

Reply to the Attention of: Guy Pinsonnault /  
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Our File No.: 255745  
Date: December 21, 2018

**CONFIDENTIAL**

Honourable Justice London-Weinstein  
Superior Court of Ontario  
161 Elgin Street  
Ottawa, ON K2P 2K1

Dear Ms. Honourable Justice London-Weinstein:

**Re: Notice of Applications to seal records in Court File No. 13327/18 on the matter of s. 11(1)(a) of the Competition Act**

We represent Torstar Corporation, Metroland Media Group Ltd. and Free Daily News Group Inc. (collectively "Torstar") who are Respondents in the above-noted Application. I have copied this letter to Mr. Naudie, as co-counsel for Torstar, as well as Mr. Hood, as counsel for the Commissioner of Competition (the "Commissioner"). We have discussed this letter in advance with Mr. Hood, and he has consented to the forwarding of this letter to the court.

On November 22, 2018, Your Honour granted an *ex parte* Order compelling examinations of six current and former employees of Torstar before a presiding officer pursuant to s.11 of the *Competition Act*. In support of the Application, the Commissioner filed the Affidavit of Pierre-Yves Guay and four exhibits attached thereto.

The records contained in Exhibit C included alleged confidential commercially-sensitive, competitively sensitive and/or proprietary information relating to Torstar, and confidential personal information of employees (the "Confidential Documents"). Therefore, Torstar advised the Commissioner that it intended to bring a sealing application.

On December 3, 2018, the parties brought an application to temporarily seal Exhibit C pursuant to s. 487.3(1) of the *Criminal Code* to allow Torstar to file an application to seal the said records.

To accommodate Torstar's anticipated application, Justice London-Weinstein ordered the interim sealing of Exhibit C until further Order of the Court, or 30 days from December 3, 2018, whichever comes first.

Torstar has filed today its Notice of Application which has been served on the Commissioner by email. Torstar is also working on its supporting affidavit materials. However, following our last

attendance, we were advised that Torstar's affiant will be outside the country from December 23, 2018 until January 7, 2019, and we will not be available to execute his affidavit during the first week of January

Therefore, in light of our affiant's schedule, and the fact that the original 30 day time period straddled the holiday period, we are seeking the consent of the Court to file this affidavit material on or before January 11, 2019.

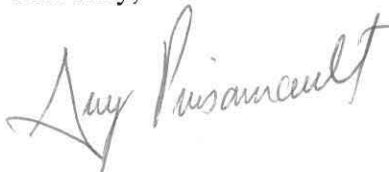
We are also seeking the continuation of the Sealing Order pursuant to s. 487.3(1) granted on December 3, 2018 until further Order of this Court or 30 days from the issuance of this additional order.

Counsel for the Commissioner takes no position on the filing of the supporting affidavit material to January 11, 2019 as well as the extension of the Interim Sealing Order.

As discussed and agreed during before our attendance before the Court, the parties believe that it would be helpful to set a case management hearing before setting the date for the *in-camera* hearing. We anticipate setting that case management hearing in January following the delivery of Torstar's supporting affidavit.

Please find attached a copy of the Notice of Application, a draft Sealing Order and a copy of the Order to be affixed on the sealed packet.

Sincerely,



Guy Pinsonnault

c: C. Naudie (*Osler, Hoskin & Harcourt LLP*)  
J. Hood (*Competition Bureau Legal Services*)

**SUPERIOR COURT OF JUSTICE  
(East Region)**

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

**AND IN THE MATTER OF** an inquiry under subparagraph 10(1)(b)(iii) of the *Competition Act*, concerning alleged activities between Postmedia Network Canada Corp. and Postmedia Network Inc. (collectively, "Postmedia"), and Torstar Corporation, Metroland Media Group Ltd. ("Metroland") and Free Daily News Groups Inc. (collectively, "Torstar"), and other persons known and unknown, contrary to paragraphs 45(1)(b) and (c) of the *Competition Act*.

**AND IN THE MATTER OF** an ex parte application by an authorized representative of the Commissioner of Competition for an Order requiring Sandy Edward MacLeod; Dana Robbins; Dino Luis (Dean) Zavarise; Derek John Fleming; Lorenzo DeMarchi, and Ian Oliver to attend before a presiding officer to be examined on matters relevant to an inquiry pursuant to paragraph 11(1)(a) of the *Competition Act*.

**AND IN THE MATTER OF** an application pursuant to s. 487.3 of the *Criminal Code* to prohibit access to and disclosure of Exhibit C to the affidavit of Pierre-Yves Guay, an authorized representative of the Commissioner of Competition, filed in support of an application to obtain an order compelling oral examinations under section 11 of the *Competition Act*.

**B E T W E E N:**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

- and -

**SANDY EDWARD MACLEOD, DANA ROBBINS, DINO LUIS (DEAN) ZAVARISE,  
DEREK JOHN FLEMING, LORENZO DEMARCHI, and IAN OLIVER**

**Respondents**

- and -

**TORSTAR CORPORATION, METROLAND MEDIA GROUP LTD. and FREE DAILY  
NEWS GROUP INC.**

**Third Parties**

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**SEALING ORDER**

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**UPON THE APPLICATION**, pursuant to section 487.3 of the *Criminal Code*, made on December 21, 2018 by Torstar;

**AND UPON** hearing counsel for the parties in support of the application to temporarily seal and prohibit disclosure until further determination of this Court;

**AND UPON** being satisfied, on an interim basis, that the disclosure of Exhibit C to the affidavit of Pierre-Yves Guay, an authorized representative of the Commissioner of Competition, requires further consideration pursuant to section 487.3 of the *Criminal Code* and to prevent the subversion of the ends of justice pending further consideration of this Court;

**IT IS ORDERED THAT**, pursuant to subsection 487.3(1) of the *Criminal Code*, the original *ex parte* Application Record of the Commissioner of Competition containing Exhibit C to the affidavit of Pierre-Yves Guay, an authorized representative of the Commissioner of Competition, continue to be placed in a sealed packet and kept in the custody of the Court in the Office of the Clerk thereof in a safe, secure and private place to which the public has no access, so as to ensure the privacy and confidentiality of such contents until further Order of this Court., or 30 days from the issuance of this order, whichever comes first.

**DATED** at the City of Oshawa in the Province of Ontario this 27<sup>th</sup> day of December, 2018.

  
\_\_\_\_\_  
Judge of the Ontario Superior Court  
(East Region)

SANDY EDWARD MACLEOD, DANA ROBBINS, DINO LUIS (DEAN)  
ZAVARISE, DEREK JOHN FLEMING, LORENZO DEMARCHI, and IAN  
OLIVER

-and-

THE COMMISSIONER OF COMPETITION

-and-

TORSTAR CORPORATION, METROLAND MEDIA GROUP LTD. and  
FREE DAILY NEWS GROUP INC.

(Applicant)

(Respondents)

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
*(East Region)*

PROCEEDING COMMENCED AT OTTAWA

**SEALING ORDER**

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Canada

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Counsel for the Respondents

**SUPERIOR COURT OF JUSTICE  
(East Region)**

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

**AND IN THE MATTER OF** an inquiry under subparagraph 10(1)(b)(iii) of the *Competition Act*, concerning alleged activities between Postmedia Network Canada Corp. and Postmedia Network Inc. (collectively, "**Postmedia**"), and Torstar Corporation, Metroland Media Group Ltd. ("**Metroland**") and Free Daily News Groups Inc. (collectively, "**Torstar**"), and other persons known and unknown, contrary to paragraphs 45(1)(b) and (e) of the *Competition Act*.

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for an Order requiring Sandy Edward MacLeod; Dana Robbins; Dino Luis (Dean) Zavarise; Derek John Fleming; Lorenzo DeMarchi, and Ian Oliver to attend before a presiding officer to be examined on matters relevant to an inquiry pursuant to paragraph 11(1)(a) of the *Competition Act*.

**AND IN THE MATTER OF** an application pursuant to s. 487.3 of the *Criminal Code* to prohibit access to and disclosure of information filed in support of obtaining oral examinations orders under the *Competition Act*.

**B E T W E E N:**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

- and -

**SANDY EDWARD MACLEOD, DANA ROBBINS, DINO LUIS (DEAN) ZAVARISE,  
DEREK JOHN FLEMING, LORENZO DEMARCHI, and IAN OLIVER**

- and -

**TORSTAR CORPORATION, METROLAND MEDIA GROUP LTD. and  
FREE DAILY NEWS GROUP INC.**

**Respondents**

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**NOTICE OF APPLICATION TO SEAL CERTAIN RECORDS IN EXHIBIT C  
TO THE AFFIDAVIT OF PIERRE-YVES GUAY  
SWORN NOVEMBER 21, 2018**

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**TAKE NOTICE** that an application will be brought in camera on behalf of the Respondents, Torstar Corporation, Metroland Media Group Ltd. ("Metroland") and Free Daily News Group Inc. (collectively, "Torstar"), on a date to be fixed by the Court, at the Ontario Superior Court of Justice (East Region), at the Ottawa Courthouse, 161 Elgin Street, for an order directing the sealing of certain records and information contained in Exhibit C to the Affidavit of Pierre-Yves Guay filed by the Applicant Commissioner of Competition in support of an application for an order compelling oral examinations before a presiding officer pursuant to s. 11 of the *Competition Act* (the "Guay Affidavit").

**THE GROUNDS FOR THIS APPLICATION ARE:**

*Overview of Torstar's Position*

1. As part of his recent application under s. 11 of the *Competition Act*, the Commissioner has unilaterally filed, without notice to Torstar, confidential and competitively sensitive business records of Torstar, a public company, that disclose Torstar's business strategies and non-public commercially-sensitive and competitively-sensitive information.
2. Torstar maintains that it would have been sufficient for the Commissioner to file the Guay Affidavit itself, without any exhibits at all, to support his application. In addition, the vast majority of the information contained in these business records is totally irrelevant to support the Commissioner's belief that the six individuals who were the subject of his application have or are likely to have information relevant to his inquiry. By filing these confidential records without notice, the Commissioner has acted contrary to his established policies relating to the treatment of confidential and competitively sensitive information, and with disregard to the public interest in a competitive playing field.
3. In light of the Commissioner's unilateral actions, and in light of the public interest in fair competition in the media industry, Torstar has brought this sealing application that is targeted at certain non-public business records that were attached to the Guay Affidavit.
4. Torstar is a media company, and it is a strong believer and advocate in favour of open courts and access to court records. Pursuant to that belief, Torstar is not seeking to seal any part of the Guay Affidavit itself, and is only seeking to seal certain records within Exhibit C, notwithstanding Torstar's belief that it would have been sufficient for the Commissioner to file the Guay Affidavit without Exhibit C to support his application.
5. Torstar maintains that a number of records in Exhibit C of the Guay Affidavit contain non-public commercially-sensitive and competitively-sensitive information relating to Torstar as a public company, and as well as private and personal information relating to the



performance, self-assessments and compensation arrangements of certain Torstar employees. Given the unusual circumstances of this case, and consistent with the Commissioner's past positions on confidentiality and established precedent of the Supreme Court of Canada, Torstar submits that a balancing of the public interest in open courts and the public interest in fair competition dictates that these specific records contained in Exhibit C ought to be sealed or alternatively redacted to remove irrelevant and confidential information.

#### *Background of Transaction*

6. On November 27, 2017, Torstar and Postmedia Network Canada Corp. and Postmedia Network Inc. (collectively, "Postmedia") publicly announced an asset purchase transaction whereby Torstar would acquire a number of newspaper and digital assets from Postmedia and vice-versa (the "Transaction").
7. Shortly thereafter, the Commissioner of Competition commenced an investigation of the Transaction under the merger provisions of the *Competition Act* as well as a separate investigation under Part VI of the *Competition Act*.
8. Torstar has maintained that the Transaction is a public and transparent asset purchase transaction that addresses some of Torstar's serious challenges in the newspaper industry. The Transaction raises no material competition issues. Torstar has further maintained that the Transaction should have been reviewed under the merger provisions of the *Competition Act* consistent with the legislation and the Commissioner's own policies. However, to date, Torstar has cooperated fully with the Commissioner's parallel investigations.

#### *Background of Section 11 Application*

9. On November 22, 2018, the Commissioner brought an *ex parte* application for an order compelling oral examinations of six current and former employees of Torstar before a presiding officer pursuant to s. 11 of the *Competition Act* (the "Section 11 Application" and the "Section 11 Order").
10. The Commissioner did not provide any advance notice to Torstar or the current and former employees of the Section 11 Application, and the Commissioner did not raise or discuss with Torstar or the current or former employees in advance what documents would be filed as part of his Application.
11. In support of his Section 11 Application, the Commissioner filed the Affidavit of Pierre-Yves Guay, an authorized representative of the Commissioner, sworn on November 21, 2018, and four exhibits attached thereto before Justice London-Weinstein of the Ontario Superior Court (defined above as the "Guay Affidavit").
12. The records in Exhibit C of the Guay Affidavit appear to have been obtained from the Respondents by the Commissioner through the exercise of his investigative powers during the course of his investigation of the Transaction.



13. Upon receipt of the Guay Affidavit, Torstar promptly advised the Commissioner's counsel that the records contained in Exhibit C were filed unnecessarily and included commercially sensitive, competitively sensitive and/or proprietary information relating to Torstar, as well as confidential private and personal information relating to certain Torstar employees (the "Confidential Documents").
14. Torstar advised the Commissioner that it intended to bring a sealing application and sought the Commissioner's consent to a sealing application in light of the Commissioner's policies and practices and the public interest in competition.
15. The Commissioner's counsel advised that while the Commissioner was open to interim sealing arrangements, Torstar's proposed sealing application would be contested. However, the Commissioner's counsel indicated that the Commissioner may be open to certain redactions of personal information relating to Torstar's current or former employees.
16. To accommodate Torstar's anticipated application, Justice London-Weinstein ordered on December 3, 2018 pursuant to s. 487.3(1) of the *Criminal Code* the interim sealing of the original *ex parte* Application Record of the Commissioner of Competition containing Exhibit C to the affidavit of Pierre-Yves Guay until further order of the Court, or 30 days from the issuance of the order, whichever comes first.
17. Justice London-Weinstein further ordered that a copy of the original *ex parte* Application Record, absent Exhibit C to the affidavit of Pierre-Yves Guay, be placed in the court file for public access until further Order of this Court, or 30 days from the issuance of the order, whichever comes first.

*The Commissioner Disregarded Torstar's Commercial and Competitive Interests*

18. To obtain an order pursuant to s. 11 of the *Competition Act* against an individual, the Commissioner is generally required to demonstrate, among other things, that the individuals have information that is relevant to the Commissioner's inquiry.
19. There is publicly available information in respect of the roles and titles of most of the individual employees on Torstar's website and through other resources.
20. Through the exercise of his investigative powers, the Commissioner is also in the possession of non-financial and non-confidential information relating to the involvement of these individual employees in the Transaction that is the subject of his inquiry.
21. The Commissioner is also aware that Torstar is a public company, and that the release of material and non-public information relating to Torstar is regulated by provincial securities laws and could cause commercial or competitive harm to Torstar.
22. However, the Commissioner chose to file a number of confidential and non-public records relating to Torstar as part of Exhibit C to the Guay Affidavit.

23. The Commissioner could have applied for and obtained an order under s. 11 of the *Competition Act* using some information contained in the records without attaching the said records to the Guay Affidavit. Nonetheless, the Commissioner proceeded to file confidential and non-public records relating to Torstar as part of Exhibit C to the Guay Affidavit.
24. By proceeding in this manner, the Commissioner acted with disregard to Torstar's commercial and competitive interests, the privacy interests of Torstar employees and the public interest in fair competition.
25. Given the lack of relevance of this confidential and non-public information to the Section 11 Application, the lack of any apparent public interest in the disclosure of commercially sensitive, competitively sensitive and/or proprietary information relating to a public company that already reports its financial statements in compliance with provincial securities laws, of confidential personal and private information of employees and the real and serious risk of harm to Torstar, a sealing order should be issued consistent with the *Dagenais/Mentuck* test.

*The Confidential Documents*

26. The records contained in Tabs 5-6-7-8-10-12-14-15-16-17-18-20 to 30, 32-33 in Exhibit C are confidential and contain commercially sensitive, competitively sensitive and/or proprietary information relating to Torstar (the "Confidential Documents").
27. In particular, the Confidential Documents contain non-public business and financial information relating to Torstar as a public company, including without limitation, information relating to the following areas:
  - (a) Torstar's non-public financial and budget information and future financial projections;
  - (b) Torstar's non-public commercial and business strategies;
  - (c) Torstar's non-public transition and implementations plans that are ongoing in connection with the transaction that is the subject of the Commissioner's inquiry;
  - (d) The identity of Torstar's customers and certain financial arrangements relating to such customers;
  - (e) The identity of Torstar's suppliers and certain financial arrangements relating to such suppliers;
  - (f) The description of Torstar's IT platforms and systems that could be exploited and lead to data security issues;
  - (g) The description of Torstar's printing and distribution facilities, printing frequencies and press times; and

- (h) Torstar's board minutes that discuss Torstar's business strategies and financial performance as a public company.
28. Torstar operates in a competitive industry that is facing serious challenges and is undergoing disruptive change. In the event that another newspaper or media company obtained access to the information contained in the Confidential Documents, they could use the information as a competitive weapon against Torstar, and could disrupt the competitive playing field and undermine the public interest in competition.
29. The Confidential Documents also contain certain confidential personal and private information (including personal goals, bonus arrangements and performance assessments) relating to individual employees of Torstar.
30. It was completely unnecessary for the Commissioner to file the records of Exhibit C as part of the Section 11 Application. The information contained in the Guay Affidavit was sufficient in itself to allow Justice London-Weinstein to make an assessment of whether the facts rise to the standard required in the legal test for issuing the Section 11 Order.
31. Therefore, the inclusion of the records in Exhibit C in the material submitted to the Court was superfluous and contrary to the guidance of the Supreme Court of Canada in *Araujo* that an information to obtain or an affidavit should be clear and concise without being as detailed as an automotive repair manual. An affidavit need not be full and complete in an absolute sense. There is no need to include everything about the investigation.

*R. v. Araujo*, [2000] 2 SCR 992, par. 46.

*R. v. Green*, 2011 ONSC 5830, par.10.

*The Dagenais/Mentuck Test*

32. To date, the Commissioner has reached no conclusions or findings of wrongdoing in this case. In his press release dated December 4, 2018, the Commissioner stated that "[t]here has been no conclusion of wrongdoing at this time and no charges have been laid."
33. The presumption of openness of judicial proceedings is well established in Canada. On the other hand, s. 487.3 of the *Criminal Code* and the inherent jurisdiction of this Court to control its own process and records to ensure the proper administration of justice allows this Court to prohibit access to any information relating to the Section 11 Order on the ground that the ends of justice would be subverted because, *inter alia* (a) the disclosure of the information (i) would prejudice the interests of an innocent person (ii) any other sufficient reason, or (iii) the information might be used for an improper reason, and (b) these reasons outweigh in importance the access to the information.

(*P.G.*) (*Nova Scotia*) *v. MacIntyre*, [1982] 1 SCR 175, pp. 186-89.

34. The *Dagenais/Mentuck* test applies to all discretionary judicial orders limiting the openness of judicial proceedings. The test requires the party seeking the sealing order to demonstrate that:

- a) the order is necessary to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- b) the salutary effects of the sealing order outweighs the deleterious effects of the rights and interests of the parties and the public.

*Toronto Star Newspapers Ltd v. Ontario*, [2005] 2 SCR 188, paras. 26, 28 and 30.

*R. v. Canadian Broadcasting Corp.*, 2018 ONSC 5167, 2018 Carswell Ont. 14760, par. 21.

35. The test is a flexible and contextual one that should not be applied mechanistically but always adapted to the circumstances.

*Toronto Star Newspapers Ltd v. Ontario*, [2005] 2 SCR 188, par. 31.

36. The evidentiary burden is not subject to the same stringent standard at the investigative stage of the judicial process than it is at trial.

*Toronto Star Newspapers Ltd v. Ontario*, [2005] 2 SCR 188, par. 32-33.

*R. v. Canadian Broadcasting Corp.*, 2018 ONSC 5167, 2018 Carswell Ont. 14760, par. 24.

#### *Protection of the Innocent*

37. The freedom of the press or public access to confidential and sensitive information is not absolute, it must be balanced with other important values such as the protection of the innocent. Under certain conditions such access will endanger and not protect the integrity of our system of justice.

*Ottawa Citizen Group Inc. v. Ontario*, (2005) 75 OR (3d) 590, par. 55.

*R. v. Twitchell*, 2009, ABQB 644, par. 65.

38. Prejudice to an innocent is only one of the factors to be considered, but it has a significant weight.

*Philips v. Vancouver Sun*, 2004 BCCA 14, par. 66.

39. The term “innocent” applies not only to persons that are not subject of allegations of criminal activity but also to those that have not yet been charged even if they were subject to a search. As mentioned earlier, none of the Respondents have been charged with any offence.

*Globe and Mail v. Alberta*, 2011 ABQB 363, par. 16.

*The Commissioner's Policies and Practices in Dealing with Confidential Information*

40. The Commissioner has established policies that deal with the treatment of confidential information. In particular, the Commissioner has publicly stated that he is committed to respecting confidentiality, particularly when it relates to the disclosure of commercially or competitively sensitive information.

"The Bureau is committed to treating confidential information responsibly and in accordance with the law. It remains vigilant to avoid communicating confidential information when dealing with matters under the Act, unless such communication is permitted under section 29 of the Act or other statutory provisions pertaining to confidentiality and, even when permitted, considers whether disclosure is, in the circumstances, advisable or necessary. In other words, the general policy of the Bureau is one of minimizing the extent to which confidential information is communicated to other parties." [ Emphasis ]

Competition Bureau, *Information Bulletin on the Communication of Confidential Information under the Competition Act* (dated September 30, 2013)

41. In other enforcement cases, the Commissioner has applied for and has obtained sealing orders that prevent the release of commercially or competitively-sensitive information. Most recently, in the *Chatr* case, the Commissioner applied for a sealing order to prevent the release of "financial information including average revenue per user, marketing plans and strategy" and other confidential information relating to competitors of Rogers and other third parties. The Court granted a sealing order in respect of those categories of information.

*Commissioner of Competition v. Chatr Wireless Inc.*, 2011 ONSC 3387 (CanLII), at paras. 2, 4, 43, 74.

42. In the *Chatr* case, the Commissioner also submitted that the maintenance of confidentiality was important because the disclosure of confidential and competitively-sensitive information to competitors "can frustrate the goal of the *Competition Act*, which is the promotion and protection of competition." The Commissioner further submitted that the risk of disclosure of such information presents a "serious risk to the proper administration of justice" that should be weighed under the *Dagenais/Mentuck* test.

*Commissioner of Competition v. Chatr Wireless Inc.*, 2011 ONSC 3387 (CanLII), at para. 31.

43. In s. 12(4)(b) of the *Competition Act*, Parliament specifically concluded that the disclosure of confidential commercial information is a sufficient ground to exclude a party being inquired into from attending an examination under an order under s. 11 of the *Act*. Therefore, such a reason should be sufficient pursuant to s. 487.3 (2) (b) to subvert the ends of justice and outweighs in importance the access to the information in the present circumstances.



*Evidence of a Real and Substantial Risk to Commercial Interests*

44. Evidence of a real and substantial risk to commercial interests can be expressed in terms of a public interest in confidentiality.

*Globe and Mail v. Alberta*, 2011, ABQB 363, par. 19.

45. The preservation of confidential information constitutes a sufficiently important commercial interest when the information has been treated at all relevant times as confidential and its proprietary commercial interest could reasonably be harmed by its disclosure.

*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] SCC 41, par. 61.

46. A confidentiality order is justified to prevent a serious risk to an important commercial interest when the commercial information is confidential in nature, consistently treated as confidential, that would be of interest to the Respondent's competitors.

*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] SCC 41, par. 61.

47. Evidence of specific financial harm as it is demonstrated in the present case justifies the sealing of information.

*R. v. Canadian Broadcasting Corp.*, 2018, ONSC 5167, 2018 Carswell Ont. 14760, par. 32.

*The Test for a Sealing Order is Satisfied*

48. Under these circumstances, a sealing order is necessary to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk, and the salutary effects of the sealing order will outweigh the deleterious effects of the rights and interests of the parties and the public. In particular:

- (a) Torstar is a public company;
- (b) The Confidential Documents contain commercially sensitive, competitively sensitive and/or proprietary information relating to Torstar.
- (c) The vast majority of the information contained in the Confidential Documents is totally irrelevant to support the belief of the affiant Pierre-Yves Guay that the six individuals subject to the Section 11 Order have or are likely to have information relevant to the Inquiry.
- (d) It was completely unnecessary for the Commissioner to file the Confidential Documents, or in the alternative unredacted versions of the Confidential Documents, as part of the Section 11 Application.

- (e) A disclosure of one or more of these records would create a real and serious risk of commercial harm to Torstar;
- (f) A disclosure of one or more of these records would create a real and serious of competitive harm to Torstar and the public interest in competition more generally;
- (g) A disclosure of one or more of these records would create a real and serious risk of prejudice to the interests of innocent persons, namely certain employees of Torstar by the invasion of their privacy;
- (h) A disclosure of one or more of these records may be used for improper purposes; and
- (i) There is no public interest in the disclosure of Torstar's confidential business information at this time that outweighs the potential harm to Torstar and its employees.

*The Requested Sealing Order is Narrowly Tailored*

- 49. Torstar is not seeking to seal any part of the Guay Affidavit.
- 50. Torstar is not seeking to seal any Exhibits of the Guay Affidavit aside from Exhibit C.
- 51. Torstar is not seeking to seal all of the records at Exhibit C.
- 52. Rather, as its primary request for relief, Torstar is only seeking to seal the Confidential Documents contained at Tabs 5-6-7-8-10-12-14-15-16-17-18-20 to 30, 32-33 of Exhibit C, on the basis that these records contain commercially sensitive, competitively sensitive and/or proprietary information relating to Torstar, or personal or private information relating to Torstar's employees.
- 53. As an alternative request for relief, Torstar is only seeking to seal the Confidential Documents contained at Tabs 5-6-7-8-10-12-14-15-16-17-18-20 to 30, 32-33 of Exhibit C, subject to the filing of a redacted version of the said documents on the public record that redacts out the underlying confidential information relating to Torstar, or personal or private information relating to Torstar's employees.
- 54. Pursuant to s. 487.3 of the *Criminal Code*, the ends of justice would be subverted by the disclosure of the Confidential Documents in Exhibit C.
- 55. It will not be possible to meaningfully address the issues raised in this application without divulging the very information to be protected and exempted from public access and disclosure. As such, proceeding otherwise than in camera will frustrate the administration of justice.



56. The proposed sealing order strikes a reasonable balance between the public interest in open courts and the public interest in avoiding commercial harm, competitive harm or prejudice to the privacy of individuals, particularly since the proposed order will contain terms that permit an interested party to apply at a later date and make submissions to obtain access to the sealed records with reasonable notice to Torstar and the Commissioner.

**IN SUPPORT OF THIS APPLICATION, THE RESPONDENTS RELY UPON:**

1. The affidavit of Neil Oliver and such further and other material and/or witnesses as counsel may advise and the Honorable Court permit (the "Oliver Affidavit").

**THE RELIEF SOUGHT IS:**

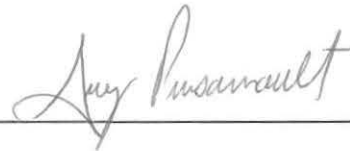
1. An Order that this application be heard *in camera*;
2. An Order directing the sealing of Tabs 5-6-7-8-10-12-14-15-16-17-18-20 to 30, 32-33 of Exhibit C to the Affidavit of Pierre-Yves Guay (the "Sealed Records") from public view in a packet to be kept in the custody of the court located at 161 Elgin Street, Ottawa, Ontario, within the cage, within the limited access vault, and shall not be dealt with until set aside by a court of competent jurisdiction or terminated as a result of an application pursuant to s. 487.3(4) of the *Criminal Code*.

**ALTERNATIVELY AND WITHOUT PREJUDICE TO THE FOREGOING RELIEF SOUGHT:**

3. In the alternative, an Order directing the sealing of the "Sealed Records" from public view in a packet to be kept in the custody of the court located at 161 Elgin Street, Ottawa, Ontario, within the cage, within the limited access vault, and shall not be dealt with until set aside by a court of competent jurisdiction or terminated as a result of an application pursuant to s. 487.3(4) of the *Criminal Code*, subject to Torstar's filing of a redacted version of the Sealed Records in accordance with the redactions set out in the Oliver Affidavit.
4. The proposed Order shall include terms that will permit an interested third party to apply to obtain access to the Sealed Records by means of an application pursuant to s. 487.3(4) of the *Criminal Code* or otherwise, upon providing reasonable advance notice to Torstar and the Commissioner.
5. The continuation of the sealing order issued December 3<sup>rd</sup>, 2018 until final decision on this application.
6. An Order directing the sealing of the parts and/or schedules of Neil Oliver's affidavit filed in support of this application that refer to the commercially sensitive, competitively sensitive and/or proprietary information relating to Torstar, and/or the personal or private information of Torstar's employees, contained within the Sealed Records.
7. Such further and other relief as counsel may advise and this Court may deem just.

**THE RESPONDENTS MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION** by service in accordance with Rule 5 at McMillan LLP, 45 O'Connor Street, Suite 2000, Ottawa, ON K1P 1A4, Tel: 613-691-6125, Fax: 613-231-3191 and at Osler, Hoskin & Harcourt LLP, 100 King Street West, 1 First Canadian Place, Suite 6200, Toronto, ON M5X 1B8, Tel: 416-862-6811, Fax: 416-862-6666.

DATED this 20th day of December, 2018.



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Counsel for the Respondents

**TO:** The Clerk of the Court  
Superior Court of Justice  
Ottawa, Ontario

**AND TO:** Jonathan Hood  
Department of Justice Canada  
Competition Bureau Legal Services  
Place du Portage, Phase 1  
50 Victoria Street, 22<sup>nd</sup> Floor  
Gatineau, QC K1A 0C9

**SANDY EDWARD MACLEOD, DANA ROBBINS, DINO LUIS  
(DEAN) ZAVARISE, DEREK JOHN FLEMING, LORENZO  
DEMARCHI, and IAN OLIVER**

**THE COMMISSIONER OF COMPETITION**

**-and-**

**-and-**

**TORSTAR CORPORATION, METROLAND MEDIA  
GROUP LTD. and FREE DAILY NEWS GROUP INC.**

(Applicant)

(Respondents)

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
**(East Region)**

**PROCEEDING COMMENCED AT OTTAWA**

**NOTICE OF APPLICATION TO SEAL RECORDS**

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