

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

PARRISH & HEIMBECKER, LIMITED

Respondent

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

Date: February 3, 2020
CT-2019-005

Andrée Bernier for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

22

RESPONSE OF PARRISH & HEIMBECKER, LIMITED

OVERVIEW

1. Parrish & Heimbecker, Limited ("**P&H**") opposes the Commissioner of Competition's (the "**Commissioner**") application pursuant to section 92 of the *Competition Act* (the "**Application**").
2. P&H denies that the Commissioner is entitled to any of the relief sought by him on the Application. The Commissioner has incorrectly defined the relevant product and geographic markets and asserts a substantial lessening and prevention of competition where there is none.
3. P&H's acquisition of the primary grain elevator ("**Elevator**") in Virden, Manitoba (the "**Virden Elevator**") formerly owned by Louis Dreyfus Company Canada ULC ("**Louis Dreyfus**") will not provide P&H with either the ability or the incentive to materially lower the prices it pays to farmers for their wheat or canola nor will it lead to a substantial lessening or prevention of competition in any relevant and properly defined market. To the contrary, as a key element of P&H's recent purchase of the ten Elevators in western Canada formerly owned by Louis Dreyfus, the acquisition of the Virden Elevator will contribute to the creation of a more efficient and competitive grain industry in Canada, to the benefit of both farmers and consumers.

FACTS ADMITTED AND DENIED

4. Except for the allegations in paragraphs 2, 9, 12 and 15 of the Notice of Application and as otherwise expressly admitted below, P&H denies all of the Commissioner's allegations.

STATEMENT OF GROUNDS AND MATERIAL FACTS

P&H

5. P&H is a private, family-owned Canadian agribusiness founded in 1909 and headquartered in Winnipeg, Manitoba.

6. P&H's grain trading business sells many varieties of grains, including wheat and canola, to customers in Asia, South America, Europe and Canada (including P&H's own flour and feed mills). The grains supplied by P&H are purchased (for its own account) from farmers across Canada through its network of 37 Elevators, including its Elevator in Moosomin, Saskatchewan (the "**Moosomin Elevator**") and the ten Elevators purchased from Louis Dreyfus in December 2019.

7. Grains supplied by P&H to overseas customers move by rail from its Elevators to export facilities on the West Coast and in Thunder Bay for shipment by vessel. In the West, P&H has an interest in the Vancouver Alliance Grain Terminal and operates a standing grain berth at the Fraser Surrey Docks. In the East, P&H has an interest in the Superior Terminal in the Port of Thunder Bay.

The Acquisition

8. Pursuant to an Asset Purchase Agreement dated September 3, 2019, P&H agreed to acquire ten Elevators (and related assets) in western Canada from Louis Dreyfus (the "**Transaction**").

9. On December 10, 2019, after P&H and Louis Dreyfus had worked diligently for more than three months with the Commissioner to assist him in his review of the Transaction, P&H and Louis Dreyfus closed the Transaction in respect of the ten Louis Dreyfus Elevators, including the Virden Elevator.

10. The Commissioner's Application relates only to P&H's acquisition of the Virden Elevator (the "**Acquisition**").

11. The Transaction (including the Acquisition) was intended to enhance P&H's efficiency and effectiveness as a competitor in the grain trading business against major industry players such as Viterra, Incorporated, Richardson International Limited, Paterson Grain Limited, Cargill Limited and G3 Canada Limited.

12. P&H has invested \$ [REDACTED] in the construction of a new export terminal on the Fraser River in Surrey, British Columbia (the "**Fraser Grain Terminal**"), in order to compete more effectively with the leading grain companies in Canada, each of which owns its own export terminals.

13. The Fraser Grain Terminal is projected to open in September 2020 and P&H requires the grain purchased by the Louis Dreyfus Elevators (including the more than 200,000 MT of wheat and canola typically purchased by the Virden Elevator each year) to fully realize the economies, efficiencies and other competition-enhancing benefits associated with the new export terminal.

Prices Paid to Farmers for their Wheat and Canola are Determined by Many Non-Local Factors

14. Whatever the boundaries of a given Elevator's draw area or a farmer's drive, like all Elevators in western Canada (and elsewhere), P&H's prices paid for grain at the Moosomin and Virden Elevators are determined by many non-local factors.

15. Elevators buy grain from farmers at a purchase price that is largely dependent on the global price of the commodity from the international market for grain. This component of the purchase price is independent of local Elevator dynamics and is unaffected by any changes to the competitive landscape around the Virden and Moosomin Elevators.

16. Further, P&H, Viterra, Cargill, Richardson, Paterson, G3 and other purchasers of grain compete to export Canadian grain to international markets, as well as to ship to domestic markets, such as Eastern Canada. Each of these firms will source grain across their respective networks of Elevators to meet their sales commitments. Therefore, each firm's demand for grain across its network is derived from the demand that it faces in the markets into which it sells. The amount of grain demanded, and bought, by P&H is a function of sales made to both export and domestic customers. The purchase prices that P&H pays farmers for grain are derived from the

demand and prices it receives in these markets, and P&H's costs to transport grain from its network of Elevators to port terminals for export, or to domestic buyers. To meet its sales requirements, P&H (like its rivals) must source grain across numerous Elevators and across large distances. As a result, P&H centrally sets the amount that it will pay farmers across multiple Elevators for grain to meet these needs. Adjustments will be made in local Elevator pricing when insufficient grain supplies across its system are sourced to meet P&H's overall, system-wide demand.

The Relevant Markets

17. The Commissioner has not properly pleaded the relevant product markets nor has he correctly defined the geographic scope of those product markets for antitrust purposes.

18. The relevant geographic market, as noted above, is impacted by many non-local factors which influence the price negotiated between the grain companies and the farmers. Farmers producing grain are effectively competing with other farmers to sell their grain to the grain companies. The networks owned by the grain companies allow the grain companies to compete for the purchase of grain throughout the growing regions in western Canada. As a result, a farmer in Saskatchewan is competing with a farmer in Manitoba. Similarly, a grain company purchasing grain will compete with another grain company to purchase its requirements agnostic to where the grain is purchased subject to transportation and quality differences. This creates a price discipline throughout the western Canadian growing regions.

19. Therefore, it could be argued that the relevant markets in this Application are the purchase of wheat and canola from farmers throughout the western Canadian growing region. However, for the purpose of this Application, even if it were conceded for analysis that the relevant geographic market were limited to southeastern Saskatchewan and southwestern Manitoba (the "**Geographic Market**"), P&H does not hold or exercise monopsony power in this market and the Acquisition will not result in a

substantial lessening or prevention of competition.

20. In the alternative, even if the relevant geographic market were confined to the farmer locations within the Commissioner's alleged relevant geographic market (which is not admitted, but expressly denied), P&H does not hold or exercise monopsony power in that alleged market and the Acquisition will not result in a substantial lessening or prevention of competition.

a. The relevant product market

21. The relevant product market is the purchase of grain, either wheat or canola, which are the overlapping products purchased by the Virden and Moosomin Elevators from farmers. Contrary to paragraph 17 of the Application, P&H does not supply Grain Handling Services to farmers.

b. The relevant geographic market

22. The Commissioner's alleged relevant geographic market (i.e., "the aggregated locations of farmers that benefited from competition for Grain Handling Services for wheat and canola between the Virden Elevator and Moosomin Elevator") is also factually and legally incorrect.

23. The Virden Elevator is located approximately three hours west of Winnipeg, close to the border between Manitoba and Saskatchewan. It is 64 kilometers driving distance to P&H's Moosomin Elevator along the TransCanada Highway.

24. The Commissioner refers (in paragraph 25 of his Application) to the draw area of an Elevator as being "local" and claims that the wheat and canola purchased by an Elevator originates from farms within a one-hour drive time of that Elevator. This is incorrect. Elevators purchase grain from farmers that are located well beyond an hour's drive away. And farmers are willing to travel distances beyond a one-hour drive to sell their wheat and canola to the Moosomin and Virden Elevators, and to rival Elevators outside

the small, artificial area defined by the Commissioner; there is no “corridor” as imagined by the Commissioner.

25. The Moosomin and Virden Elevators each purchase grain from hundreds of farmers, with most of these producers located outside the alleged “corridor” between the two Elevators. Thus, the “draw area” for each Elevator covers a geographic area that extends well beyond the narrow geographic area defined by the Commissioner.¹ The Moosomin and Virden Elevators compete with numerous rival Elevators within and beyond their individual Elevator draw areas for the purchase of grain from farmers. Rival Elevators have their own draw areas, which similarly extend well beyond the one-hour driving distance alleged by the Commissioner. Elevators are widely distributed throughout the region creating an overlapping network of Elevator draw areas. As a result, there are numerous Elevators within southeastern Saskatchewan and southwestern Manitoba competing for grain from farmers. To fulfill their requirements, the Moosomin and Virden Elevators must purchase grain at competitive prices against these many other rival Elevators. Thus, the purchase prices set by the Moosomin and Virden Elevators are influenced by rival Elevators that are located far beyond their individual draw areas. In addition to rival Elevators, the Moosomin and Virden Elevators need to purchase canola at prices that are competitive with canola crushers located in Yorkton, SK, Harrowby, MB, Altona, MB and Velva, ND, as well as other direct purchasers.

26. Farmers are price-sensitive and are willing to travel farther than the one-hour drive alleged by the Commissioner, which is already observed in the marketplace given the far-reaching draw areas of the Moosomin, Virden, and rival Elevators. With numerous rival Elevators throughout the region, farmers (including those located in the “corridor” between the Virden and Moosomin Elevators) have access to many competing Elevators to compare

¹ The draw area of an Elevator is the physical boundary from which the Elevator purchases grain from farmers. It represents the physical home locations of all farmers selling grain to the Elevator.

prices at the time of sale. Thus, the purchase prices received by farmers within a given local area are influenced by competition from Elevators far beyond the driving distance that any one farmer might consider (which as noted is farther than a one-hour drive). Even if the focus of analysis is limited to those farmers located between the Virden and Moosomin Elevators, the prices that they receive from those Elevators are influenced by the many alternative Elevators (and other purchasers) against which the Virden and Moosomin Elevators compete to purchase grain.

27. Moreover, using generally accepted transportation distances that farmers travel to sell their wheat and canola, there are at least four competing Elevators available to farmers located between the Virden and Moosomin Elevators (which, like the Virden and Moosomin Elevators, are) located on the TransCanada Highway, as well as two rival Elevators that are closer to the Virden Elevator than is the Moosomin Elevator, and two rival Elevators that are closer to the Moosomin Elevator than is the Virden Elevator.

28. There are no farmers within the draw areas of the Virden and Moosomin Elevators (including those located in the "corridor" between the Virden and Moosomin Elevators) who are "captive" to the Virden and Moosomin Elevators. Further, contrary to paragraph 26 of the Application, Elevators do not set different purchase prices for grain from individual farmers based on their physical proximity to the Elevator.

29. Therefore, the relevant geographic market – whether defined around the farmer or the Elevator – is much broader than the Commissioner alleges.

The Acquisition Will Not Substantially Lessen or Prevent Competition

30. P&H denies that the Acquisition creates, enhances or maintains monopsony power in any properly defined market.

31. In the face of vigorous and effective competition from competing

Elevators, as well as canola crushers and other direct purchasers of wheat and canola, P&H's control of the Virden Elevator gives it neither the ability nor the incentive to exercise monopsony power in any properly defined market.

32. Competing purchasers of wheat and canola, including rival Elevators throughout the region and canola crushers located in Yorkton, SK, Harrowby, MB, Altona, MB and Velva, ND, would effectively constrain any attempted exercise of monopsony power. Contrary to paragraphs 4, 6 and 32 of the Application, transportation costs and capacity constraints will not limit their ability to do so. Rival Elevators and other purchasers within and beyond the draw areas of the Virden and Moosomin Elevators already purchase grain from farmers who sell to the Virden and Moosomin Elevators, have significant excess capacity to purchase additional grain and can increase their purchases from those farmers at low cost.

33. Similarly, farmers located in the draw areas of the Virden and Moosomin Elevators (including in the "corridor" between the two Elevators) already sell to multiple Elevators at varying distances from their farms and are unconstrained in their ability to sell more grain to rival Elevators and other purchasers. In this regard, incremental transportation costs associated with selling to more distant Elevators and other purchasers are not economically material to farmers – constituting a very small percentage of current and reasonably anticipated wheat and canola purchase prices – allowing farmers to easily switch purchasers and rival purchasers to influence prices over a very large area.

34. Further, and contrary to paragraphs 7 and 33-34 of the Application, barriers to entry and expansion are low, with the result that P&H's ability to exercise any monopsony power would be constrained by the expansion of existing Elevators' purchases and by those of other alternative purchasers and/or by new entry. Rival Elevators have excess capacity, such that they can easily increase their purchases of grain at low cost. They could also easily add grain purchasing capacity, as needed. Similarly, a potential

entrant could build a new Elevator within both the Geographic Market and the Commissioner's alleged geographic market in less than 2 years.

35. It is also not the case, contrary to paragraph 31 of the Application, that but for the Acquisition, P&H would have expanded the rail car capacity at the Moosomin Elevator, thereby increasing the rivalry with the Virden Elevator to the benefit of farmers. P&H made the decision not to expand rail capacity at the Moosomin Elevator before LDC solicited P&H to buy the LDC Elevators, including the Virden Elevator.

36. For all of these reasons, the Acquisition will not lead to a substantial lessening or prevention of competition and, contrary to paragraph 30 of the Application, farmers within the Geographic Market (including those located in the "corridor" between the Moosomin and Virden Elevators) will not be paid materially less for their wheat and canola as a result of the Acquisition.

The Acquisition's Efficiencies are Greater than and Offset any Alleged Anti-competitive Effects

37. If the Acquisition substantially lessens or prevents competition (which is not admitted but expressly denied), the efficiencies that the Acquisition is likely to bring about will be greater than, and will offset, the effects of any alleged substantial lessening or prevention of competition, and such gains in efficiency will not likely be attained if the order requested by the Commissioner are made by the Tribunal. The efficiencies from the Acquisition include: improved Fraser Grain Terminal scale economies and cost savings, elimination of the margin that Louis Dreyfus formerly paid to use the Vancouver export terminal owned by Kinder Morgan, output expansion and improved scale economies at the former Louis Dreyfus Elevator and administrative synergies.

Relief Sought

38. The Commissioner is not entitled to any of the relief he seeks on this Application. With respect to:

- a. **"an order requiring P&H to dispose of all of the assets of the ongoing business of an Elevator in the Relevant Markets"** (paragraph 36(a) of the Application), there is no basis for such a divestiture order because the Acquisition does not substantially lessen or prevent competition; and
- b. **"an order that P&H is prohibited from acquiring, within a period of ten years from the date of the order, any Elevator in the [Commissioner's] Relevant Markets, unless P&H provides the Commissioner with at least 30 days' advance written notice of such proposed merger, where the proposed merger would not otherwise be subject to notification pursuant to the [Competition Act]"** (paragraph 36(b) of the Application), even if the Tribunal were to find a substantial lessening or prevention of competition (which is not admitted but expressly denied), by virtue of subparagraph 92(1)(e)(iii) of the *Competition Act*, the Tribunal has no jurisdiction to make the requested order because P&H does not consent to it, nor would it remedy any substantial lessening or prevention of competition.

39. P&H requests that the Tribunal dismiss the Commissioner's Application with costs to P&H on a substantial indemnity basis.

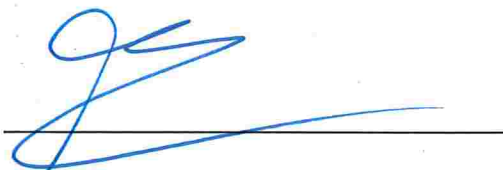
CONCISE STATEMENT OF ECONOMIC THEORY

40. P&H's Concise Statement of Economic Theory is attached as Schedule "A".

LOCATION AND CONDUCT OF THE HEARING

41. P&H agrees that the Application be heard in English and that the hearing be held in Ottawa, Ontario.

Dated this 3rd day of February, 2020



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SCHEDULE "A"

CONCISE STATEMENT OF ECONOMIC THEORY

1. Grain companies, including P&H, sell many varieties of grains, including wheat and canola, to customers in Asia, South America, Europe, the United States and Canada. The grains supplied by grain companies are purchased (for their own account) from farmers across Canada through their respective networks of Elevators.
2. The grains supplied by grain companies, including P&H, to overseas customers move by rail from their Elevators to export facilities on the West Coast and in Thunder Bay for shipment by vessel.
3. The price paid by grain companies, including P&H, to farmers for their grain is determined by many non-local factors.
4. The relevant product market is the purchase of grain, either wheat or canola, which are the overlapping products purchased by the Virden and Moosomin Elevators from farmers.
5. Elevators buy grain (including wheat and canola) from farmers at a purchase price that is largely dependent on the global price of the commodity from the international market for grain. This component of the purchase price is independent of local Elevator dynamics and is unaffected by any changes to the competitive landscape around the Virden and Moosomin Elevators.
6. Further, P&H, Viterra, Cargill, Richardson, Paterson, G3 and other purchasers of grain compete to export Canadian grain to international markets, as well as to ship to domestic markets, such as Eastern Canada. Each of these firms will source grain across their respective networks of Elevators to meet their sales commitments. Therefore, each firm's demand for grain across its network is derived from the demand that it faces in the markets into which it sells. The amount of grain demanded, and bought, by

P&H is a function of sales made to both export and domestic customers. The purchase prices that P&H pays farmers for grain are derived from the demand and prices it receives in these markets, and P&H's costs to transport grain from its network of Elevators to port terminals for export, or to domestic buyers. To meet its sales requirements, P&H (like its rivals) must source grain across numerous Elevators and across large distances. As a result, P&H centrally sets the amount that it will pay farmers across multiple Elevators for grain to meet these needs. Adjustments will be made in local Elevator pricing when insufficient grain supplies across its system are sourced to meet P&H's overall system-wide demand.

7. The relevant geographic market, as noted above, is impacted by many non-local factors which influence the price negotiated between the grain companies and the farmers. Farmers producing grain are effectively competing with other farmers to sell their grain to the grain companies. The networks owned by the grain companies allow the grain companies to compete for the purchase of grain throughout the growing regions in western Canada. As a result, a farmer in Saskatchewan is competing with a farmer in Manitoba. Similarly, a grain company purchasing grain will compete with another grain company to purchase their requirements agnostic to where the grain is purchased subject to transportation and quality differences. This creates a price discipline throughout the western Canadian growing regions.

8. Therefore, it could be argued that the relevant markets in this Application are the purchase of wheat and canola from farmers throughout the western Canadian growing region. However, for the purpose of this Application, even if it were conceded for analysis that the relevant geographic market was limited to southeastern Saskatchewan and southwestern Manitoba (the "**Geographic Market**"), P&H does not hold or exercise monopsony power in this market and the Acquisition will not result in a substantial lessening or prevention of competition.

9. In any event, the relevant geographic market – whether defined around

the farmer or the Elevator – is much broader than the Commissioner alleges.

10. The Moosomin and Virden Elevators purchase wheat and canola from hundreds of farmers, with most of these farmers located outside the alleged “corridor” between the two Elevators. The outer bounds of the farmer locations from whom these Elevators purchase grain comprise their respective “draw areas” and cover a geographic area that extends well beyond the narrow geographic area defined by the Commissioner. The Moosomin and Virden Elevators compete with numerous rival Elevators within and beyond their individual Elevator draw areas for the purchase of grain from farmers. Rival Elevators have their own draw areas, which similarly extend well beyond the one-hour driving distance alleged by the Commissioner. Elevators are widely distributed throughout the region creating an overlapping network of Elevator draw areas. As a result, there are numerous Elevators within southeastern Saskatchewan and southwestern Manitoba competing for grain from farmers. To fulfill their requirements, the Moosomin and Virden Elevators must purchase grain at competitive prices against these many other rival Elevators. Thus, the purchase prices set by the Moosomin and Virden Elevators are influenced by rival Elevators that are located far beyond their individual draw areas. In addition to rival Elevators, the Moosomin and Virden Elevators need to purchase canola at prices that are competitive with canola crushers located in Yorkton, SK, Harrowby, MB, Altona, MB and Velva, ND, as well as other direct purchasers.

11. Farmers are price-sensitive and are willing to travel farther than the one-hour drive alleged by the Commissioner, which is already observed in the marketplace given the far-reaching draw areas of the Moosomin, Virden, and rival Elevators. With numerous rival Elevators throughout the region, farmers (including those located in the “corridor” between the Virden and Moosomin Elevators) have access to many competing Elevators to compare prices at the time of sale. Thus, the purchase prices received by farmers

within a given local area are influenced by competition from Elevators far beyond the driving distance that any one farmer might consider (which as noted is farther than a one-hour drive). Even if the focus of analysis is limited to those farmers located between the Virden and Moosomin Elevators, the prices that they receive from those Elevators are influenced by the many alternative Elevators (and other purchasers) against which the Virden and Moosomin Elevators compete for grain.

12. There are no farmers in the draw areas of the Virden and Moosomin Elevators (including those located in the "corridor" between the two Elevators) who are "captive" to the Virden and Moosomin Elevators and Elevators do not set different purchase prices for grain from individual farmers based on their physical proximity to the Elevator.

13. Competing purchasers of wheat and canola throughout the region, including rival Elevators throughout the region and canola crushers located in Yorkton, SK, Harrowby, MB, Altona, MB and Velva, ND, would effectively constrain P&H from any attempted exercise of monopsony power. Transportation costs and capacity constraints will not limit their ability to do so. Rival Elevators and other purchasers already purchase grain from farmers from whom the Moosomin and Virden Elevators purchase, and rival purchasers have significant excess capacity to purchase additional grain from farmers at low cost.

14. Farmers within the Geographic Market (including those located in the "corridor" between the Virden and Moosomin Elevators) already sell to multiple Elevators at varying distances from their farms and are unconstrained in their ability to sell more grain to rival Elevators and other purchasers. In this regard, incremental transportation costs associated with selling to more distant Elevators and other purchasers are not economically material to farmers – constituting a very small percentage of current and reasonably anticipated wheat and canola prices – allowing farmers to easily switch purchasers and rival purchasers to influence purchase prices over a

very large area.

15. In these circumstances, farmers located within the Geographic Market (including in the “corridor” between the Virden and Moosomin Elevators) would readily turn to rival Elevators (and other purchasers) – of which there are many – that are within easy shipping distance if P&H were to attempt to reduce its purchase price to these producers at either the Virden or the Moosomin Elevator.

16. Expansion or entry by competitors is likely to occur in a timely and sufficient manner to constrain any attempted exercise of monopsony power. Barriers to entry and expansion are low. Rival Elevators (and the canola crushers) have excess capacity and can easily expand their purchases at low cost. They could also easily add grain-purchasing capacity, as needed. Similarly, a potential entrant could build a new Elevator within both the Geographic Market and the Commissioner's alleged geographic market in less than 2 years.

17. For all of these reasons, the Acquisition will not lead to a substantial lessening or prevention of competition in the Geographic Market (including for those farmers located in the “corridor” between the Virden and Moosomin Elevators) and farmers will not be paid materially less for their wheat and canola as a result of the Acquisition.

PUBLIC

CT-2019-005

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

**THE COMMISSIONER OF
COMPETITION**

Applicant

- AND -

PARRISH & HEIMBECKER, LIMITED

Respondent

**RESPONSE OF PARRISH &
HEIMBECKER, LIMITED**

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