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CT-2019-005

OTTAWA, ONT.

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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

**MEMORANDUM OF FACT AND LAW OF THE
COMMISSIONER OF COMPETITION CHALLENGING THE ADMISSIBILITY
OF CERTAIN PROPOSED EVIDENCE FROM JOHN HEIMBECKER**

PART I: OVERVIEW

1. The Commissioner of Competition seeks an order striking certain evidence that Parrish & Heimbecker, Limited (“**P&H**”) proposes to lead at the hearing of this application. The evidence in question should be struck for two reasons: first, it constitutes opinion evidence that does not meet the requirements for admissibility of lay opinions; and, second, it constitutes inadmissible hearsay.

2. The proposed evidence is contained within the statement of Mr. John Heimbecker signed October 13, 2020. In particular, the Commissioner seeks to strike the following paragraphs as inadmissible opinion evidence:
 - a. Mr. Heimbecker’s opinion on market shares (paras 27 -- 29);

 - b. Mr. Heimbecker’s opinion that the addition of a crop input facility at Virden is expected to increase grain production in the Virden area, which is expected to increase Canadian exports (part of para. 55 and 59);

 - c. Mr. Heimbecker’s opinion that “based on publicly available information, it appears that rival Elevators have excess capacity, such that they could easily increase their purchases of wheat and canola from farmers in the Virden/Moosomin area” (paras. 141 – 147);

 - d. Mr. Heimbecker’s opinion that he “believes that rival Elevators could easily add significant grain purchasing capacity, if needed, in less than 2 years” (part of para. 152); and

- e. Mr. Heimbecker's opinion that increased throughput at Virden is an efficiency that accrues entirely to the Canadian economy (parts of paras. 178 – 179) (together referred to as the "**Opinion Evidence**")
3. Mr. Heimbecker is a lay witness and not an expert. His opinion evidence does not fall within the limited circumstances where lay opinion evidence is admissible.
4. In addition, the Commissioner seeks to strike the following paragraphs from Mr. Heimbecker's statement as inadmissible hearsay:
 - a. Mr. Heimbecker's hearsay testimony, expressly relying on information provided by a former Louis Dreyfus Company Canada ULC ("**LDC**") employee (now a P&H employee), on LDC's practices and policies with respect to the purchase of particular grades and types of grain (parts of paras. 166, 167, and 170); and
 - b. Mr. Heimbecker's hearsay testimony about the relationship between a Moosomin customer service representative and one of the farmers the Commissioner is relying on in this proceeding (para. 174) (together referred to as the "**Hearsay Evidence**")
5. Mr. Heimbecker is clear that the evidence in these paragraphs is hearsay. It is based on information provided to Mr. Heimbecker by other P&H employees. While hearsay evidence can be admissible, if it is necessary and reliable, the Hearsay Evidence does not meet those requirements.

6. The Hearsay Evidence is not necessary because there is no reason why P&H could not submit witness statements from the individuals on whom Mr. Heimbecker relies. The evidence is also unreliable as the nature of the testimony makes it almost immune to cross-examination.
7. For these reasons, the Opinion Evidence and the Hearsay Evidence should be excluded from Mr. Heimbecker's statement.

PART II: SUMMARY OF FACTS

A. The Application

8. The Commissioner has brought this proceeding seeking relief against P&H pursuant to section 92 of the *Competition Act*.¹
9. In December 2019, Parrish & Heimbecker likely caused a substantial lessening of competition ("**SLC**") by acquiring a grain elevator in Virden, Manitoba from LDC (the "**Acquisition**"). The Acquisition eliminated the competition that had existed between the Virden Elevator and P&H elevator in Moosomin, Saskatchewan.²
10. The Commissioner has alleged that the relevant markets in this application are the supply of grain handling services for wheat and the supply of grain handling services for canola for the aggregated locations of farmers that benefited from competition between the Virden and Moosomin elevators.³

¹ RSC 1985, C C-34 as amended.

² Notice of Application of the Commissioner ("**NOA**"), Motion Record of the Commissioner, Tab 1.

³ NOA, *supra* note 2, Statement of Grounds and Material Facts ("**SGMF**") at para 21.

11. As a result of the Acquisition, these farmers are likely to pay more to obtain grain handling services for wheat and canola from these two elevators. The consequence is less money in the pockets for these farmers when they sell their wheat or canola.⁴
12. To remedy this likely substantial lessening of competition, the Commissioner seeks an order requiring P&H to divest either one of the Virden or Moosomin elevators.⁵
13. P&H denies these allegations. P&H alleges that the product market is the sale of wheat and canola and the relevant geographic market is at least the western Canadian growing region. As a result, P&H alleges that the Acquisition will not result in a substantial lessening of competition.⁶
14. P&H also relies on the efficiencies defence arguing that the Acquisition's efficiencies are greater than and offset any alleged anti-competitive effects.⁷ The Commissioner denies that efficiencies, if any, outweigh or offset the anticompetitive effects of the Acquisition.⁸

A. Mr. Heimbecker's statement

15. P&H has submitted only one witness statement from a P&H representative to support its defence – Mr. Heimbecker the CEO and President Grain Division Canada of P&H.⁹

⁴ NOA, *supra* note 2, SGMF at para. 1.

⁵ NOA, *supra* note 2, at para. 1.

⁶ Response of Parrish & Heimbecker, Limited ("**P&H Response**"), Motion Record of the Commissioner, Tab 2, at paras 17 - 20.

⁷ P&H Response, *supra* note 6, at para. 37.

⁸ Reply of the Commissioner of Competition, Motion Record of the Commissioner, Tab 3, at paras. 8 – 10.

⁹ Witness Statement of John Heimbecker - Confidential Level A dated October 13, 2020, Motion Record of the Commissioner, Tab 4, at para. 1.

16. Mr. Heimbecker's statement covers a wide variety of subjects. Relevant to this motion is Mr. Heimbecker's statements with respect to the following: (a) P&H's market position (paras. 27 - 29); (b) crop inputs expansion (paras. 55 - 59); (d) excess capacity, expansion, and new entry (paras. 141 - 155); (e) Commissioner's farmer witness statements (paras. 160 - 177); and (f) quantification of efficiencies (paras. 178 - 179).
17. As described in paragraphs 2 and 4 above, Mr. Heimbecker's statement contains inadmissible Opinion Evidence and Hearsay Evidence. The Commissioner has attached Mr. Heimbecker's statement to his motion record with the Opinion Evidence highlighted in pink and the Hearsay Evidence highlighted in purple.¹⁰

B. P&H's Other Responding Evidence

18. In addition to Mr. Heimbecker's statement, P&H's response includes witness statements from three farmers and the expert report of Margaret Sanderson.¹¹
19. P&H has not submitted an expert report with respect to efficiencies. The Sanderson Report does not quantify the alleged efficiencies.

PART III: ISSUE IN DISPUTE

39. This motion raises the issue of whether the Tribunal should strike the Opinion Evidence and the Hearsay Evidence.

¹⁰ Heimbecker Statement, *supra* note 9.

¹¹ Expert Report of Margaret Sanderson - Confidential Level A dated October 19, 2020 ("**Sanderson Report**"), Motion Record of the Commissioner, Tab 5.

PART IV: SUBMISSIONS

40. The Opinion Evidence and the Hearsay Evidence is inadmissible. This evidence is precisely the type of clear evidence the Tribunal contemplated in *The Commissioner of Competition v. Vancouver Airport Authority* should be ruled inadmissible at an early stage.¹²

A. The Opinion Evidence is inappropriate lay opinion evidence

41. The Opinion Evidence from Mr. Heimbecker is only admissible if it meets one of the two exceptions to the general rule excluding opinion evidence. The first exception is available to properly qualified independent experts who are permitted to draw inferences from proven facts in matters requiring specialized knowledge or skill.¹³

42. Mr. Heimbecker is not independent nor is he an expert. Therefore, the first exception does not apply.

43. The second exception is available when three criteria are met: (i) the opinion is one that a person of ordinary experience could have drawn; (ii) the facts upon which the witness based his or her opinion were observed by the witness and are too fleeting to be remembered or too complicated to be separately described; and (iii) the witness has the requisite experience to form the opinion.¹⁴

44. For the reasons below, none of the opinions Mr. Heimbecker seeks to share with the Tribunal meet the requirements of the second exception.

¹² 2018 Comp Trib 15, Commissioner's Book of Authorities, Tab 1, at para 12.

¹³ *White Burgest Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, Commissioner's Book of Authorities, Tab 2, at paras. 15 and 19.

¹⁴ *Toronto Real Estate Board v. Commissioner of Competition*, 2017 FCA 236 ("TREB"), Commissioner's Book of Authorities, Tab 3, at para. 79.

45. *Heimbecker's opinion on market shares (paras. 27 – 29).* Mr. Heimbecker provides his opinion on P&H's market position. Relying on a combination of data from P&H as well as data from the Canadian Grain Commission (“CGC”), Mr. Heimbecker provides his opinion on market shares.
46. This is inappropriate lay opinion evidence. Mr. Heimbecker is not independent, nor is he an expert economist. By opining on market shares, he is commenting on what constitutes a proper market and how market shares should be calculated. Mr. Heimbecker is not producing business records prepared in the ordinary course of business. Rather, like the independent experts in this case, he gathered data and is opining on what inferences to draw from that data. As an example, the Commissioner's economic expert has provided market share calculations.¹⁵ Ms. Sanderson, P&H's expert, takes issue with Dr. Miller's calculation of market shares providing in response her own market share calculations.¹⁶ It is not appropriate for Mr. Heimbecker to do the same.
47. *Mr. Heimbecker's opinion that the addition of a crop input facility at Virden is “expected to increase grain production in the Virden area, which is expected to increase Canadian exports” (paras. 55 and 59).* Mr. Heimbecker can testify to the fact that P&H is planning to add a crop input facility at Virden. However, Mr. Heimbecker goes beyond P&H's plans and suggests to the Tribunal the following inferences: (a) that adding a crop input facility expands demand for crop inputs as opposed to simply diverting crop input sales from other retailers; (b) that expanded demand, assuming that occurs, leads directly to higher priced and better yielding seed varieties; and (c) that higher yields increase Canadian exports.

¹⁵ Expert Report of Dr. Nathan Miller dated September 11, 2020, Motion Record of the Commissioner, Tab 6, at para. 83.

¹⁶ Sanderson Report, *supra* note 11, at paras. 156 and 97.

48. First, each of these opinions do not meet the second requirement for providing lay opinion evidence as the facts underlying the opinion are not too fleeting to be remembered or too complicated to be separately described.
49. Second, each of these inferences require expertise and are not proper inferences for a lay party to suggest. For example, whether and by how much demand for a product might expand requires economic expertise. Mr. Heimbecker might believe that the sales of crop inputs from the Virden facility might not displace sales from other retailers but unless Mr. Heimbecker has access to competitively sensitive information from his competitors, he has no way of grounding his belief in fact.
50. If the first inference, which Mr. Heimbecker cannot know, is not true or properly grounded in independent expertise, then the other two inferences are necessarily false. Even if it is true, Mr. Heimbecker then layers on two subsequent inferences he is not qualified to make. Mr. Heimbecker is not an agricultural scientist qualified to discuss what impact various crop protection products might have on yield. Nor is Mr. Heimbecker an agricultural economist with the expertise necessary to opine on how yields affect Canadian exports. The opinion evidence, in the mouth of Mr. Heimbecker, who is not independent, is not properly presented before the Tribunal.
51. Allowing Mr. Heimbecker to present this opinion evidence also contradicts the guidance from the Federal Court of Appeal describing the limited circumstances when lay opinion is acceptable in competition cases: “it is clear that lay witnesses cannot testify on matters beyond their own conduct and that of their businesses in the ‘but for’ world. Lay witnesses are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the ‘but for’ world, nor do they

have the experiential competence”.¹⁷ As he is not a qualified as an independent expert, Mr. Heimbecker is not permitted to opine on the economic consequences of adding a crop input facility to an elevator.

52. *Mr. Heimbecker’s opinions about rival elevators’ ability to easily increase their purchases of wheat and canola from farmers in the Virden/Moosomin area (paras. 141-147).* Mr. Heimbecker gives an opinion based on facts that he cannot observe. This section starts with Mr. Heimbecker pulling information from the CGC about elevators’ capacity and throughput. After making a number of calculations and assumptions, Mr. Heimbecker’s opinion is that rival elevators “could easily increase their purchases of wheat and canola from farms in the Virden/Moosomin area.”¹⁸

53. Mr. Heimbecker is asking the Tribunal to accept as true that his excess capacity calculations mean that an elevator not owned by P&H could easily increase its purchases of wheat and canola. The elements required for opinion evidence are not made out. Mr. Heimbecker is not basing his opinion on facts he observed that are too fleeting to be remembered or too complicated to be separately described.

54. Although Mr. Heimbecker can provide an opinion that Moosomin and Virden have excess capacity – which are facts that he can observe – he cannot guess what other grain companies would do. Allowing Mr. Heimbecker to provide such opinion evidence contradicts the guidance, described above, from the Federal Court of Appeal in the TREB case with respect to the scope of opinion evidence in competition matters.¹⁹ As he is not a qualified as an independent expert, Mr. Heimbecker is not

¹⁷ TREB, *supra* note 14, at para. 81

¹⁸ Heimbecker Statement, *supra* note 9, at para. 141.

¹⁹ *Supra* note 17.

permitted to opine on what his competitors might do with their excess capacity.

55. *Mr. Heimbecker's opinion that he "believes that rival Elevators could easily add significant grain purchasing capacity, if needed, in less than 2 years (para. 152). Mr. Heimbecker testifies to P&H's experience expanding capacity at its own elevators. However, for the same reasons described above, it is inappropriate for Mr. Heimbecker to ask the Tribunal to draw an inference that elevators not owned by P&H could do what P&H did and "add significant grain purchasing capacity in less than 2 years."*
56. *Mr. Heimbecker's opinion that "increased throughput at Virden is an efficiency that accrues entirely to the Canadian economy" (para. 178 and 179). Quantifying efficiencies requires specialized knowledge and expertise that Mr. Heimbecker simply does not have. Quantifying efficiencies from a merger that constitute a cognizable efficiency under the *Competition Act* requires the education and experience of an independent expert accountant, financial analyst, or business valuator.²⁰ Mr. Heimbecker has none of these qualifications nor is he independent.*
57. Mr. Heimbecker can testify that Virden has increased its throughput and he can testify to P&H's grain margins. But he is not qualified – nor does he have the requisite independence – to give the opinion that these two facts mean that P&H has achieved a cognizable efficiency.
58. To conclude that there is a cognizable efficiency, the Tribunal must understand and accept the inference that any increased throughput: (a) is a productive or dynamic efficiency; (b) was brought about because of

²⁰ *Commissioner of Competition v. CCS Corporation et al*, 2012 Comp. Trib 14, Commissioner's Book of Authorities, Tab 4, at paras. 260, 273, 275 and Schedule B. *Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib 15, Commissioner's Book of Authorities, Tab 5, at paras. 318-320.

the merger; and (c) would not likely be obtained if the order was made. Mr. Heimbecker does not explain, nor does he have the experience to provide any opinion on, what constitutes a cognizable efficiency under the Act.

B. Mr. Heimbecker has provided hearsay evidence that is neither necessary nor reliable.

59. Hearsay is testimony of a statement made to a witness by another person who is not a witness when that statement is offered to show the truth of the matter stated therein.²¹ Hearsay is only admissible if it meets the criteria of necessity and reliability.²²
60. Mr. Hiembecker's statement contains numerous examples of explicit hearsay (see for example, paras, 47, 48, 61, and 85). However, the Commissioner seeks to strike only the most egregious examples of hearsay in Mr. Heimebecker's statement.
61. First, in parts of paras. 166, 167, and 170, Mr. Heimbecker testifies to LDC's practices and policies with respect to the purchase of particular grades and types of grain. Mr. Heimbecker statement is not based on his own observations. Instead, Mr. Heimbecker relies on information provided by former LDC employee (now general manager of the Virden elevator) Mr. Andrew Klippenstein.
62. P&H has provided no explanation for why this hearsay is necessary. Mr. Klippenstein is a P&H employee within P&H's control who could be called to testify. In addition, the reliability of the evidence is suspect: the hearsay

²¹ *Nadeau Poultry Farm Ltd v. Groupe Westco Inc*, 2009 Comp Trib 6, Commissioner's Book of Authorities, Tab 6, at para. 84.

²² *R v. Bradshaw*, 2017 SCC 35, Commissioner's Book of Authorities, Tab 7, at para. 1.

evidence is being adduced by a CEO who apparently asked his subordinate to speak about his work at a competitor.

63. The concerns about reliability are heightened in light of the ease with which P&H could have provided a witness statement by Mr. Klippenstein. By taking the approach P&H has taken, it has effectively rendered these hearsay statements immune to cross-examination.
64. Second, in para. 174, Mr. Heimbecker testifies regarding the relationship between a Moosomin customer service representative (“**CSR**”), Mr. Jeremy Krainyk, and one of the farmers the Commissioner is relying on in this proceeding.
65. Mr. Heimbecker is the CEO of P&H. He is many steps removed from this particular CSR’s experience with the farmer. Again, there is no reason why P&H could not call Mr. Krainyk to testify to his relationship with this farmer.
66. These two instances are clear examples of hearsay. Unlike in VAA, these are not instances where Mr. Heimbecker is directly supervising a process that took place in the ordinary course of business.²³ Cross-examining Mr. Heimbecker will not help clarify the weight that the Tribunal should give to these hearsay statements. They should be struck.

²³ *Supra* note 12 at para. 7.

PART V: ORDER SOUGHT

106. The Commissioner respectfully requests that the Opinion Evidence and Hearsay Evidence be struck along with his costs of the motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27TH DAY OF
NOVEMBER, 2020**



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