

Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 1

File No.: CT-2019-005

Registry Document No.: 12

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 request by the Commissioner of Competition for an expedited proceeding process.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Parrish & Heimbecker, Limited
(respondent)



Date of case management conference: January 9, 2020

Before: D. Gascon J. (Chairperson)

Date of order: January 13, 2020

ORDER REGARDING THE COMMISSIONER'S REQUEST FOR AN EXPEDITED PROCEEDING PROCESS

[1] **FURTHER TO** the application (“**Application**”) filed by the Commissioner of Competition (“**Commissioner**”) on December 19, 2019 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 certain primary grain elevators (“**Transaction**”).

[2] **AND FURTHER TO** the request made by the Commissioner for an expedited proceeding process of this Application (“**Expedited Process**”), as contemplated under the Tribunal’s *Practice Direction Regarding an Expedited Proceeding Process before the Tribunal* (“**Expedited Process Direction**”).

[3] **AND FURTHER TO** the case management conference held by teleconference on January 9, 2020 (“**CMC**”) to determine whether the Expedited Process should be used in this proceeding, and to the oral submissions made by counsel for both parties at the CMC.

[4] **UPON** considering the following background to the Commissioner’s request:

- The Expedited Process Direction states that the Tribunal will likely adopt the Expedited Process if all parties consent to it in a particular proceeding. This is the typical situation contemplated by the Expedited Process Direction, in part because the compressed timeline provided for in this Direction heavily relies on the reasonable cooperation and agreement between the parties at the various procedural stages of the Expedited Process;
- However, the Expedited Process Direction also provides that the Tribunal may adopt the Expedited Process even if only one of the parties requests it. In such a case, the requesting party has the burden of satisfying the Tribunal that the Expedited Process is reasonable and advisable in light of the circumstances of the particular matter and the considerations of fairness;
- In assessing the circumstances and the considerations of fairness and in determining whether the Expedited Process should be used, the Tribunal will take into account all relevant considerations, including those identified in the Expedited Process Direction as well as those expressed by the parties concerned;
- In this Application, P & H does not consent to the use of the Expedited Process and in fact strongly opposes it, and the Commissioner is the sole party requesting it.

[5] **AND UPON** considering that counsel for the Commissioner made the following submissions in support of the Commissioner’s request:

- There is an absence of informational advantage or disadvantage between the parties in this Application;
- The Application is not as complex as previous merger applications considered by the Tribunal, and it does not raise novel legal issues under section 92 of the Act, whether in relation to the definition of the relevant markets, the alleged substantial lessening of competition or the theory of alleged harm to competition;

- There are commercial imperatives for the use of the Expedited Process as it will allow the hearing and the Tribunal's decision to be completed prior to the next harvest season, scheduled to start in September. This will provide clarity and certainty to all market participants and will avoid harm to farmers. In addition, there is a practical advantage of having the hearing before the harvest season, as it will be more difficult to have farmers available to appear as witnesses at a hearing held during such a season;
- Extending the hearing beyond the Expedited Process timeline of 5 to 6 months will likely cause harm to farmers and to competition in the relevant markets;
- P & H has not been willing to enter into a hold separate agreement pending the disposition of the Application;
- The Commissioner is willing to reduce and eliminate procedural steps in order to expedite the proceeding, including by providing early production of data; not requiring the production of materials already submitted by P & H further to the supplementary information request process conducted by the Commissioner during his review of the Transaction; having a targeted search of records; not having claims of privilege in the Commissioner's affidavit of documents; and limiting oral discovery to one day per party.

[6] **AND UPON** considering that counsel for P & H made the following submissions in support of P & H's opposition to the use of the Expedited Process:

- The grain handling industry has experienced major changes in recent years and there are numerous complexities in this Application. The issues in dispute between the parties notably include the definition of the relevant product and geographic markets, the determination of grain handling prices, the assessment of alleged anti-competitive effects and the measure of price effects, the efficiencies resulting from the Transaction and the appropriate remedies;
- There is an informational advantage for the Commissioner, as relevant data will be coming from third parties and the Commissioner has already had the benefit of reviewing 3 expert reports submitted by P & H as part of the Commissioner's review of the Transaction, whereas the Commissioner has provided no such reports so far;
- There are no commercial imperatives justifying the use of the Expedited Process as farmers can sell their grains at any time of the year and the vast majority of grain handling contracts for the next harvest season will have been entered into by the farmers prior to September;
- Having the hearing after the harvest season will be beneficial to farmers as it will allow the pre-selling and purchase of grains from the 2020 harvest to proceed without any uncertainty;
- There is no evidence of any alleged imminent harm to farmers, save for the allegations and submissions of the Commissioner which, according to P & H, are based on a misunderstanding of the grain handling industry;

- The Commissioner has not sought a hold separate agreement or other form of interim relief before the filing of the Application. P & H claims it is now impossible to put a hold separate agreement in place since the Transaction has closed;
- The main remedy sought by the Commissioner is a divestiture of assets, and any potential assets to be divested further to an order of the Tribunal will remain viable and available, even outside the timeline of the Expedited Process. In other words, even if this Application does not use the Expedited Process, this will not impair the availability or effectiveness of contemplated remedies;
- The Commissioner retains the option and the ability to seek an interim order under section 104 of the Act if he can demonstrate the required level of harm;
- There are concerns of procedural fairness at various procedural steps of the Expedited Process, notably in relation to documentary discovery and the pre-hearing process. More specifically, given the fact that P & H has already submitted 3 expert reports to the Commissioner as part of the Commissioner’s review of the Transaction, and that the Commissioner has not yet shared any with P & H, the simultaneous and compressed timeline for the exchange of the parties’ cases at the pre-hearing process of the Expedited Process would be unfair to P & H.

[7] **AND UPON** further considering that, at the CMC, counsel for P & H expressly indicated that this Application could be heard in October/November 2020, approximately 3 to 4 months later than the hearing dates that would likely be contemplated under the Expedited Process, thus allowing all parties to proceed rapidly to the hearing on the merits.

[8] **AND UPON** observing that the alternative timeline proposed by counsel for P & H means that the hearing of the Application would take place about 10 months after the filing of the Application, which is at the low end of the 10 to 16 months typical timeline set out in the Tribunal’s *Practice Direction Regarding Timelines and Scheduling for Proceedings before the Tribunal* (“**Timelines Direction**”) for the regular proceeding process before the Tribunal.

[9] **AND UPON** noting that there is a profound disagreement between the parties on the complexity of the issues raised by this Application and on a number of other fundamental matters, such as the main commercial imperatives underlying the grain handling business.

[10] **AND UPON** further noting that P & H has indicated that the use of the Expedited Process would raise procedural fairness issues for the Respondent at the discovery and pre-hearing stages, which could lead to procedural motions and delay the process.

[11] **AND UPON** considering that the Commissioner’s claims of harm relating to the timeline for the disposition of the Application and the necessity for the Expedited Process are disputed by P & H, that the Tribunal has no evidence before it at this stage, and that this issue of alleged harm can only be resolved with the benefit of a more fulsome evidentiary record.

[12] **AND WHEREAS** the Commissioner has the option to seek interim relief under section 104 of the Act, with appropriate evidence, to address this issue of alleged imminent harm.

[13] **AND UPON** considering that, in determining whether it is reasonable and advisable to impose the use of the Expedited Process without the consent of all parties involved, the Tribunal has to balance the benefits of the Expedited Process option with other alternative processes proposed by the parties for the disposition of an application, especially when specific alternatives are being put forward, as is the case in this Application.

[14] **AND UPON** considering the principles set out in subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd supp) and echoed in Rule 2 of the *Competition Tribunal Rules*, SOR/2008-141, which direct the Tribunal to deal with all matters as informally and expeditiously as the circumstances and considerations of fairness permit.

[15] **AND UPON** considering that, in this Application, the alternative timeline proposed by P & H under the Tribunal's regular proceeding process will allow the Tribunal to deal with the Application in a manner that is consistent with subsection 9(2), and pursuant to a timetable which would be amenable to all parties.

[16] **AND UPON** finding that the Commissioner has not satisfied the Tribunal that the alternative timeline proposed by P & H is unreasonable, unfair or impractical.

[17] **AND UPON** concluding that, notwithstanding the able submissions of his counsel, the Commissioner has not persuaded the Tribunal that using the Expedited Process is a reasonable and advisable option in light of the circumstances of this specific matter and the considerations of fairness, or that the period of 3 to 4 months that could be gained with the Expedited Process option justifies imposing the Expedited Process against the strong objection of P & H.

THE TRIBUNAL ORDERS THAT:

[18] The Commissioner's request for an Expedited Process is refused.

[19] The proposed timetable(s) for the disposition of the Application, to be filed by the parties on February 17, 2020, on consent or separately, shall provide that the hearing of this Application will take place in October/November 2020. The parties can contact the Tribunal Registry to determine the Tribunal's availability during these months.

[20] The proposed timetable(s) to be submitted by the parties shall schedule the necessary discovery and pre-hearing steps to bring the Application to a hearing in October/November 2020, taking into account the Timelines Direction.

[21] As mentioned by the Tribunal at the CMC, counsel for the parties are strongly encouraged to include the mediation option as part of their proposed timetable(s).

DATED at Montreal, this 13th day of January 2020.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL OF RECORD:

For the applicant:

The Commissioner of Competition

Jonathan Hood
Ellé Nekiar

For the respondent:

Parrish & Heimbecker, Limited

Robert S. Russell
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