[25] On the first issue, the Commissioner argues that disclosing the identities of the Farmers poses a serious threat to their commercial interest, as they will be at risk of retaliation from P&H. Unlike what was found in *Fairview Donut Inc v The TDL Group Corp*, 2010 ONSC 6688 ("***Fairview Donut***"), cited by P&H, the Farmers are not embarrassed about having their business information in the public eye; they are instead concerned that their ability to conduct business with P&H will be harmed if their identities are made public. The Commissioner argues that this goes beyond a vague and speculative fear of embarrassment, which the Ontario Superior Court of Justice ("**ONSC**") found insufficient in *Fairview Donut*.

[26] The Commissioner refers to four main elements supporting the Farmers' fear of retaliation. First, the Farmers sell a significant amount of their grain to the two elevators now owned by P&H in Moosomin, Saskatchewan and Virden, Manitoba, further to the Acquisition. Second, the Farmers have strong relationships with the elevators' employees that are important to their business, and they benefit from special price alerts through the customer sales representatives ("**CSRs**") working at the elevators. The Farmers fear that the relationship they have with P&H would be compromised if P&H's employees at the elevators were to know that they have testified for the Commissioner. Third, P&H has contemplated influencing potential witnesses and it pays attention to those farmers who support it as well as those who speak out against it. Fourth, P&H has the ability to retaliate in different ways against disloyal farmers through multiple mechanisms which can impact the Farmers' businesses.

[27] The Commissioner also maintains that ordering to keep the Farmers' identities confidential will be in the public interest, as it will ensure that the Farmers can testify freely and openly, without fear of retaliation from P&H, given its market power. Furthermore, says the

Commissioner, protecting the commercial interest of the Farmers serves the public interest as a disclosure of their identities would affect the Tribunal's ability to receive a full factual record in this case and potentially in future cases. The Commissioner more specifically argues that, if the Farmers' identities were to be disclosed, this might lead to third parties refusing to co-operate and to provide witness statements in the future because they would believe that the Tribunal would not protect them from possible retaliation by an entity alleged to have market power. In support of this argument, the Commissioner submits that he was unable to obtain a witness statement from a farmer who was afraid of reprisals from P&H. In his reply, the Commissioner further mentions that the Farmers are not under subpoena and that one of the five Farmers has submitted in his affidavit that he is not interested in testifying publicly.

[28] With respect to the second issue flowing from the *Sierra Club* test, the Commissioner submits that there is no other reasonable alternative to the confidentiality order he is seeking. Indeed, there is no other way to disclose publicly the names of the Farmers without disclosing them to all P&H employees, some of whom would then be able to enact retaliation.

[29] Turning to the last part of the *Sierra Club* test, the Commissioner argues that the positive effects that would result from granting the confidentiality designations would outweigh the deleterious effects, if any, of protecting the Farmers' identities. Public disclosure of this information is not required for P&H to defend the Application, and a confidentiality designation would be minimally intrusive on the open court principle, since the public will still be able to access the substantive points made in each Farmer's testimony. The public versions of the Farmers' witness statements will only be slightly altered, as the redactions would be limited to the identifying information. The Commissioner submits that the Tribunal's decision in *The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 ("***CCS***") – where the identities of certain third-party witnesses was not revealed – is a demonstration that redacting the identities of witnesses does not prevent the public from grasping the underlying reasons to a decision.

[30] The Commissioner further asserts that keeping the Farmers' identities confidential will not impair the truthfulness of their testimonies. Each Farmer is going to have to take an oath or affirmation and then testify in front of an audience, in a session that will not be completely secret: the Farmers will testify in front of the Tribunal, the Tribunal's staff, the Commissioner's representatives, as well as five individuals from P&H and counsel for P&H. Adding members of the public is not going to make the Farmers' testimonies more truthful, says the Commissioner.

[31] The Commissioner therefore submits that the flexible and contextual application of the *Sierra Club* test supports granting the order he is seeking.

(2) P&H

[32] P&H responds that a party seeking a confidentiality order bears a heavy onus which, in the case at bar, has not been met by the Commissioner. To meet this onus, one must demonstrate, based on strong and convincing evidence, that the confidentiality order sought is required by and compatible with the public interest in the proper administration of justice. P&H also argues that the *Sierra Club* principles apply to the Commissioner's Motion and specifies that the Tribunal

has no discretion to derogate from the test prescribed by the SCC in that decision and followed consistently by Canadian courts ever since.

[33] P&H first submits that the Commissioner has failed to meet the test set out in *Sierra Club* with respect to a serious risk to an important commercial interest. The alleged threat to the Farmers is not "well grounded in the evidence", as it relies merely upon assertions and speculations. P&H further argues that the Commissioner's submissions are contrary to the relevant jurisprudence and rest on a mischaracterization of the evidence and on baseless charges that could be interpreted as alleging witness tampering.

[34] According to P&H, any of the alleged "risks of retaliation" brought forward by the Commissioner with regard to the Farmers are speculative. P&H submits that the affidavits of the Farmers contain no evidence of a "real and substantial risk" of reprisal but rather lay out the Farmers' bald and unsubstantiated "concerns" that P&H could retaliate if their identities were to be more widely known within the company. These affidavits do not state that the Farmers would not have provided a witness statement if they had known that their identities would be publicly disclosed nor that the Commissioner gave them any assurance of confidentiality before they agreed to sign their witness statement. According to P&H, the mere fear of retaliation cannot constitute a ground of harm. Furthermore, the Farmers do not even face a "real", "serious" or "substantial" risk to their personal commercial interest, as they can and do sell their wheat and canola to other grain elevators.

[35] P&H also argues that the Commissioner has provided no evidence from any of the Farmers that P&H has retaliated against or "blacklisted" farmers in the past. According to P&H, the Commissioner is therefore relying upon unfounded assumptions to make his allegations of a serious commercial risk, which are based on a misinterpretation of a handful of P&H documents and speculation. Moreover, P&H has filed an affidavit from its CFO, Mr. Klippenstein, in which he states that P&H and its employees have no interest, incentive or intention to disturb their productive and positive relationships with the Farmers and that as a company, P&H will not retaliate against any farmer.

[36] P&H takes particular exception with the allegations made by the Commissioner with regard to P&H wanting to meet with farmers to influence them. According to P&H, it simply wanted to reach out to the farmers for legitimate business reasons in view of strengthening their existing relationships and explaining the Acquisition; the evidence does not allow the inference of any ill-advised intentions on P&H's part, let alone any attempt to improperly influence witnesses.

[37] In addition, P&H submits that the commercial interest identified by the Commissioner does not qualify as an "important" one under the *Sierra Club* test, as it is narrow and personal to the Farmers. The evidence of a serious risk must not only be personal to the person claiming confidentiality, but it must also have a public interest dimension. On that front, the Commissioner has failed to establish that the alleged risk or harm rises to the level of public interest. More specifically, P&H maintains that there is no evidentiary basis in the Commissioner's motion materials to support any submission that the Tribunal will not have a complete factual record in the absence of an order designating the Farmers' identities as confidential. Furthermore, when the Commissioner argues that he has not subpoenaed the

Farmers, this is contrary to what the Farmers themselves state in their respective witness statements. Moreover, the submission made by the Commissioner to the effect that he was unable to obtain a witness statement from a farmer allegedly afraid of reprisals from P&H is not supported by the evidence adduced by the Commissioner and is triple hearsay. According to P&H, it certainly does not meet the standard of strong and convincing evidence.

[38] Finally, P&H argues that the Commissioner has also failed to put forward any evidence of the alleged salutary effects of the requested order. P&H submits that issuing an order designating the Farmers' identities as confidential is in fact unnecessary to ensure that the Tribunal can have a full factual record before it. Furthermore, the public disclosure of a witness' identity is of great importance to the search for truth and the integrity of the Tribunal process. The public is entitled to see the assessments of credibility that inform the decisions of the Tribunal. In order to fully appreciate the evidence, the public needs to know who is giving it, what is the background and the context of these witnesses. In P&H's view, the open court principle requires a public standard of accountability for witnesses.

D. THE *SIERRA CLUB* PRINCIPLES

[39] In their respective submissions, both the Commissioner and P&H heavily rely on the SCC decision in *Sierra Club* and argue that the principles set out by the SCC in that decision apply to the Tribunal in general and to this Motion in particular. These principles can be summarized as follows.

[40] In *Sierra Club*, the SCC articulated a new test for issuing confidentiality orders in civil matters. The SCC went on to adapt the model and principles it had developed in *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 and *R v Mentuck*, 2001 SCC 76 ("***Mentuck***"), which addressed publication bans in the criminal law context. In *Sierra Club*, the SCC examined when, and under what circumstances, a confidentiality order pursuant to Rule 151 of the *Federal Courts Rules*, SOR/98-106 ("**FC Rules**") should be granted. FC Rule 151 permits the Federal Court to order that material to be filed in a proceeding before the court shall be treated as confidential; before doing so, the court "must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings". At issue in *Sierra Club* was a request for a confidentiality order in respect of commercial documents that contained, according to the appellant Atomic Energy of Canada Limited ("**AECL**"), confidential information subject to a confidentiality agreement with a third party.

[41] At the outset of its reasons, the SCC noted that "[o]ne of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution" (*Sierra Club* at para 1). The SCC stated that, in light of the established link between open courts and freedom of expression, the fundamental question for a court to consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances.

[42] In the context of FC Rule 151, the SCC established the following conjunctive two-part test for determining whether a confidentiality order ought to be granted (*Sierra Club* at para 53). A confidentiality order under FC Rule 151 should only be granted when:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[43] The first branch of the test deals with the "necessity" of the confidentiality order whereas the second branch imposes a balancing exercise (or "proportionality") between the need for confidentiality and the open court principle.

[44] The SCC added that "three important elements" are subsumed in the first branch of the test dealing with necessity:

1. the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the important commercial interest in question (*Sierra Club* at para 54);

2. the "important commercial interest" in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a "public interest in confidentiality", where there is a general principle at stake (*Sierra Club* at para 55); and

3. the phrase "reasonably alternative measures" requires the motions judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question (*Sierra Club* at para 57).

[45] The second branch of the *Sierra Club* test contemplates a balancing exercise between the positive effects in having confidentiality orders and the public interest in maintaining open and accessible court proceedings. In order for the courts to grant a confidentiality order, the need to protect the confidentiality of a document (which includes the public interest in the confidentiality sought) must outweigh the public interest in open and accessible court proceedings, as there is a presumption that court proceedings must be open to the public. In sum, the notion of "public interest" rests at the very core of the analytical approach prescribed by the SCC to handle requests for confidentiality orders.

[46] In *Sierra Club*, the SCC concluded that there was an important commercial interest to protect in terms of preserving contractual obligations of confidentiality, and the evidence supported AECL's position that disclosure would result in a substantial risk of harm to that interest. The public interest dimension of the alleged harm resided in the fact that, without the benefit of a confidentiality order, AECL would be prevented from using the information as it was protected by a confidentiality agreement, and would thus be unable to fully present its case. The SCC also concluded that the confidentiality order would have significant salutary effects on AECL's right to a fair trial, and that these salutary effects outweighed the deleterious effects of

the order on the principle of open and accessible court proceedings and the right to freedom of expression.

[47] The *Sierra Club* principles have been consistently followed and adopted by the courts in the context of confidentiality orders. As pointed out by the parties in their submissions, these principles have notably been applied to motions seeking to prevent the disclosure of the identities of parties or witnesses (see for example *Named Person v Vancouver Sun*, 2007 SCC 43 ("***Named Person***"); *Fairview Donut*; *Adult Entertainment Association of Canada v Ottawa (City)*, [2005] OJ No 1999 (ON SC) ("***Adult Entertainment***"); *G(B) v British Columbia*, 2002 BCSC 1417 ("***G(B)***"); *B(A) v Stubbs* (1999), 44 OR (3d) 391 ("***Stubbs***")).

[48] I underline that proper and sufficient evidence must be provided in order for a court to grant a confidentiality order, as there must be "a convincing evidentiary basis for issuing" such an order (*Sierra Club* at para 39). The Federal Court of Appeal ("**FCA**") recently reiterated this principle in *Desjardins v Canada (Attorney General)*, 2020 FCA 123 ("***Desjardins***"). In that case, the FCA considered the principles applicable to confidentiality orders in a case brought against the background of disclosures of alleged wrongdoing made under the *Public Servants Disclosure Protection Act*, SC 2005, c 46 ("**PSDPA**"). The information at issue was the names of witnesses and disclosing parties, as well as witness interviews and notes arising from the investigation conducted by the Public Sector Integrity Commissioner ("**PSIC**").

[49] In *Desjardins*, the FCA discussed the two leading cases from the SCC on the issuance of confidentiality orders, *Sierra Club* and *AB v Bragg Communications Inc*, 2012 SCC 46 ("***Bragg***"). In *Bragg*, the SCC addressed sexualized cyberbullying of minors, the inherent vulnerability of which was demonstrated through "reason and logic" with reference to case law, statutes and international treaties. In that case, the SCC affirmed that "while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm" to justify issuing a confidentiality order (*Bragg* at para 15). However, in *Desjardins*, the FCA emphasized that nothing in *Bragg* could be taken as undermining the principle that the existence of a "serious risk" of harm arising from disclosure must be "well grounded in the evidence" (*Desjardins* at paras 82-84; *Sierra Club* at para 46).

[50] The FCA found that the generalized allegations proffered by the PSIC, including statements that revealing the names and testimony of those involved in the investigation would discourage others from coming forward, were insufficient to demonstrate a risk of harm "well grounded" in the evidence (*Desjardins* at paras 86-87). The FCA allowed the appeal and dismissed the motion brought forward by the PSIC for a confidentiality order pursuant to FC Rule 151, as there was "no real evidence in the record to support a finding of harm" (*Desjardins* at para 94). The FCA notably observed that simply being a disclosing party or a witness was insufficient to create a presumption that disclosure of their identity would create a serious risk of harm to an important interest, and that neither the existence of an important interest nor the provisions of the PSDPA could dictate the outcome of a motion seeking a confidentiality order (*Desjardins* at paras 88, 90).

[51] The test developed in *Sierra Club* clearly establishes that confidentiality orders form an exception to the open court principle. However, it is well recognized that the test must not be applied mechanistically but rather in a flexible and contextual manner: "[r]egard must always be

had to the circumstances" in which such an order is sought (*Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 ("***Toronto Star***") at para 31; *Sierra Club* at para 48). In other words, there is no "one size fits all" application of the openness principle, and the courts have consistently held that the test is a flexible one.

[52] As the SCC repeated in several cases, the open court principle is not absolute. While, as a rule, no party or witness appears in court anonymously, a court nonetheless has the power, in appropriate circumstances, to limit the openness of its proceedings (*Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2 ("***CBC***") at paras 1-2; *Named Person* at para 91; *Mentuck* at paras 56-57). Orders that limit openness are numerous and do come in a variety of forms: imposing publication bans, sealing documents, issuing protective or confidentiality orders, redacting versions of pleadings or other documents in a legal proceeding, requiring that documents be "for counsel's eyes only", granting anonymity to certain parties or witnesses, or holding hearings *in camera*.

E. THE CT RULES

[53] Reference should also be made to the CT Rules.

[54] In their respective motion materials, both parties seem to have assumed that the *Sierra Club* test, which was developed in the context of motions under FC Rule 151, was automatically applicable to Tribunal matters. In their written submissions, neither of the parties considered to any meaningful extent the specific language of the CT Rules. The Commissioner obliquely referred to CT Rules 30 and 66 in two footnotes of his reply, whereas P&H mentioned CT Rules 29 and 66 in passing, in the context of its discussion of the Tribunal's *Policy on Openness and Privacy* issued in July 2019 ("**Policy on Openness**"). But no submissions were made by the parties on the requirements of the CT Rules with respect to confidentiality orders and public access to documents and information in Tribunal proceedings.

[55] Yet, the CT Rules contain specific provisions that govern public access to Tribunal hearings and documents that are filed or received in evidence, such as witness statements. The current version of the CT Rules took effect in May 2008, after the *Sierra Club* decision, following their publication in Part II of the *Canada Gazette* in accordance with section 16 of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) ("**CTA**").

[56] For the purposes of this Motion, the relevant provisions are CT Rules 29-30 and 66-67.

[57] Rules 66 and 67 are found in Part II of the CT Rules entitled "Contested Proceedings", and refer to documents and information contained in documents in the context of contested proceedings. They aim, for example, at protecting competitively sensitive information. CT Rule 66 provides that the Tribunal may order that a document be treated as confidential and make any order that it deems appropriate upon a motion of a party or intervenor who has filed or will file the document, or a party who has served an affidavit of documents. CT Rule 67 provides the details of the information that must be included in such a motion. It reads as follows :

Content of motion

67 The party or intervenor making a motion referred to in rule 66 shall

(a) include in the grounds for the motion details of the specific, direct harm that would allegedly result from unrestricted disclosure of the document or information; and

(b) include in the motion a draft confidentiality order including the following elements, namely,

(i) a description of the document or information or the category of documents or information for which the person seeks the confidentiality order,

(ii) the identification of the person or category of persons who are entitled to have access to the confidential document or information,

(iii) any document or information or category of documents or information to be made available to the person or category of persons referred to in subparagraph (ii),

(iv) any written confidentiality agreement to be signed by the person or persons referred to in subparagraph (ii) and the provisions of that agreement,

(v) the number of copies of any confidential document to be provided to the person or persons referred to in subparagraph (ii) and any limitation on subsequent reproduction of that document by that person or those persons, and

(vi) the disposal of the confidential document following the final

Contenu de la requête

67 La partie ou l'intervenant qui présente la requête visée à la règle 66 :

a) énonce en détail, dans les motifs de celle-ci, le préjudice direct et précis qu'occasionnerait la communication complète du document ou des renseignements;

b) joint à la requête un projet d'ordonnance de confidentialité qui comporte les éléments suivants :

(i) la désignation du document ou des renseignements ou des catégories de documents ou renseignements pour lesquels l'ordonnance est demandée,

(ii) le nom des personnes ou les catégories de personnes qui ont droit d'avoir accès au document ou aux renseignements confidentiels,

(iii) le document ou les renseignements ou les catégories de documents ou renseignements mis à la disposition des personnes ou des catégories de personnes visées au sous-alinéa (ii),

(iv) tout accord de confidentialité éventuel que devront signer les personnes visées au sous-alinéa (ii) et les dispositions de cet accord,

(v) le nombre de copies des documents confidentiels qui seront fournies aux personnes visées au sous-alinéa (ii) et les restrictions quant au droit de reproduire les documents,

(vi) les dispositions à prendre relativement aux documents

disposition of the proceeding.	confidentiels une fois l'instance terminée.
[Emphasis added.]	[Mes soulignements.]

[58] CT Rule 67 thus expressly requires a moving party to include in the grounds for seeking a confidentiality order the "details of the specific, direct harm" that would allegedly result from an "unrestricted disclosure of the document or information" [emphasis added]. However, CT Rules 66-67 contain no specific reference to the open court principle, similar to what is found in the second part of FC Rule 151. Provisions similar to the CT Rules 66-67 were found in previous iterations of the Tribunal rules. For example, the 1994 *Competition Tribunal Rules*, SOR/94-290 ("**1994 CT Rules**") also provided, at rules 62 and 64, that a party or intervenor making the confidentiality request should advise the Tribunal of the reasons for the request, "including details of the specific, direct harm that would allegedly result" from public access to the document or hearing.

[59] I observe that the Confidentiality Order issued by the Tribunal in this Application indeed refers to this notion of "specific and direct harm" at paragraph 4, when describing the types of information that could be designated as confidential.

[60] I pause to mention that CT Rules 66-67 could apply to both "protective orders" and "confidentiality orders" in the course of proceedings before the Tribunal. A protective order is an order which prescribes the treatment of confidential information exchanged between parties to litigation, but does not provide for the filing of confidential information with the court or decision-maker. A confidentiality order is one that addresses the actual filing of confidential information with the court or decision-maker. One might say that the Tribunal's orders under CT Rules 66-67 are hybrid orders because they are characteristic of both protective orders and confidentiality orders as they typically include provisions governing both confidential information exchanged between parties during discovery and confidential information filed with the Tribunal. In *Canadian National Railway Company v BNSF Railway Company*, 2020 FCA 45 ("***BNSF***"), the FCA recently clarified that the entirety of the *Sierra Club* principles described above apply to confidentiality orders, but not to protective orders.

[61] Turning to CT Rules 29-30, they relate to hearings and are found in Part I of the Rules entitled "General". These rules provide that Tribunal hearings are open to the public unless the Tribunal orders that all or a portion of the hearing be held *in camera*. They read as follows:

Hearings	**Audience**
Hearings open to the public	*Audience publique*
29 Subject to rule 30, hearings shall be open to the public.	**29** Sous réserve de la règle 30, le public peut assister aux audiences du Tribunal.
In-camera hearings	*Audience à huis clos*
30 (1) A party, an intervenor or a person	**30** (1) Toute partie, tout intervenant ou

interested in the proceedings may request that all or a portion of a hearing not be open to the public.	toute personne ayant un intérêt dans une instance peut demander que tout ou partie d'une audience soit tenue à huis clos.
Content of request	*Contenu de la demande*
(2) A person who makes the request shall advise the Tribunal of the reasons for the request, including details of the specific, direct harm that would allegedly result from conducting the hearing or a portion of the hearing in public.	(2) La personne qui présente la demande en expose les motifs au Tribunal, y compris des précisions sur le préjudice direct qu'occasionnerait la présence du public à l'audience ou à une partie de celle-ci.
Power of the Tribunal	*Pouvoirs du Tribunal*
(3) The Tribunal may, if it is of the opinion that there are valid reasons for a hearing not to be open to the public, make any order that it deems appropriate.	(3) Le Tribunal peut rendre l'ordonnance qu'il juge indiquée lorsqu'il estime qu'il existe des raisons valables de tenir l'audience à huis clos.
[Emphasis added.]	[Mes soulignements.]

[62] These rules aim at protecting the public process at the Tribunal. They state that a person can request that all or a portion of a hearing not be open to the public, but must include in such request "reasons" for it, "including details of the specific, direct harm that would allegedly result" from conducting the hearing or a portion of it in public. The Tribunal may issue any order that it deems appropriate if it is satisfied that there are "valid reasons" for a hearing not to be open to the public.

[63] Subject to any confidentiality order issued by the Tribunal, the public is entitled to access documents that are filed or received in evidence, in accordance with CT Rule 22. If a party or intervenor asserts confidentiality in a document to be filed that is not covered by a confidentiality order, that party or intervenor must file a motion for a confidentiality order under CT Rule 66, together with public and confidential versions of the document (CT Rule 23).

[64] I observe that, since the publication of the first set of rules in 1987, the Tribunal rules have always provided that Tribunal hearings shall be open to the public (see section 40 of the *Competition Tribunal Rules*, SOR/87-373 and section 61 of the 1994 CT Rules. This is also reflected in the Tribunal's Policy on Openness, which adopts the open court principle and reminds that "the Tribunal conducts its oral hearings in public, save for exceptional circumstances". The Policy also states that portions of a hearing may however be held *in camera* under CT Rule 30, thus limiting access to the public and media, if the parties refer to information (such as commercially sensitive information) that has been designated as confidential under a Tribunal order of confidentiality.

[65] The CT Rules do not require that the person who is making a request for confidentiality be the person who is at risk of the specific, direct harm that is alleged. Indeed, in this Motion, the Commissioner makes a request to designate the identities of third parties, namely the five Farmers, as confidential.

III. ANALYSIS

[66] The issues for the Tribunal are: 1) the applicable analytical approach for the Commissioner's Motion and the basis for granting an order designating the identities of witnesses as confidential; 2) whether the order sought by the Commissioner should be issued in this case.

A. THE APPLICABLE ANALYTICAL APPROACH

[67] The first issue to be determined is the applicable test for the Commissioner's Motion. As detailed below, I agree with the parties that the *Sierra Club* principles can generally be extended to the Tribunal and that they provide the legal framework governing the confidentiality designations sought by the Commissioner on this Motion. However, these principles need to be adapted to reflect the specific relevant provisions contained in the CT Rules.

[68] There are strong similarities between the confidentiality order reviewed by the SCC in the context of judicial proceedings in *Sierra Club* and the order sought by the Commissioner on this Motion. In both cases, a restriction on the open court principle is sought in order to preserve or promote an interest engaged by the proceedings; in opposition to the confidentiality orders at stake lies the fundamental principle of open and accessible proceedings before the courts or the Tribunal. Moreover, there is no doubt that the order sought by the Commissioner in this Motion addresses the actual filing of confidential information with the Tribunal and its treatment at the hearing of the Application, and thus bears the attributes of "confidentiality orders" as these were defined by the FCA in *BNSF*.

[69] In *Commissioner of Competition v Sears Canada, Inc*, 2003 Comp Trib 27 ("***Sears***"), the Tribunal accepted that the analysis of the SCC in *Sierra Club* is applicable to a confidentiality order seeking to declare a document confidential or restricting access to it, because of the similarity between the confidentiality provision considered by the SCC (i.e., FC Rule 151) and the comparable provisions in the CT Rules (*Sears* at para 6). This decision of Justice Dawson in *Sears* was cited with approval by Justice Blanchard in two decisions issued by the Tribunal in *Nadeau Poultry Farm Limited v Groupe Westco Inc et al*, 2009 Comp Trib 11 and *Nadeau Poultry Farm Limited v Groupe Westco Inc et al*, 2010 Comp Trib 16 (together, "***Nadeau***").

[70] In *Sears*, Justice Dawson was satisfied that, when considering whether to declare a document confidential or restrict access to it in the course of a proceeding, the Tribunal is to balance the salutary effects of a confidentiality order against the deleterious effects of the order, as instructed by the SCC in *Sierra Club* (*Sears* at para 5). Justice Dawson added that the Tribunal was also "required to consider whether reasonable alternative measures, such as expungement of a portion of the document, will prevent the risk of specific, direct harm and are available so as to restrict the scope of the confidentiality order as much as reasonably possible

while still protecting the applicant for the order from specific, direct harm" (*Sears* at para 5). I note that Justice Dawson determined that the Tribunal ought to follow the teachings of the SCC in *Sierra Club* despite the fact that the applicable Tribunal rules governing the issuance of confidentiality orders did not contain an explicit reference to the "public interest in open and accessible court proceedings", as FC Rule 151 does.

[71] In *Sears* and in the two above-mentioned decisions in the *Nadeau* case, the Tribunal dealt with requests to designate certain documents or information as confidential and to restrict their disclosure. I underline that, in her assessment of the alleged risk of harm likely to result from public access to the documents, Justice Dawson referred to the notion of "specific, direct harm" contained in the applicable Tribunal rules at the time of her decision, and not to the notion of "serious risk to an important interest" used by the SCC in *Sierra Club* (see for example *Sears* at paras 10, 15). As is the case today with CT Rule 30 and CT Rule 67, the applicable Tribunal rules at the time required the demonstration of this type of harm in cases where a party wanted to restrict disclosure of a document listed in an affidavit of documents delivered in proceedings before the Tribunal. In sum, Justice Dawson read the first branch of the *Sierra Club* test under the light of the specific language used in the Tribunal rules.

[72] While, in the present case, the Commissioner's Motion is not the typical motion for a confidentiality order under CT Rules 66-67, I see no reason to depart from the conclusions reached by Justice Dawson in *Sears* regarding the applicability of the *Sierra Club* principles. In fact, there are even more reasons to follow the *Sierra Club* framework here.

[73] The Commissioner's Motion is a *sui generis* motion seeking confidentiality designations in a context where the Tribunal has already issued a Confidentiality Order. As explained above, the order requested by the Commissioner would not only deal with the confidentiality designation of information relating to the Farmers' identities in the course of a Tribunal proceeding but would also require a decision whereby a portion of the hearing would not be open to the public to allow the Farmers to testify *in camera*.

[74] While, arguably, the Commissioner's Motion does not fit squarely into any one specific CT Rule, it is certainly informed by CT Rules 29-30 dealing with hearings before the Tribunal. These rules allow the Tribunal to issue an order determining that a portion of a hearing not be open to the public and designating that the identities of witnesses be kept confidential in certain circumstances, if the Tribunal is satisfied that there are valid reasons for doing so, including details of the specific, direct harm that would allegedly result from conducting a portion of the hearing in public. The conjunction of the "valid reasons" requirement at CT Rule 30 with the default rule contained at CT Rule 29 stating that Tribunal "hearings shall be open to the public" certainly allows for the importation of the open court principle at the heart of *Sierra Club* into the Tribunal's consideration of the Commissioner's Motion. In fact, since the Tribunal must be satisfied that there are "valid reasons" to depart from having a public hearing, CT Rules 29-30 in fact dictate that the Tribunal must take into account the open court principle and the public interest dimension of the *Sierra Club* test in its assessment of the Motion.

[75] If CT Rule 29 and the Tribunal's Policy on Openness left any doubt, I would add that the specific attributes of the Tribunal reinforce the conclusion that the Tribunal is bound to apply the open court principle in its assessment of the Commissioner's Motion.

[76] The legislative history of the Tribunal, and its enabling legislation, reflect an intention to judicialize to a substantial degree the processes of the Tribunal. This is notably reflected in: the Tribunal's establishment as a "court of record" by virtue of subsection 9(1) of the CTA; subsection 8(2) of the CTA which confirms that the Tribunal has, with respect to "the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record"; the requirement that a judicial member preside over the Tribunal's hearings; and the presence of appeal rights to the FCA as if a decision of the Tribunal was a judgment of the Federal Court (*The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 at para 141; *B-Filer Inc et al v The Bank of Nova Scotia*, 2006 Comp Trib 42 at para 256). Furthermore, the Tribunal adheres to the duty of fairness, and subsection 9(2) of the CTA requires it to conduct its proceedings in accordance with the principles of natural justice, as it provides that "[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit". In addition, it has been repeatedly recognized that the judicial-like and court-like nature of the Tribunal, and the important impact that its decisions can have on a party's interests, mean that the Tribunal must act with the highest degree of concern for procedural fairness: "[t]he Tribunal resides very close to, if not at, the 'judicial end of the spectrum', where the functions and processes more closely resemble courts and attract the highest level of procedural fairness" (*Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24 ("***VAA***") at para 29).

[77] In sum, the Tribunal performs a quasi-judicial function much like that of a court of law. The Tribunal is adjudicative in nature and is an impartial decision-maker. The Tribunal weighs evidence, hears the contradictory positions of the parties and witnesses, makes findings of fact and assesses credibility, and issues decisions that affect the rights and duties of the parties. Since proceedings before the Tribunal are highly "judicialized" and, subject to the informality and expeditiousness aspects of subsection 9(2) of the CTA, often virtually indistinguishable from civil trials in the courts, openness fosters the integrity of the Tribunal proceedings just as it does for judicial proceedings. In light of the foregoing, there are no grounds not to fully extend to the Tribunal and to the Commissioner's Motion the principles established in *Sierra Club* in a judicial context.

[78] I am therefore satisfied that, when considering whether to maintain the identity of a witness confidential and declare that a portion of a hearing shall not be open to the public, the Tribunal must apply the *Sierra Club* principles and has to balance the salutary effects of the contemplated order against its deleterious effects, as instructed by the SCC in *Sierra Club*. However, similarly to what Justice Dawson did in *Sears*, the first branch of the *Sierra Club* test must be reformulated to reflect the specific reference contained in the CT Rules to the notion of "details of the specific, direct harm", as opposed to a "serious risk to an important commercial interest".

[79] Applying the rights and interests engaged in this case and the CT Rules to the analytical framework of *Sierra Club*, I would therefore rephrase as follows the test to determine whether an order designating as confidential information relating to the identity of a witness and allowing such witness to testify *in camera* at a hearing before the Tribunal ought to be granted. Such an order should only be granted if the Tribunal is satisfied that:

1. the order is necessary to prevent, in the context of proceedings before the Tribunal, a specific, direct harm that would allegedly result from disclosing the identity of the witness or revealing the information in a hearing open to the public;

2. there are no reasonable alternative measures to prevent the harm;

3. the salutary effects of the order, including the effects on the right of the parties to a fair hearing, outweigh its deleterious effects, including the effects on the right to free expression, which includes the public interest in open and accessible proceedings before the Tribunal.

[80] As formulated, the test reflects the "necessity" and "proportionality" branches of the *Sierra Club*, while replacing the notion of "serious risk to an important commercial interest" by the notion of "specific, direct harm" found in the CT Rules.

[81] Three important considerations must guide the Tribunal's analytical approach.

[82] First, it should be underlined that, as was the case in *Sierra Club*, the two main branches of the test remain fundamentally animated by public interest concerns. As repeatedly stated in *Sierra Club* and its progeny, confidentiality orders form an exception to the open court principle. While the balancing of the specific, direct harm with the open court principle takes place under the second branch of the test, the public interest dimension also permeates into the first branch of the test, where the Tribunal must be alive to the fundamental importance of the open court rule and be convinced that the alleged harm rises up to a public interest dimension (*Sierra Club* at para 56). Therefore, like in *Sierra Club*, the specific, direct harm rendering a confidentiality order necessary in Tribunal proceedings cannot merely be private and specific to the person or party requesting the order. It must also be harm that can be expressed or characterized in terms of a public interest in preserving the confidentiality of the information, harm where there is a general principle at stake.

[83] I point out that the Commissioner does not dispute that this public interest requirement applies to the necessity of the confidentiality protection he is seeking in this Motion. In his submissions made in relation to the *Sierra Club* test, the Commissioner agreed that the alleged serious risk had to be real, substantial and grounded in the evidence, and that the risk had to relate to an "important commercial interest" expressed in terms of a public interest in confidentiality.

[84] Second, while the test must be applied by the Tribunal in a flexible and contextual manner (*Toronto Star* at para 31; *Sierra Club* at para 48), the CT Rules nonetheless require that the moving party demonstrates the presence of specific, direct harm with sufficient "details".

[85] Third, as was the case under the *Sierra Club* test, the specific and direct harm in question must be well grounded in the evidence and there must always be a convincing evidentiary basis for issuing the order (*Sierra Club* at para 46; *Desjardins* at paras 82-84). In that respect, the Tribunal remains guided by the principles established in *FH v McDougall*, 2008 SCC 53 ("***McDougall***"), where the SCC held that there is only one civil standard of proof in Canada, the balance of probabilities. Speaking for a unanimous Court, Justice Rothstein stated in his reasons that the only legal rule in all cases is that "evidence must be scrutinized with care by the trial

judge" and that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at paras 45-46). In all civil cases, the trier of fact "must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred" (*McDougall* at para 49).

[86] P&H submits that, whether the test is expressed in terms of "details of specific, direct harm" or "real and substantial risk to an important commercial interest", the evidentiary requirement is similar, and it is a heavy one. For his part, at the hearing of the Motion, counsel for the Commissioner expressed the view that the CT Rules requirements of "specific, direct harm" may be less onerous than the *Sierra Club* threshold. For the purpose of this Motion, I do not need to determine how "harm" ought to be defined or how harm may be "specific" and "direct", or to decide whether, compared to *Sierra Club*, the CT Rules provide for a more relaxed standard of harm or risk regarding the issuance of confidentiality orders and orders to hold hearings *in camera*. The assessment of a "specific, direct harm" will always remain a heavily fact-based determination. But one thing is clear: whether the test is expressed in terms of "specific, direct harm" or "serious risk to an important commercial interest", clear and convincing evidence meeting the balance of probabilities threshold is needed on both the private dimension and the public interest dimension of the alleged harm.

B. APPLICATION OF THE TEST TO THE COMMISSIONNER'S MOTION

[87] Applying the test to the present circumstances, I find that the Commissioner has failed to present supporting evidence sufficient to satisfy the Tribunal, on a balance of probabilities, that the requirements for the confidentiality designations he is seeking are met. More specifically, two main (and related) evidentiary findings lead me to this conclusion. First and foremost, the "public interest" component of the alleged harm, as claimed and as framed by the Commissioner on this Motion, is not supported by clear, convincing and cogent evidence. Second, this lack of evidence on the "public interest" component of the alleged harm does not allow me to conclude that the salutary effects of preventing such harm would outweigh the deleterious effects of the confidentiality designations on the open court principle. This is so, even though in this particular case, the deleterious effects on the open court principle that would result from designating the identities of the Farmers as confidential are fairly minimal in light of the public versions of the Farmers' evidence and of the Tribunal's reasons that will be made available on a timely basis.

[88] In other words, because of the failure to provide evidence to meet the "public interest" dimension of harm, the Commissioner's Motion fails on both the "necessity" and the "proportionality" branches of the *Sierra Club* test, as adapted to reflect the requirements of the CT Rules.

[89] Since it is not disputed that there are no reasonably available alternatives to the order sought by the Commissioner or to its terms, this component is not addressed in these reasons.

(1) Specific, direct harm to the Farmers

[90] Given my conclusions on the "public interest" component of the alleged harm, I do not need to determine whether the disclosure of the Farmers' identities would effectively cause a

specific, direct harm to the Farmers themselves. However, since both parties have spent a fair amount of their submissions on this point, I will make the following remarks.

(a) Fear of commercial retaliation as a ground of harm

[91] The Commissioner argues that disclosing the identities of the Farmers poses a serious threat to their commercial interest, on the basis that they will be at risk of retaliation from P&H, given its market power further to the Acquisition. In essence, to express it in the language of the CT Rules, the Commissioner claims that the Farmers' fear of retaliation constitutes the specific, direct harm anchoring his request for the confidentiality designations and the necessity for the order sought. In support of his position, the Commissioner refers to four main elements evidencing, in his view, the Farmers' fears and concerns about retaliation by P&H. First, the Farmers sell a significant amount of their grain to the two elevators now owned by P&H in Moosomin and Virden. Second, the Farmers have strong relationships with the elevators' employees, and they fear that these relationships will be compromised if P&H's employees at the elevators learn that they have testified for the Commissioner in the Application. Third, P&H has contemplated influencing potential witnesses. Fourth, P&H has the ability to retaliate in different ways against disloyal farmers through multiple mechanisms that can impact the Farmers' businesses.

[92] According to P&H, any of these alleged "risks of retaliation" brought forward by the Commissioner with regard to the Farmers are speculative. P&H submits that the affidavits of the Farmers contain no evidence of a "real and substantial risk" of reprisals but rather merely state bald and unsubstantiated "concerns" that P&H could retaliate if the Farmers' identities were to be more widely known within the company. P&H also argues that the Commissioner has provided no evidence from any of the Farmers showing that P&H has retaliated against or "blacklisted" farmers in the past. According to P&H, a mere fear of retaliation cannot constitute a ground of harm or risk.

[93] I do not agree with this general statement made by P&H.

[94] I acknowledge that, in many cases, courts have found that the mere fear of reprisals or embarrassment was not enough to justify the issuance of confidentiality orders or the preservation of a witness' anonymity in court proceedings (see for example *Fairview Donut*, *Adult Entertainment* and *G(B)* cited by P&H). In *Fairview Donut,* the moving party was seeking an order to redact and replace by pseudonyms any information that could identify franchisees in a commercial dispute. It was submitted that the disclosure of such information "would prejudice and embarrass franchisees, both personally and financially, damaging their employee relations and injuring their goodwill in the community" (*Fairview Donut* at para 27). The ONSC dismissed the request for a confidentiality order as the judge was of the view that "embarrassment is an unavoidable consequence of an open justice system" and that a testifying witness should be held to a "public standard of accountability" (*Fairview Donut* at para 34). The judge was not satisfied that there was "clear evidence that irreparable harm will ensue" (*Fairview Donut* at para 34). The judge rather found that the evidence presented regarding the harm that would rise from the public disclosure of the franchisees' identities was speculative and vague (*Fairview Donut* at para 37).

[95] In *Adult Entertainment*, the ONSC dismissed a motion for an anonymity order or a publication ban on the names of affiants who were female adult entertainment performers. Although he recognized that female adult entertainment performers are "a potentially vulnerable group", the motions judge found that none of the affidavits filed by the affiants had properly demonstrated the need for the requested anonymity order. Stating that "the risk of embarrassment or the existence of a legitimate privacy interest will not justify an anonymity order or a publication ban, nor will potential harm that is merely speculative", he went on to conclude that the affiants had failed to meet the test for issuing a confidentiality order, as there was insufficient evidence establishing the potential irreparable harm resulting from the disclosure of their identities (*Adult Entertainment* at para 16).

[96] In *G(B)*, the British Columbia Supreme Court also refused to grant an order banning the publication of the identities of witnesses who were formerly employed at a school where personnel had been accused of perpetrating physical and sexual assault on young boys, but who were not themselves accused of any misconduct. These individuals had raised concerns about possible reprisals by former students if their identities were made public. The motions judge found that the protection of the "innocent" exception did not apply to these individuals, as there was no factual basis to the safety concerns raised, and no actual evidence of intimidation or threats. The court considered the risk to be solely "speculative" (*G(B)* at para 59).

[97] In my view, what these cases illustrate is that confidentiality orders seeking the anonymity of witnesses are heavily dependent on the underlying facts of each matter. Such confidentiality orders will be denied when the evidence submitted by the moving party with respect to the alleged fear of harm is merely speculative, vague and based on bald assertions and unsupported assumptions (see also *Pfizer Canada Inc v Novopharm Limited*, 2010 FC 668 ("***Pfizer***") at para 37). Since the general rule is that witnesses must testify in public and their identities must be disclosed to the public in judicial proceedings, only in exceptional circumstances can their identities be kept confidential. However, the cases cited by P&H do not stand for the proposition that, as a matter of principle, a fear of economic retaliation cannot be sufficient to constitute a "specific, direct harm" or a "serious risk to an important commercial interest". There are no precedents stating that a fear of commercial reprisals is not enough, as an absolute principle, to support an order of confidentiality. There are only decisions where, on the facts before it, the court found that the evidence was not sufficiently clear and convincing to conclude to a well-founded fear of reprisals.

[98] A fear of commercial retaliation could arguably be enough to constitute a ground of specific, direct harm if it is based on sufficiently clear and convincing evidence satisfying the balance of probabilities test. When the alleged harm is apprehended and has not yet occurred, the situation is akin to requests for *quia timet* ("because he fears") injunctions, which are routinely issued by the courts. These require the courts to assess the propriety of injunctive relief without the advantage of actual evidence regarding the nature and extent of existing or past harm. In those situations where the harm is apprehended or feared, the courts must be convinced, on a balance of probabilities, that there is clear and non-speculative evidence demonstrating how the apprehended harm will occur, so that the inferences that harm will likely occur can be found to reasonably and logically flow from the evidence (*The Commissioner of Competition v Parkland Industries Ltd*, 2015 Comp Trib 4 ("***Parkland***") at para 58). To determine whether, in a given

case, there is indeed such a level of evidence is a factual determination to be made, based on the evidence on the record.

[99] In this case, because of my conclusion on the "public interest" dimension of harm, I do not have to determine whether it is more likely than not that, without the protection of the confidentiality designations sought by the Commissioner, the Farmers have a well-founded fear of commercial retaliation specific to their respective businesses, and whether the Commissioner has presented sufficiently clear, convincing and cogent evidence to satisfy the balance of probabilities test on this private dimension of the alleged harm.

[100] I will simply observe that the evidence referred to by the Commissioner contains details of the specific, direct harm feared by the Farmers in terms of the potential impact that a disclosure of their identities could have on their sales and their relationships with P&H employees and of the mechanisms available to P&H to impact the Farmers' businesses. On the Farmers' sales, there is evidence on this Motion that the Farmers sold a significant portion of their canola and wheat to the Virden elevator now owned by P&H, and that the Farmers' businesses heavily rely on P&H's elevators in Moosomin and Virden. I accept, for the purpose of this Motion, that the Farmers can and do sell their wheat and canola to other grain elevators, but there is evidence indicating that they materially rely on P&H's elevators and would have to travel to elevators located much further away from their farms if they could not sell their grain to P&H.

[101] On the fear that their relationships with P&H employees could be harmed by a disclosure of their identities, the Farmers distinguish in their affidavits between "P&H" and "the employees or the staff" working at P&H elevators. There is evidence showing that the Farmers can benefit commercially from these relationships through: 1) being offered preferred access to special pricing opportunities; 2) having P&H's CSRs more motivated to obtain "extra money" for them; and 3) P&H employees accepting deliveries during harvest not previously contracted for as a favour to farmers.

[102] I acknowledge that, to some extent, the Farmers' fear of retaliation is contradicted by Mr. Klippenstein's affidavit saying that P&H will not retaliate against any farmer and stating that P&H and its employees have no interest, incentive or intention to disturb their productive and positive relationships with the Farmers. Mr. Klippenstein affirms that, because throughput is essential to its business, P&H has no commercial interest or incentive to disturb productive and positive relationships with the Farmers or any other farmers who supply wheat and canola to P&H. Mr. Klippenstein more specifically indicates that "[a]s a company, we have no intention to, and will not, retaliate against any farmer because of his testimony in this case" (para 9). He adds that he is "confident that our Elevator staff who have good and, in some cases, close personal relationships with the Commissioner's Farmer Witnesses will have no interest in disturbing those relationships […] the financial incentives of our Elevator staff – they are compensated based on the grain volumes purchased – mean they will have no desire to undermine or interfere with those relationships" (para 10). Mr. Klippenstein thus indirectly acknowledges that good relationships between farmers and P&H employees are important. However, while he affirms that P&H, as a company, will not retaliate, his affidavit contains no undertaking not to retaliate against the Farmers if they testify for the Commissioner at the hearing. Nor is there any evidence of any clear instructions or directions to P&H employees not

to retaliate. I underscore that the Farmers' concerns about commercial retaliation are not at P&H's corporate level but at the level of P&H employees, where they claim that the relationships need to be preserved.

[103] On P&H's ability to use various mechanisms that could impact the Farmers' businesses, the Commissioner has also provided cogent evidence showing how P&H could harm the Farmers through its business mechanisms rewarding loyalty. The evidence offered by the Commissioner relies on materials coming from P&H itself and demonstrates three ways in which P&H can reward farmers with competitive benefits: 1) preferred access to pricing specials; 2) CSRs advocating on the farmers' behalf if they are loyal customers; and 3) taking delivery of grain from farmers when space is at a premium.

[104] True, the Farmers in their affidavits speak in terms of concerns and possibilities of commercial retaliation if their identities are known by P&H employees. The affidavits of the five Farmers are drafted in similar terms, they are somewhat succinct and they sometimes use vague terms such as the fear that disclosing their identities "could impact my ability to do business", that they "would not feel comfortable with" P&H employees knowing about their testimonies, or that their relationship "may suffer". But, when the evidence referred to by the Commissioner is taken together and considered in its totality, I am satisfied that the Commissioner is not relying upon unfounded assumptions to make his allegations of a specific, direct harm to the Farmers, and that the evidence could amount to sufficiently clear, convincing and cogent evidence to satisfy the balance of probabilities test.

(b) The allegation of P&H influencing the witnesses

[105] P&H takes particular exception with the allegations made by the Commissioner with regard to P&H wanting to meet with farmers and unduly trying to influence them. The Commissioner submits that P&H's attempts to influence potential witnesses by impacting their business is one of the grounds fuelling the Farmers' fear of retaliation from P&H. The Commissioner notably complains that, prior to the filing of his Application, P&H demonstrated a particular interest in finding out who may have complained to the Competition Bureau. After the Application was filed, P&H also considered contacting five farmers located in the corridor of concern between the Moosomin and Virden elevators to "discuss their business needs". According to P&H, it simply wanted to reach out to the farmers for legitimate business reasons in view of strengthening its existing relationships and explaining the Acquisition.

[106] I agree with P&H that the evidence referred to by the Commissioner in support of this specific allegation does not allow me to infer any ill-advised intentions on P&H's part, let alone any attempt to improperly influence witnesses. The evidence adduced by the Commissioner consists of emails showing that P&H contacted certain farmers, paid attention to their views, expressed intention to meet with them and welcomed news or reports indicating that some of them were supportive of its Acquisition. I cannot detect any evidence that would support a conclusion that, by doing so, P&H was attempting to unduly or improperly influence witnesses, nor any evidence that reflected a problematic "particular interest" exhibited by P&H. Further to my review of the evidence, I instead find that the emails contain no evidence whatsoever of any improper hidden or ulterior motive on P&H's part and that, far from revealing ill-advised

intentions, they instead reflect the normal business behaviour of an entity seeking to ensure that its existing and potential customers would support a contemplated transaction.

[107] Even the fact that P&H applauds customers supportive of the Acquisition and would be willing to "premium" them because of their support (or to offer them some rewards such as "a nice bottle of whiskey") cannot realistically lead to an inference that such approaches are anything but proper discussions and actions legitimately undertaken in the normal course of business. I would add that nowhere in the evidence relied on by the Commissioner does P&H state or suggest that non-supportive farmers would be punished for failing to support the Acquisition.

[108] In claiming that the Farmers had well-founded fears of retaliation because P&H had contemplated influencing potential witnesses, the Commissioner was in fact tiptoeing the sideline of allegations of witness tampering and witness intimidation on the part of P&H. These are very serious allegations that cannot, and should not, be advanced lightly. The Tribunal would expect to see much more compelling evidence than what has been submitted by the Commissioner before a party elects to make such an allegation in support of its case. On this issue, the Commissioner's evidence falls well short of the mark of the evidentiary requirements he had to meet.

(2) Public interest component of the specific, direct harm

[109] Even if I were to assume that the confidentiality designations are necessary to prevent a specific, direct harm to the Farmers, the Commissioner's Motion does not succeed because the "public interest" component of the specific, direct harm, as claimed and as framed by the Commissioner on this Motion, is not supported by any clear, convincing and cogent evidence.

[110] Confidentiality orders are the exception to the rule of open and accessible court proceedings, and they should be reserved for exceptional circumstances based on a solid evidentiary foundation from which the appropriate inferences of risk or harm can be drawn (*Sierra Club* at paras 53-54). Here, the alleged specific, direct harm that would be caused by a failure to protect the identities of the Farmers takes the form of a fear of economic retaliation, a concern for commercial reprisals for the Farmers. Under the *Sierra Club* test, it is not sufficient that this harm be specific and limited to the Farmers. It needs to have a public interest dimension and to raise a general principle. However, there is a complete absence of evidence on a "public interest" dimension of the alleged harm and on a general principle at stake in the Commissioner's Motion. There is simply no evidence going beyond the specific personal harm invoked by the Farmers themselves with respect to their individual relationships with P&H.

[111] The Commissioner does not dispute that the first branch of the *Sierra Club* test has a public interest dimension, and that the specific, direct harm or the serious risk to important commercial interests that would need to be protected by a confidentiality order must not be merely limited to the Farmers' sole situation and must involve a "general principle at stake". The Commissioner has indeed not made any legal submissions arguing that this should not be an element to be considered by the Tribunal.

[112] On the contrary, in both his written submissions and at the hearing of his Motion, the Commissioner advanced several arguments regarding this public interest dimension, claiming that issuing the requested order would protect the integrity of the Tribunal process. In his written submissions, the Commissioner argued that protecting the Farmers from potential commercial retaliation by P&H was in the public interest as disclosing the identities of the Farmers would hamper the Farmers' ability "to testify freely and openly", would impact "the Tribunal's ability to receive a full factual record in this case" and would also affect its ability to receive a complete factual record "in future cases".

[113] At the hearing, in support of his claim that the Farmers' commercial interest rose to the level of a public interest, the Commissioner further submitted that he was unable to obtain a witness statement from a farmer who feared reprisals from P&H, that the Farmers were not under subpoena, and that one of the five Farmers had submitted in his affidavit that he had no interest in testifying publicly.

[114] I cannot accept any of these submissions made by the Commissioner for one single reason: there is strictly no clear and convincing evidence supporting any of those allegations. It is trite law that a litigant who wishes to benefit from an exceptional remedy must establish the facts supporting his request. More specifically, a litigant must do more than identify satisfactory harm in his legal submissions. He must demonstrate that such harm will be suffered by providing evidence concrete or particular enough to allow the Tribunal to be persuaded on the matter, on a balance of probabilities. No matter how eloquent arguments from counsel may be, they cannot replace the need for the litigant to provide clear, convincing and non-speculative evidence of the requisite harm. In the circumstances of this case, such evidence is just absent, and the lack of proper affidavits or materials from the Commissioner allowing me to find sufficient, reliable evidence in support of his allegations of a "public interest" in confidentiality is fatal to his Motion.

(a) Inability to testify freely and openly

[115] The Commissioner claims that protecting the Farmers from potential retaliation by P&H is in the public interest as it ensures that the Farmers can testify freely and openly without worrying that P&H, who the Commissioner alleges has market power, will retaliate.

[116] However, I have been unable to find any reference in the Farmers' affidavits stating that they will be unable to testify "freely and openly" or that they will not be fully truthful in their testimony before the Tribunal unless their identities are kept confidential or unless they testify *in camera*.

(b) Inability to have a full factual record in this case

[117] The Commissioner further claims that disclosing the Farmers' identities will affect the Tribunal's ability to obtain a full factual record in this case.

[118] Again, no evidence was offered by the Commissioner to demonstrate how the Tribunal's factual record will be affected in this case if the confidentiality order sought by the

Commissioner is not granted. At the hearing, I specifically asked counsel for the Commissioner about the evidence supporting the Commissioner's legal submissions on this point, and no satisfactory answer was provided.

[119] In order to support his allegation that the Tribunal's ability to have a full factual record would be hampered by the absence of a confidentiality order, the Commissioner had to demonstrate that, if their identity was not protected by a confidentiality order, the Farmers would not have provided a witness statement, they would not have testified at the hearing, the Commissioner would not have been able to rely on and use the Farmers' information and, without the witness statements and the evidence emanating from the Farmers, the Commissioner would not have been able to present a full factual record to the Tribunal. In sum, the Commissioner needed to show how his ability to provide a full record to the Tribunal and to have the necessary evidence to make his case before the Tribunal would have been hindered.

[120] Here, there is no clear and convincing evidence in the Farmers' affidavits establishing that the Farmers would not have provided a witness statement had they known that their identities would be publicly disclosed.

[121] There is no clear and convincing evidence in the Farmers' affidavits establishing that the absence of the requested confidentiality designations would prevent them from testifying at the hearing or that the Farmers would not testify or refuse to testify if their identity was disclosed.

[122] There is no clear and convincing evidence in the Farmers' affidavits establishing that they were given any assurances of confidentiality by the Commissioner.

[123] There is no clear and convincing evidence nor any affidavit from an officer at the Competition Bureau establishing that, without the witness statements and evidence from the Farmers, the Commissioner would have been unable to adduce evidence of key facts in support of his case and would have been unable to present a full factual record to the Tribunal. Such evidence had to come from the Commissioner, but none was offered in support of the Motion.

[124] In the absence of any evidence that the Farmers would not have signed their witness statements, that they would not testify, and that this would have impeded the Commissioner's ability to present his case, there is simply no evidentiary foundation on which I could conclude that the Tribunal would not be able to obtain a complete factual record without the protection of the confidentiality order sought by the Commissioner.

(c) Inability to have a complete factual record in future cases

[125] The Commissioner also claims that, without the benefit of the confidentiality order, the Tribunal's ability to receive a full factual record potentially in future cases will be hampered and that the order is generally needed to protect the "integrity of the Tribunal process". In the same vein, the Commissioner further argues that, 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.

[126] Again, the problem is that no evidence or support was provided by the Commissioner on this claim of a "public interest" in confidentiality.

[127] I underline that, as acknowledged by the Commissioner and P&H at the hearing, there are no previous decisions in which the Tribunal has ordered the identity of witnesses to be kept confidential on a contested motion, or where the Tribunal has agreed, on a contested motion, to allow a witness to testify entirely *in camera*. There is also no precedent of a Tribunal order shielding the identity of a witness based on evidence that the witness would not sign a witness statement unless his or her anonymity was guaranteed. I am also unaware of any precedent where it was stated that the Tribunal did not have a complete factual record before it because a potential witness allegedly feared for its commercial interest or because a witness' identity had to be made public.

[128] In his submissions, the Commissioner referred to the *CCS* precedent, but I find that it is of little assistance to the issue raised by the Commissioner in this Motion. In the *CCS* case, the names of certain third-party witnesses were redacted in the Tribunal's decision, but it is not disputed that these redactions were permitted on consent. I agree with P&H that, in those circumstances, this decision is of little precedential value for present purposes.

[129] In fact, this is the very first time that, on a contested motion, the Commissioner is seeking an order to keep the identity of witnesses confidential in a proceeding before the Tribunal and to have witnesses testify entirely *in camera* at a hearing. In other words, the confidentiality order that the Commissioner is seeking on this Motion is highly exceptional.

[130] I am not saying that, in an application before the Tribunal, the Commissioner could not have been faced with a witness raising concerns about the disclosure of his or her identity. Or that a situation where the Commissioner was unable to present a complete factual record to the Tribunal could not have happened or could not happen in the future. But, in the absence of any precedent to that effect at the Tribunal, it was incumbent upon the Commissioner to provide evidence and examples of previous practices or situations to support his claim that, without the benefit of the confidentiality order he is seeking, the Tribunal's ability to receive a full factual record will potentially be hampered in future cases.

[131] The Commissioner could have provided an affidavit from one of his officers referring to past examples where the Commissioner did not bring an application because of an incomplete factual record due to witnesses being reluctant to testify in public, or examples where an application brought by the Commissioner floundered because of his inability to provide a complete factual record to the Tribunal due to similar circumstances. He did not.

[132] There is, again, a complete absence of evidence showing, for example, that the Commissioner required anonymity for witnesses in past cases or needed it for future cases in order to effectively fulfill his statutory mandate. There is not even a general sworn statement by an officer from the Competition Bureau stating that the public disclosure of the Farmers' identities in this case would set a precedent that would discourage other witnesses who may want to disclose a wrongdoing or provide testimony in future applications before the Tribunal. While it is far from clear that such a generalized assertion would be enough to amount to clear and convincing evidence supporting the Commissioner's claim (*Toronto Star* at para 9;

Commissioner of Competition v Chatr Wireless Inc, 2011 ONSC 3387), it has not even been adduced by the Commissioner in support of his Motion.

[133] The Commissioner's Motion is clearly an exceptional request and, without any evidence to support the Commissioner's claim regarding the impact on future cases, the Tribunal is left with nothing but bald assertions and speculation. This is evidently insufficient to sustain the argument of a public interest in confidentiality. The Tribunal cannot simply take the word of counsel for the Commissioner as evidence.

[134] I accept that the Commissioner has the responsibility to protect the public interest in respect of competition in Canada in the manner conferred upon him by the Act. He may bring cases before the Tribunal when he considers it necessary in order to carry out this responsibility. He is presumed to act in the public interest, and weight should be given to these public interest considerations and to the statutory duties carried out by the Commissioner (*Parkland* at paras 104-108). As Chief Justice Crampton stated in *The Commissioner of Competition v Pearson Canada Inc*, 2014 FC 376 ("***Pearson***"), "[i]t is now well established that, as a statutory authority responsible for the administration and enforcement of the Act, the Commissioner benefits from a presumption that actions taken pursuant to the Act are *bona fide* and in the public interest" (*Pearson* at para 43). There is no question that, in the present case, the Commissioner's activity in bringing this Application before the Tribunal was undertaken pursuant to his responsibility to protect competition in Canada under the provision dealing with mergers.

[135] For the Commissioner, there will generally be a public interest in preserving the confidentiality of some competitively sensitive information where the failure to do so will prevent him from obtaining the information and being able to present his case. The Commissioner is right to point out that confidentiality orders are a normal feature of Tribunal cases, and that designating competitively sensitive information as confidential is routinely done by the Tribunal in its confidentiality orders. However, designating the identity of witnesses as confidential is not. This is clearly out of the ordinary, and the Commissioner needed evidence to demonstrate the existence of a public interest in obtaining the confidentiality designations he is seeking in this Motion and to justify overcoming the open court principle.

[136] In *VAA*, in the context of an interlocutory motion dealing with public interest privilege, the FCA insisted on the importance of providing an evidentiary basis to support the Commissioner's claim that he is acting in the public interest (*VAA* at paras 82, 84-85). In *VAA*, the Commissioner had argued that "if anything less than blanket confidentiality protection were afforded to documents and information supplied by third party sources, there might be reprisals or the threat of reprisals against them", "third party sources might be less inclined to act", "the Commissioner would be less able to discharge the important responsibilities Parliament has assigned to him in the *Competition Act*", and the "public interest would suffer" (*VAA* at para 84). However, the Commissioner had not filed evidence establishing these matters, and the FCA found that "given the consequences of recognizing a class privilege and the high threshold that must be met, the unsworn say-so of the Commissioner in submissions cannot suffice" (*VAA* at para 85). I can do no better than echo the statements made by the FCA in that case: here again, there is no evidentiary basis to support the public interest component of the harm claimed by the Commissioner.

[137] As the FCA said in *VAA* with respect to the public interest privilege, while the Tribunal "might be in a position to accept in a general way that third party sources *might* have a fear of reprisal if they assist the Commissioner in an investigation" [emphasis in original], the Tribunal "is in no position to make definitive conclusions without evidence about the Commissioner's relationship with third party sources" if the confidentiality protection sought is not given (*VAA* at para 90). In particular, without evidence, the Tribunal cannot conclude that a fear of commercial reprisals will actually exist, that third party sources will be less inclined to assist, and that the Commissioner will be prevented from carrying out his mandate under the Act (*VAA* at para 90).

[138] This need for a proper evidentiary basis to support the "necessity" element of the *Sierra Club* test was reemphasized by the FCA in *Desjardins*: the Tribunal cannot simply rely on generalized assumptions for the purposes of the *Sierra Club* test. The Tribunal's conclusions must instead be well grounded in the evidence. As the FCA ruled in both *VAA* and *Desjardins*, it was incumbent on the Commissioner to adduce evidence establishing that, without the protection of confidentiality designations and guarantees of anonymity, witnesses would not want to provide witness statements, would refuse to testify and that not having such testimonies would hamper the Commissioner's ability to bring cases before the Tribunal.

(d) Further specific claims

[139] At the hearing, the Commissioner insisted on three particular pieces of evidence to support his claim that there is a public interest in maintaining the confidentiality of the Farmers' identities in this Application: the fact that the Commissioner was unable to obtain a witness statement from a farmer who was afraid of the repercussions from testifying; the fact that the Farmers are not under subpoena; and the fact that one of the five Farmers said he would not testify publicly.

[140] I am not persuaded by any of these arguments and find that the evidence on the record does not support the Commissioner's allegations.

[141] First, regarding the farmer who was "unwilling to testify" and apparently refused to sign a witness statement, I agree with P&H that there are two fundamental problems with the evidence put forward by the Commissioner on this point. First, the email from a Competition Bureau officer submitted by the Commissioner just does not say that the farmer refused to testify because of a fear of retaliation from P&H. The brief email only reports that the farmer was "very concerned" about possible repercussions of signing his witness statement. With respect, such a short statement and such language cannot reasonably be read and interpreted as suggested by the Commissioner. There is a material difference between being "concerned" and refusing to testify because of fears of repercussions. Second, the email relied on by the Commissioner does not emanate from the farmer himself but is a correspondence relaying a report about what the farmer apparently said. This evidence bears all the attributes of inadmissible hearsay. Hearsay is an out-of-court statement tendered for the truth of its contents. Its essential defining features are "(1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant" (*R v Khelawon*, 2006 SCC 57 at para 35). It is well established that hearsay evidence is presumptively inadmissible because it is difficult for the trier of fact to assess its truth, and that relying on such evidence therefore

threatens the integrity of the hearing's truth-seeking process and fairness. This is precisely the case here with the statement attributed to the farmer.

[142] Turning to the Commissioner's contention that the Farmers are not under subpoena, it is not very convincing. The evidence on the record shows that, in their respective witness statements, each of the Farmers expressly states that he is "providing this witness statement because the Commissioner has served me with a subpoena". It may be that the Farmers are not yet formally under subpoena for their appearance at the upcoming virtual hearing, but they expressly agreed to provide their witness statements further to their understanding that they were served with a subpoena. Moreover, the Commissioner can certainly serve them with a subpoena and force them to testify at the virtual hearing of the Application. The fact that the CT Rules do not require third parties to provide detailed witness statements to the Tribunal does not mean that the Farmers cannot be subpoenaed to testify.

[143] Finally, I am also of the view that the statement made by one of the Farmers to the effect that he is "not interested in testifying publicly" does not constitute clear and convincing evidence that this Farmer will not testify or will refuse to testify if his identity is revealed publicly. Words do matter and, in order to support his claim of a public interest in maintaining the confidentiality designations sought for the Farmers, the Commissioner needed to rely on much clearer statements than not being "interested" in testifying in public. I cannot conclude from such an ambiguous statement that it is more likely than not that the Farmer will not testify at the hearing in the absence of confidentiality protection.

(e) Public interest in confidentiality

[144] The above analysis does not mean that demonstrating a public interest in confidentiality when seeking an order to keep the identity of witnesses confidential is an impossible task for the Commissioner. The public interest dimension of harm is a broad and flexible concept: in *Sierra Club*, the SCC indicated that, if the interest "can be characterized more broadly" as public, it is enough (*Sierra Club* at para 55). There simply has to be a "general principle" at stake.

[145] Arguably, there are at least two ways in which the public interest in confidentiality could be demonstrated in situations similar to this one. First, by providing clear and convincing evidence that, without the protection of the confidentiality designations on the witnesses' identities, the Commissioner would not have the ability to properly present his case to the Tribunal (like in *Sierra Club*). Second, by providing clear and convincing evidence that, without the protection of the confidentiality designations of the witnesses' identities, the alleged harm would rise to the level of concern for the competitive process that the Commissioner is mandated to protect through an application to the Tribunal under the Act. In each case, however, the Commissioner needs to adduce the necessary evidence.

[146] First, with respect to the inability to present a case, the SCC has expressly recognized that the search for the truth may actually be promoted by a confidentiality order if the disclosure of an important commercial or contractual interest would result in a party not submitting relevant documents, thus hindering the party's capacity to fully present its case (*Sierra Club* at paras 51, 52, 77). In *Sierra Club*, the SCC found a broader "general commercial interest in preserving

confidential information" because the disclosure would breach a confidentiality agreement and prevent AECL from defending its case (*Sierra Club* at paras 55, 59). The confidential information was relevant to defences available to AECL and the inability to rely on the confidential information would have hindered AECL's capacity to make a full answer and defence. Without the confidential protection it was seeking, AECL would have had to withdraw the document at issue and, without the benefit of the confidentiality protection, AECL's right to a fair trial was impaired. This was the general principle at stake in that case as the right of civil litigants to a fair trial is related to the public and judicial interests in seeking the truth in civil proceedings (*Sierra Club* at para 51).

[147] Similarly, in *John Doe and Suzie Jones v R*, 2014 FC 737, the Federal Court stated that the "public interest" component of the "serious risk" requirement under the first prong of the *Sierra Club* test can be met if the denial of the confidentiality order would impede the ability of a class proceeding to go forward, something which was of public interest as the inability to proceed would be to the detriment of all putative class members.

[148] Therefore, evidence demonstrating that the confidentiality protection is necessary to preserve the Commissioner's right to a fair hearing and to bring a case could provide the required public interest dimension of harm in a situation where the Commissioner seeks to keep the identities of witnesses confidential.

[149] Second, on the same logic as in *Sierra Club*, one could argue that there could be a specific, direct harm having a public interest dimension in preserving a witness' identity if the fear of retaliation could not only negatively affect the specific competitive position of that witness (or its company) in a market but could also distort the competitiveness of the relevant market itself. This legal reasoning was not advanced by the Commissioner in this case, but there is arguably a general principle at stake or a public interest dimension in maintaining competition in a market, in keeping a competitive environment and in avoiding harm or injury to the competitive process in a market resulting from the failure to have the necessary confidentiality protection. However, once again, harm to the competitive process cannot be presumed or simply inferred from the Act or the Commissioner's mandate, and it needs to be demonstrated by clear and convincing evidence coming from the Commissioner.

[150] For all those reasons, the evidence does not support the extraordinary and exceptional order that the Commissioner is seeking in this case, and does not allow the Tribunal to give the Farmers a level of confidentiality protection similar to informers, to the vulnerable cyberbullied children in *Bragg* or to victims of sexual assault, whose identities have sometimes been protected. As was the case in *Pfizer*, the harm or risk to an important commercial interest identified by the Commissioner is narrow and personal to the Farmers. There is no evidence of a public interest or general principle at stake in the confidentiality order sought by the Commissioner on this Motion.

(3) The open court principle and the balancing exercise

[151] At the second branch of the *Sierra Club* test, the "proportionality" stage, the salutary effects of the contemplated confidentiality order must be weighed against the deleterious effects

of the order, including its effects on the right to free expression, which in turn is connected to the principle of open and accessible court proceedings.

[152] In this case, I agree with the Commissioner that the deleterious effects on the open court principle that would result from designating the identities of the Farmers as confidential are fairly minimal in light of the public versions of the Farmers' evidence and of the Tribunal's reasons that will be made available to the public on a timely basis. However, the lack of evidence on the "public interest" component of the alleged specific and direct harm does not allow me to conclude that the salutary effects of preventing such harm outweigh the limited deleterious effects of the confidentiality designations on the open court principle, however modest they may be. In fact, the absence of any public interest dimension in the confidentiality designations sought by the Commissioner means that the salutary effects of any order would be absent.

[153] As indicated above, the public interest dimensions permeate both branches of the *Sierra Club* test (*Sierra Club* at paras 55-56). If there is no public interest in confidentiality, there is no public interest in the salutary effects of the confidentiality order, and this will suffice to tilt the balance in favour of the public interest in protecting the open court principle. In *Sierra Club*, the determinative element was the fact that the confidentiality order would have significant salutary effects on AECL's right to a fair trial. Conversely, the disclosure of the confidential documents would have caused AECL to breach its contractual obligations and suffer a risk of harm to its competitive position. If a confidentiality order had been denied, AECL would have been forced to withhold the documents in order to protect its commercial interests, and since that information was relevant to some of its defences, the inability to present this information would have hindered AECL's capacity to make a full answer and defence. "[T]he primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case, or, more generally, the fair trial right" (*Sierra Club* at para 70).

[154] That being said, I make two quick observations on the deleterious effects of the contemplated confidentiality order which are to be assessed by the Tribunal at the proportionality stage of the test.

[155] The open court principle has been repeatedly recognized in Canadian courts and is a cornerstone of our democratic society. Covertness in judicial proceedings is an exception, to be exercised with care. However, the open court principle, as important as it is, cannot be reduced to an absolute and "one size fits all" proposition. Its application is contextual.

[156] It is fair to say that the open court principle has two dimensions: 1) one related to the "right to free expression" and the access to information in judicial proceedings for the public and the media; 2) and one related to the notion that open courts provide for a public setting deemed to be more conducive to a fairer truth-seeking process: the open examination of witnesses "in the presence of all mankind" is more conducive to ascertaining the truth than secret processes (*Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1357-1358). In *CBC*, the SCC expressed this duality as follows: the open court principle "ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law" (*CBC* at para 1). At the hearing of

the Motion, the Commissioner referred to it in terms of the "two policy rationales" underpinning the open court principle: 1) the need to know and to understand the reasons of the decision-maker; and 2) the fact that a public setting is more prone to ensuring truthfulness.

[157] In *Sierra Club* and in most cases cited by the parties in this Motion, the main open court concern was the negative effect that a confidentiality order would have on the right to freedom of expression, and on the public and the media being denied access to the confidential information. It is the concern about the public and the media not having access to documents and not knowing what is happening in the judicial proceedings that was the central issue.

[158] However, the infringement on the right to freedom of expression and on the public's right to access information will vary depending on the type of orders that limit the openness of court proceedings: imposing publication bans, redacting versions of pleadings or other documents in a legal proceeding, or granting anonymity to certain parties or witnesses do not have the same consequences in terms of eroding this first dimension of the open court principle. In assessing the impact of a contemplated confidentiality order on the open court principle, the Tribunal therefore needs to consider how and the extent to which the freedom of expression is really affected. For example, in *Mentuck*, the SCC acknowledged that the deleterious effect of a ban as to identity was not as substantial as the negative effects caused by a publication ban.

[159] Here, I agree with the Commissioner that any impairment of the contemplated confidentiality designations on the open court principle would be minimal and fairly modest because of the particular features of the Tribunal process. The confidentiality designations would be minimally intrusive on the "right to freedom of expression" dimension of the open court principle, since public redacted versions of the Farmers' evidence and redacted transcripts of the *in camera* hearings would be available. Even if a confidential order was granted, there would be access to the relevant information and to the substantive points made by the Farmers in their witness statements, and the public would have a full understanding of the evidence and information with the redacted versions of the evidence and the public version of the Tribunal's reasons that will be available on a timely basis. Contrary to the situation with publication bans, there would be a much more limited concern about the open court principle, seen from the angle of the right to freedom of expression, as the public would get redacted public statements immediately and redacted transcripts two days after the testimonies of the Farmers. As the SCC stated in *Bragg*, there is a minimal effect on open courts and freedom of the press if a confidentiality order only protects the identities of persons while allowing disclosure of their evidence.

[160] My other observation relates to the second dimension of the open court principle, namely the fact that open courts contribute to the truth-seeking process and that openness guarantees the integrity of judicial processes. On this Motion, P&H's arguments with respect to the open court principle appear to be more focused on this second dimension, as it emphasized its right to cross-examine the Farmers in open proceedings in order to benefit from a fair and complete truth-seeking process. According to P&H, the case law establishes that the deleterious effects of a confidentiality order permitting a witness to testify confidentially include harm to the search for truth. Where the evidence and credibility of the witnesses go to the heart of the Commissioner's application, depriving the public of the ability to determine for themselves whether a defendant has engaged in an alleged reviewable conduct and whether the Tribunal's decision on the merits

was made after proper inquiry goes against the open court principle. In essence, P&H claims that allowing the Farmers to testify *in camera* would be less conducive to a satisfactory truth-seeking process and that the Farmers would be more truthful in their testimonies if their identities were revealed.

[161] I first note that I have found no precedent where this second dimension of the open court principle was the determining element to deny a confidentiality order. On the contrary, it was usually the protection of the right to freedom of expression that led courts to conclude that the deleterious effects of a confidentiality order outweighed its salutary effects.

[162] Furthermore, I accept that witnesses are more likely to be truthful in their testimony if they know it is subject to being scrutinized by an audience with their identity known to the public, and that witnesses who testify openly are held to a public standard of accountability (*Stubbs* at para 36). However, when the main concern about a confidentiality order is with the open court principle seen as a safeguard to the truth-seeking process and the right to a fair hearing, and when the fear is that witnesses may not testify truthfully, the particular context in which the testimony takes place needs to be taken into account. In proceedings before the Tribunal, it is common for most of a witness' testimony to include full public access, with only some parts subject to the exclusion of members of the public in order to protect confidential information. If the witness' testimony will include information that is subject to a confidentiality order, the witness testifies, still under oath or affirmation, before the Tribunal and in the presence of legal counsel for both parties. A verbatim transcript of the proceedings continues to be prepared. If the testimony concerns "Confidential - Level B" information, as is proposed for the Farmers on this Motion, the witnesses also remain subject to being scrutinized by a limited number of representatives from the other party who will know the identity of each witness. Overall, even *in camera* sessions of the Tribunal have most of the formal features of a public session and are not held entirely behind closed doors.

[163] In these circumstances, the party claiming that a confidential session of the Tribunal hearing will adversely affect the truth-seeking function may have to adduce persuasive evidence (in accordance with the standards already described above) to support a claim of infringement of the open court principle in the specific circumstances before the Tribunal. Doing so is comparable to adducing evidence to demonstrate the public interest dimension of the alleged harm when the Commissioner claims that the Farmers would be able to testify freely and openly with the protection of a confidentiality order.

[164] In the present case, no evidence has been provided by P&H to support its allegation that the Farmers would be more truthful if they were to testify in a public setting or that its right to a fair hearing would be hindered by their *in camera* testimonies before the Tribunal. It is not clear merely from P&H's legal arguments why testifying in the presence of Tribunal members, legal counsel and five senior executives from P&H (as would be the case for *in camera* sessions of the Farmers in this Application) would not be sufficient to ensure that the Farmers tell the truth in their testimonies before the Tribunal. Given the particular Tribunal context and the fact that *in camera* sessions would be open to at least some representatives of the opposing party, there is no evidence to demonstrate why, in such a situation, a well-grounded concern exists that these witnesses would not tell the truth or that the truth-seeking process would necessarily be adversely affected by the proposed confidentiality designations.

[165] In other words, when a party intends to rely on the alleged impact of a confidentiality designation on the second dimension of the open court principle (i.e., transparency and openness guaranteeing the integrity of judicial proceedings and the truth-seeking process) to support its claims of deleterious effects resulting from such a confidentiality order, appropriate evidence may be required to demonstrate to the Tribunal how having one or more witnesses testify *in camera* (but in a hearing room setting and in front of a limited audience) would hamper the truth-seeking process and, hence, the open court principle.

IV. CONCLUSION

[166] For the above-mentioned reasons, the Commissioner's Motion was dismissed.

[167] In summary, and as stated in the order dismissing the Motion, I agree with the parties that the SCC decision in *Sierra Club* provides the legal framework governing the confidentiality designations sought by the Commissioner on this Motion, adapted as they must be to reflect the specific relevant provisions contained in the CT Rules. However, I am not satisfied that the Commissioner has presented clear and convincing evidence sufficient to satisfy the Tribunal, on a balance of probabilities, that the requirements for the confidentiality designations he is seeking are met. The "public interest" component of the alleged specific, direct harm, as claimed and as framed by the Commissioner on this Motion, is not supported by any clear, convincing and cogent evidence. Moreover, even though the deleterious effects on the open court principle that would result from designating the identities of the Farmers as confidential are fairly minimal in the circumstances of this case, this lack of evidence on the "public interest" component of the alleged harm does not allow me to conclude that the salutary effects of preventing such harm would outweigh the deleterious effects of the confidentiality designations on the open court principle.

[168] I consider that, in the unusual circumstances that gave rise to the Commissioner's Motion, and given the reasons above, this is not a situation where I should exercise my discretion to award costs against the Commissioner. Consequently, no costs will be awarded.

THE TRIBUNAL ORDERS THAT:

[169] No costs are awarded.

DATED at Ottawa this 5th day of January 2021.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

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