COMPETITION TRIBUNAL
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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

MEMORANDUM OF FACT AND LAW OF P&H
(Commissioner's Motion to Strike)

PART I: OVERVIEW[1]

1. Parrish & Heimbecker, Limited ("**P&H**") opposes the Commissioner of Competition's (the "**Commissioner**") motion to strike certain paragraphs (the "**Disputed Paragraphs**") of the witness statement of John Heimbecker dated October 13, 2020, delivered on behalf of P&H (the "**P&H Statement**").

2. There is no ground to declare any portion of the Disputed Paragraphs inadmissible as improper lay opinion evidence or hearsay.

3. The Disputed Paragraphs challenged by the Commissioner as improper lay opinion evidence testify to Mr. Heimbecker's observations and perceptions regarding P&H's market position in the Canadian grain trading industry, P&H's rationale and objectives in undertaking the Transaction, Mr. Heimbecker's observations and perceptions regarding excess capacity among rival Elevators, P&H's observations and perceptions relating to its own previous rail and storage expansion projects, and Mr. Heimbecker's observations and perceptions relating to the value of the increased throughput at the Virden Elevator following the Transaction. The paragraphs in issue are either evidence of fact or, alternatively, they satisfy the test for admissible lay opinion evidence.

4. The statements in the Disputed Paragraphs alleged by the Commissioner to constitute hearsay are admissible under the corporate subordinate exception recognized by the Federal Court of Appeal. Under that exception, an affiant is entitled to give evidence that is corporate in nature on information and belief from a subordinate for which he is responsible.

5. In the alternative, if the concerns raised by the Commissioner with respect the Disputed Paragraphs were found by the Tribunal to have any merit at all (which is not admitted), this is not a clear case in which the Tribunal should rule on the admissibility of evidence on a preliminary motion. Rather, the Tribunal

[1] Defined terms in this Memorandum of Fact and Law have the meaning ascribed to them in the Witness Statement of John Heimbecker dated October 13, 2020, unless otherwise indicated.

should exercise its discretion to determine whether or not the Disputed Paragraphs constitutes improper lay opinion evidence or inadmissible hearsay at the hearing of this matter or at the time of its decision on the merits, after Mr. Heimbecker has been subject to cross-examination by counsel for the Commissioner and questioning by the panel. No issue of procedural fairness arises if the Tribunal rules on the admissibility of the Disputed Paragraphs at a later stage.

6. The Commissioner's motion should be dismissed.

PART II: SUMMARY OF FACTS

7. Given the highly expedited schedule in this matter and the resulting need for speed and efficiency, P&H filed a single corporate witness statement, rather than filing a multitude of witness statements from different P&H employees, which would have extended the time and cost the proceeding. The P&H Statement comprises 183 paragraphs (together with supporting exhibits).

8. In the P&H Statement, Mr. Heimbecker states that he has "personal knowledge of the matters" discussed by him therein unless otherwise indicated, and he provides background information on his deep experience in the Canadian grain industry, his credentials and his many varied and progressively more senior roles at P&H.[2]

9. As described in the P&H Witness Statement, Mr. Heimbecker has more than 30 years of experience in the Canadian grain industry. He has been at P&H and in the grain business for his entire professional career, starting in May 1987. He was named CEO in September 2019 and has held the position of President Grain Division Canada since April 2017. As President Grain Division Canada, he is in charge of P&H's grain business for all of Canada (including all of its Elevators). He is also on the Board of Directors of P&H and has been a member

[2] See P&H Staement at para 1.

since 1998.[3]

10. As the P&H Statement explains, in his more than 30 years with P&H, Mr. Heimbecker has also held various other positions at P&H, including Executive Vice President (between April 2017 and August 2019), Vice President (between 1999 and March 2017), Senior Merchant in P&H's Toronto Office, Assistant General Manager of P&H's Owen Sound Terminal and Truck Coordinator for Ontario.[4]

PART III: POINTS IN ISSUE

11. Whether, at this preliminary stage, the Commissioner has established on a balance of probabilities that the paragraphs containing the Disputed Evidence, as read in the context of the P&H Statement, constitute improper opinion evidence or inadmissible hearsay, such that they should be struck immediately.

PART IV: SUBMISSIONS

A. The Alleged Improper Lay Opinion Evidence is Admissible

12. In the law of evidence, opinion means an inference from observed fact.[5] The Tribunal has held that opinion evidence from lay witnesses, including as to their own conduct and the conduct of their own business, is generally admissible if a witness has personal knowledge of the observed facts and testifies to facts within his or her observation, experience and understanding of events, conduct or actions.[6]

13. In *The Commissioner of Competition v Vancouver Airport Authority* ("***VAA***"), the Tribunal also noted the guidance from the Supreme Court and the

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[3] See *ibid*.
[4] See *ibid*.
[5] See *R v Graat*, 1982 CarswellOnt 101 at para 14 (SCC); P&H Book of Authorities, Tab 1.
[6] See, e.g., *Canada (Commissioner of Competition) v Vancouver Airport Authority*, 2018 Comp Trib 15 at para 10 ("***VAA Prelim Motion***"); Commissioner's Book of Authorities, Tab 1; *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 at para 146-47 ("***VAA Merits***"); P&H Book of Authorities, Tab 2.

Federal Court of Appeal regarding opinion evidence from lay witnesses:

> The SCC has however recognized that "[t]he line between 'fact' and 'opinion' is not clear" (R. v. Graat, [1982] 2 S.C.R. 819, 144 D.L.R. (3d) 267 (S.C.C.) at p 835). The courts have thus developed greater freedom to receive lay witnesses' opinions when the witness has personal knowledge of the observed facts and testifies to facts within his or her observation, experience and understanding of events, conduct or actions. In that respect, the FCA recently stated, again in the context of a Tribunal proceeding, that opinion from a lay witness is acceptable "where the witness is in a better position than the trier of fact to form the conclusions; the conclusions are ones that a person of ordinary experience can make; the witnesses have the experiential capacity to make the conclusions; or where giving opinions is a convenient mode of stating facts too subtle or complicated to be narrated as facts" (TREB FCA at para 79). As such, when a witness has personal knowledge of observed facts such as a company's relevant, real world, operations, its evidence may be accepted by a court or the Tribunal even if it is opinion evidence (TREB FCA at para 80; Pfizer Canada at paras 105-108).
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> Furthermore, it has been recognized that lay witnesses can provide opinions about their own conduct and their own business (TREB FCA at paras 80-81). The FCA however specified that there are limits to such lay opinion evidence: "lay witnesses cannot testify on matters beyond their own conduct and that of their businesses in the 'but for' world" and they "are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the 'but for' world, they have the experiential competence" [emphasis in original] (TREB FCA at para 81).[7]

14. The Tribunal then observed: “In other words, when a witness had ‘an opportunity for observation’ and was ‘in a position to give the Court real help,’ the evidence may be admissible and the real issue will be the assessment of weight (*Imperial Brush*, at para 11)”.[8]

15. In its decision on the merits in the *VAA* case, the Tribunal ruled on the admissibility of witness statements delivered on behalf of Air Transat and Jazz in which the witnesses testified as to the savings allegedly realized or expected to be realized by Air Transat and Jazz, and the increased expenses allegedly incurred or expected to be incurred by those airlines, as a result of their inability to switch in-flight caterers at YVR.

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[7] *VAA Merits*, *supra* at paras 146-47; P&H Book of Authorities, Tab 2.

[8] *Ibid.* at para 148.

16. VAA argued that conclusions reached by the witnesses with respect to missed savings and increased expenses were not within their personal knowledge and that they did not perform the calculations underlying their testimonies, such that their evidence constituted inadmissible lay opinion evidence.[9]

17. The Tribunal rejected VAA's position. Applying the guidance from the Supreme Court and the Court of Appeal, the Tribunal found that, by virtue of their roles and responsibilities at their respective companies, both witnesses "had the required personal knowledge, observation and experience to testify on the issues challenged by VAA".[10] Further, as to VAA's objection that one of the witnesses had not prepared the exhibits attached to her witness statement, the Tribunal concluded that this went to the weight to be given to her opinions, not their admissibility:

> The Tribunal acknowledges that Ms. Bishop confirmed that she did not prepare Exhibits 10 and 13 herself and did not directly perform the calculations that underlay the conclusions reached in those two Exhibits. However, the Tribunal considers that the fact that she could not reconcile many figures or explain the discrepancies with other numbers cited solely affects the weight to be given to the evidence, not its admissibility.[11]

18. Ultimately, the Tribunal concluded as follows:

> Having heard the two witnesses, their examination by counsel for the Commissioner, their cross-examination by counsel for VAA and the questioning by the panel, the Tribunal is not persuaded that the evidence disputed by VAA was not within the respective knowledge, understanding, observation or experience of Mss. Stewart and Bishop, or that those witnesses did not observe the facts contained in their respective witness statements with respect to the disputed evidence. There is therefore no ground to declare any portion of their evidence inadmissible as improper lay opinion evidence.[12]

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[9] See *VAA Merits*, *supra* at paras 130-32; P&H Book of Authorities, Tab 2.
[10] *Ibid.* at para 149.
[11] *Ibid.* at para 153.
[12] *Ibid.* at para 154.

19. *AstraZeneca Canada Inc v Apotex Inc* is to similar effect.[13] In that case, which involved a motion for an interlocutory injunction in a patent infringement action, the relevant issue was whether an affidavit filed on behalf of Apotex ("API") contained impermissible opinion evidence. The impugned affidavit set out the lay affiant's opinions with respect to three issues based on his review of certain patents; specifically, he addressed:

> whether: (i) the API Process uses the same process as claimed in [AstraZeneca's] '994 Patent; (ii) neutral esomeprazole in a solid, crystalline form, as claimed in [AstraZeneca's] '076 Patent, is used or produced in API's Process; and (iii) the optical purity of esomeprazole is increased at any stage during API's process by selectively removing racemic omeprazole, as claimed in [AstraZeneca's] '184 Patent… [14]

20. In rejecting AstraZeneca's motion to strike, Justice Crampton (as he then was) stated that he was satisfied that API's affiant, Dr. Horne (who was the VP of Research and Development at API), had not filed improper opinion evidence:

> In my view, Dr. Horne simply provided factual information in his affidavit, primarily based on his knowledge of API's processes. To provide that factual information, he necessarily had to describe his understanding of the patents in question ... In describing his understanding of those patents, he simply and very briefly: (i) quoted the plain language in those patents; and (ii) stated his understanding of what each of those patents claimed. He spent a total of four sentences describing his understanding of [AstraZeneca's] '994 Patent, five sentences describing his understanding of [AstraZeneca's] '076 Patent, and seven short sentences describing his understanding of [AstraZeneca's] '184 Patent. By contrast, he spent nine full paragraphs describing API's Process, which was the clear focus of his affidavit.[15]

21. In light of the Commissioner's repeated assertion in his Memorandum of Fact and Law that the criteria for admissibility of lay opinion evidence include that the observed facts "are too fleeting to be remembered or too complicated to be separately described",[16] it bears noting that the actual language from the Federal

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[13] *AstraZeneca Canada Inc v Apotex Inc*, 2011 FC 505, aff'd 2011 FCA 211; P&H Book of Authorities, Tab 3. See also *Kon Construction Ltd v Terranova Developments Ltd*, 2015 ABCA 249; P&H Book of Authorities, Tab 4.
[14] *AstraZeneca*, *supra* at para 33; P&H Book of Authorities, Tab 3
[15] *Ibid.* at para 34.
[16] Commissioner's Memorandum of Fact and Law at para 43.

Court of Appeal in TREB was "where giving opinions is a convenient mode of stating facts too subtle or complicated to be narrated as facts". It also bears emphasizing that in *VAA* the Tribunal was clearly satisfied that the Air Transat and Jazz's witnesses' opinions as to lost savings and increased expenses clearly satisfied that requirement.

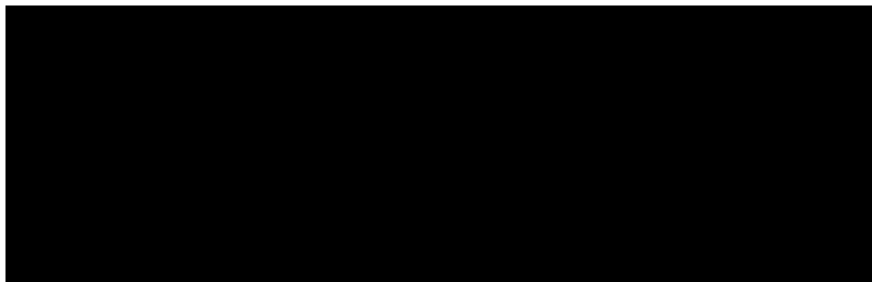
22. As a further aside, the Commissioner's repeated reference in his written submissions to Mr. Heimbecker's lack of "independence"[17] is a red herring and completely irrelevant. "Independence" is not a criterion for admissibility of opinion evidence from lay witnesses who, by definition, are not independent experts.

23. The Disputed Paragraphs which the Commissioner claims constitute improper lay opinion evidence are addressed in turn below.

(i) Disputed Paragraphs Relating to Mr. Heimbecker's Observations and Perceptions Regarding P&H's Market Position in the Grain Trading Industry [Paragraphs 27 to 29]

24. The Commissioner asks the Tribunal to strike paragraphs 27 to 29 of the P&H Statement in their entirety. Those paragraphs read as follows:

> [27] Based on data from the Canadian Grain Commission ("**CGC**") (a copy of which is attached to my Witness Statement as **Exhibit "3"**) and P&H's internal estimates, the tables below summarize P&H's storage capacity and "annual primary handle" – and therefore market share – compared to other industry players prior to the Transaction. Primary storage capacity refers to the Elevator storage capacity as licensed by the CGC, where the principal use of the Elevator is the receiving of grain from farms for storage or forwarding or both. Annual primary handle refers to the total amount of grain received from farms at Elevators for storage or forwarding or both in a 12-month period.



[17] See Commissioner's Memorandum of Fact and Law at paras 42, 46, 50, 51, 54 and 56.
[18] Includes 5 assets under construction in Alberta.

[28] Based on data from the CGC (a copy of which is attached to my Witness Statement as **Exhibit "3"**) and P&H's internal estimates, prior to the Transaction,

[29] Based on the publicly available information (see **Exhibit "4"** to my Witness Statement) and P&H's internal estimates, once the Fraser Grain Terminal and the G3 terminals (referred to above) are fully operational, west coast capacity shares will look like this: At paragraphs 27 to 29 of the P&H Statement, Mr. Heimbecker describes in a compendious fashion his factual observations and perceptions from P&H's internal estimates and publicly available information, regarding P&H's position (relative to its main competitors) within the Canadian grain trading industry.

[19] Includes 5 assets under construction in Alberta.

25. Contrary to what the Commissioner's contends, Mr. Heimbecker is not purporting in paragraphs 27 to 29 to "comment[] on what constitutes a proper market share [or] how market shares are calculated".[20] Nowhere in the impugned paragraphs or the P&H Statement, more generally, does Mr. Heimbecker discuss (much less define) the relevant product and/or geographic markets in this matter, nor does he purport to calculate shares within those markets as an economic expert would do (and Ms Sanderson and Dr. Miller have done). The tables in the market position paragraphs excerpted above state mathematical facts based on the data and information observed by Mr. Heimbecker and produced to the Commissioner.

26. Read together with the paragraphs in the P&H Statement describing the P&H's growth strategy (paragraphs 30-34) and P&H's rationales for and objectives in entering into the Transaction (paragraphs 38-59), the P&H market position paragraphs are intended to provide factual context for P&H's acquisition of the LDC Elevators (including the Virden Elevator) in order to assist the Tribunal in understanding P&H's rationale and motivation for completing the Transaction.

27. Given his position as CEO of P&H and experience in the Canadian grain industry, Mr. Heimbecker is well positioned to assist the Tribunal in this regard.

28. As the P&H Witness Statement makes clear, Mr. Heimbecker has reviewed and relies internal P&H internal estimates, publicly available data published by the Canadian Grain Commission[21] and other publicly available information to form his conclusions as to P&H's market position prior to and following the Transaction. Notably, this is precisely the kind of information that the *Notifiable Transactions Regulations* require merging parties to file with the Bureau as part

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[20] Commissioner's Memorandum of Fact and Law at para 46.

[21] By law, as primary elevator licensees and port terminal operators, grain companies are required to submit the data published by the CGC: see sections 26 and 27 of the *Canada Grain Regulations*, CRC, c 889. See also https://www.grainscanada.gc.ca/en/grain-research/statistics/, https://www.grainscanada.gc.ca/en/grain-research/statistics/grain-deliveries/; https://www.grainscanada.gc.ca/en/grain-research/statistics/grain-elevators/reports/; P&H Responding Motion Record, Tab 5.

of the merger review process mandated by the *Competition Act*.[22]

29. With the exception of the P&H internal estimates (which have been now been produced to the Commissioner), the data and other information observed and relied by Mr. Heimbecker are attached to the P&H Statement at Exhibits "3" and "4" and available for use on cross-examination.[23]

30. Like the Air Transat and Jazz witnesses in *VAA*, Mr. Heimbecker has the required personal knowledge, observation and experience to testify to P&H's market position in the Canadian grain industry and, in accordance with the Tribunal's decision in *VAA*, the fact that he did not prepare the data and other information which underlies his conclusions in the market position paragraphs goes to the weight to be ascribed to those paragraphs, not their admissibility. This is also clearly an instance where "giving opinions is a convenient mode of stating facts too subtle or complicated to be narrated as facts".

(ii) Disputed Paragraphs Related to P&H's Rationale for and Objectives in Undertaking the Transaction [Paragraphs 55 and 59]

31. The Commissioner seeks to strike the final sentence in paragraph 55 and all of paragraph 59 (as indicated by the turquoise highlighting). Those paragraphs read as follows:

> [55] The Transaction allows P&H to compete more effectively with rival grain companies, including Richardson, and others in the CI business by converting the LDC Elevators, which were pure grain facilities, into dual, CI retail/grain facilities. P&H's business model of a "one-stop shop" location for farms helps drive P&H's strong business relationships with farms. [redacted] Additionally, the application of additional

[22] Section 16(1)(d) of the *Notifiable Transactions Regulations* states: "[I]n respect of each party, and each of its affiliates referred to in subparagraph (c)(iii), all studies, surveys, analyses and reports that were prepared or received by an officer or director of the corporation — or in the case of an unincorporated entity, an individual who serves in a similar capacity — for the purpose of *evaluating or analysing the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into new products or geographic regions* and, if not otherwise set out in that document, the names and titles of the individuals who prepared the document and the date on which it was prepared". [emphasis added]

[23] See Tabs 2, 3 and 4 of P&H's Responding Motion Record.

> fertilizer and crop protection is expected to increase grain production in the Virden area, which is expected to increase Canadian exports.
>
> [59]
>
> Instead, based on our experience, I believe that there will be an increase in CI sales made within the area. As grain yields continue to improve, farms may use more fertilizer and apply more crop protection products to support higher priced and better yielding seed varieties.

32. The P&H Statement describes (at paragraphs 38 to 59) P&H's two primary rationales for and objectives in undertaking the Transaction (including the Acquisition of the Virden Elevator); namely, to improve P&H's efficiency and effectiveness as a competitor in both the grain trading and the crop inputs businesses:

> [38]

33. Paragraph 55 (as well as paragraphs 56 to 59) of the P&H Statement elaborates on P&H's rationale and objective of improving P&H's efficiency and effectiveness as a competitor in the crop inputs business. In that context, Mr. Heimbecker describes P&H's expectations, in making the decision to acquire the LDC Elevators, regarding likely the effects and benefits of P&H's planned conversion of the LDC Elevators (including the Virden Elevator) into dual, CI retail/grain facilities and states: "Additionally, the application of additional fertilizer and crop protection is *expected* to increase grain production in the Virden area,

which is <u>expected</u> to increase Canadian exports". [emphasis added]

34. Contrary to the Commissioner's claim, Mr. Heimbecker is stating an expectation, not an opinion. More particularly, he is not opining that the addition of crop input facilities at the LDC Elevators (including the Virden Elevator) *will* have the effects stated in the final sentence of paragraph 55. Rather, he is merely making a factual statement as to what P&H's expectations were and are in having acquired the LDC Elevators and in anticipation of undertaking the intended CI retail/grain conversions at those Elevators.

35. The expectation described by Mr. Heimbecker is the product of a straightforward, factual deduction: if farmers use more crop inputs and therefore reduce lost crops or increase yields, then Canadian exports of grain will increase.

36. As for paragraph 59, Mr. Heimbecker testifies to matters relating to the conduct of P&H's *own* crop input business. Contrary to what the Commissioner claims,[24] Mr. Heimbecker is not purporting to testify about either the "but for world", much less the "greater economic consequences of the 'but for' world" or the impact of the Acquisition on "competition generally". The first sentence in that paragraph (i.e., [redacted] is a factual statement regarding the expected source of the sales that will be made by P&H's new CI retail outlets, while the second and third sentences state facts, based on P&H's experience in running its own crop inputs business, that explain and support that expectation.

(iii) Disputed Paragraphs Relating to Mr. Heimbecker's Observations and Perceptions Regarding Excess Capacity [Paragraphs 141 to 147]

37. The Commissioner seeks to strike paragraphs 141 to 147 in their entirety on the basis that they are "Mr. Heimbecker's opinions about rival elevators' ability

[24] See Commissioner's Memorandum of Fact and Law at para 51.

to easily increase their purchases of wheat and canola from farmers in the Virden/Moosomin area".[25] Those paragraphs read as follows:

> **A. EXCESS CAPACITY**
>
> [141] 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 farms in the Virden/Moosomin area.
>
> **I. COMPARING MAXIMUM OBSERVED VOLUMES TO 5-YEAR AVERAGE VOLUMES**
>
> [142] Data provided publicly by the CGC shows the tonnage of each grain delivered to Elevators, by delivery point. This data is conventionally used to approximate the amount of grain that an Elevator purchases and ships in a crop year, as it is assumed that grain that is delivered into an elevator will be shipped out as well. Therefore, it can be used to compare volumes by Elevator.
>
> [143] Attached to my Witness Statement as **Exhibit "35"** is the CGC data showing the volume of grain that rival Elevators referred to above, as well as the Virden and Moosomin Elevators, purchased and shipped in each of the last five years.[26] From that data, I have set out below the average amount of grain purchased and shipped annually by each of those competing Elevators in the period between 2014-2015 and 2018-2019.
>
> [144] As the amount of grain purchased and shipped in a given year is a function of the crop size, and since crop sizes vary each year, in my experience, this five-year average tonnage is a reasonable estimate of what can be normally expected.
>
> [145] I have also set out each Elevators maximum annual throughput in that five year period and their average and best turn rates.[27]

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[25] Commissioner's Memorandum of Fact and Law at para 52.

[26] Footnote 11 to paragraph 143 states: "Deliveries are published by CGC by delivery point, not specific Elevator; therefore, the CGC-reported deliveries to those points with two or more Elevators are the total of all Elevators at that location".

[27] Footnote 12 to paragraph 145 states: "Turn ratios are calculated by dividing the annual throughput (tonnage purchased and shipped) of the Elevator or, where there is more than one Elevator at a single delivery point, the total deliveries to the delivery point by the licensed storage capacity of the Elevator(s). Both data are published by the CGC (see **Exhibit '35'** to my Witness Statement)".

Location	Operator	5-year avg throughput (000 tonnes) 2014-15 to 2018-19	Avg turn ratio	Maximum annual throughput (000 tonnes)	Best Turn Ratio	Year	Excess capacity (000 tonnes)
Binscarth	Viterra & Paterson	196.9	6.7	207.4	7.0	18-19	10.5
Bloom	G3	318.8	9.4	398.0	11.7	18-19	79.2
Brandon	Viterra & Richardson	495.8	7.9	610.6	9.8	18-19	114.8
Carnduff	Viterra & Paterson	225.0	6.4	293.5	8.4	18-19	68.5
Elva	Cargill	330.3	13.5	383.4	15.6	18-19	53.1
Estevan	Richardson & Southland	247.8	6.1	350.0	8.6	16-17	102.2
Fairlight	Viterra	257.8	7.7	321.8	9.7	18-19	64.0
Langenburg	Richardson	69.3	4.8	86.4	6.0	14-15	17.1
Melville	G3 & Richardson	174.5	6.2	446.8	8.5	18-19	272.3
Northgate	Ceres Ag	483.7[28]	6.6	530.9	7.2	18-19	47.2
Oakner	Cargill	112.3	8.5	165.4	14.1	18-19	53.1
Shoal Lake	Richardson	255.1	6.8	298.1	7.9	18-19	43.0
Souris East	Viterra	199.9	8.1	234.9	9.5	17-18	35.0
Whitewood	Richardson	203.5	6.5	235.2	7.6	18-19	31.7
TOTAL		**3,570.7**	**6.3**	**4,562.4**	**7.7**		**991.7.3**

> [146] Summing their individual maximum annual throughputs, the aggregate maximum capacity of competing Elevators is at least 4,562.4 million MT. In comparison, the five-year average of total throughput of these Elevators is 3,570.7 million MT. Due to fluctuations of the crop size, in my experience, this would be a reasonable expectation of future throughput.
>
> [147] A comparison of these two figures indicates that these rival Elevators are capable of handling at least 991,700 MT more than their average throughput over the past five years – or their expected throughput in the future, assuming normal sized crops. This excess capacity exceeds by 585,900 MT the maximum annual combined tonnage purchased and shipped by Moosomin and Virden (405,800 MT in 2014-15) in the last 5 years.

38. Paragraphs 142, 143 and 145 to 147 of the P&H Statement are purely factual. Those paragraphs merely describe Mr. Heimbecker's observations and perceptions from data published by the CGC showing the volume of grain that rival Elevators purchased and shipped (i.e., their throughput capacity) in the five

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[28] Footnote 13 in the table directly under paragraph 145 states: "Operating for only three years so the average is a three-year average".

year period between 2014-2015 and 2018-2019 (the "**Relevant Period**"). All of that CGC data is attached at Exhibit "35" to P&H Statement and available for use on cross-examination.[29]

39. Based on his observation of that data and the simple arithmetic calculations required to determine averages, totals or the difference between two figures, Mr. Heimbecker makes certain factual statements (in paragraphs 142, 143 and 145 to 147) related to the throughput capacity of certain rival Elevators; namely, he states:

- each rival Elevator's maximum (i.e., highest) annual throughput capacity in the Relevant Period;
- the average annual throughput of each rival Elevator over the Relevant Period;
- each rival Elevator's average turn rate over the Relevant Period;
- each rival Elevator's best (i.e., highest) turn rate over the Relevant Period;
- the aggregate maximum (i.e., highest) annual capacity of the rival Elevators; and
- the difference between the aggregate maximum (i.e., highest) annual capacity of the rival Elevators in the Relevant Period and the maximum (i.e., highest) annual combined throughput capacity of the Virden and Moosomin Elevators in the Relevant Period.

40. None of paragraphs 142, 143 or 145 to 147 constitutes opinion evidence. These are mathematical facts or computations of CGC data that have been put before the Tribunal at Exhibit "35" to the P&H Statement.

41. As for paragraphs 141 and 144, the statements therein constitute

[29] See Tab 6 of P&H's Responding Motion Record.

permissible lay opinion evidence.

42. With respect to paragraph 144 ("As the amount of grain purchased and shipped in a given year is a function of the crop size, and since crop sizes vary each year, in my experience, this five-year average tonnage is a reasonable estimate of what can be normally expected"), Mr. Heimbecker has the required personal knowledge, observation and experience to testify to this conclusion. Given his long experience in the grain industry, Mr. Heimbecker is well positioned to assist the Tribunal in this regard. The statement in paragraph 144 is also a convenient mode of stating facts too subtle or complicated to be narrated as facts.

43. The statement in paragraph 141 that "[b]ased 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 farms in the Virden/Moosomin area", is an inference based directly on facts that Mr. Heimbecker has observed (and of which he is aware) in the CGC data, as described in the paragraphs referred to above and attached at Exhibit "35" to the P&H Statement.

44. Like the Air Transat and Jazz witnesses in *VAA*, Mr. Heimbecker has the required personal knowledge, observation and experience to testify to this conclusion.

45. In giving this evidence, Mr. Heimbecker is not purporting to testify "about the greater economic consequences of the 'but for' world" or the impact of the Acquisition on "competition generally". Nor is he "opin[ing] on what [P&H's] competitors might do with their excess capacity".[30] Any inferences or conclusions in these regards are for the Tribunal.

46. It bears noting that the Commissioner has not put any evidence before the Tribunal regarding the capacity of rival Elevators. Accordingly, were the

[30] Commissioner's Memorandum of Fact and Law at para 54.

Commissioner to succeed in striking these paragraphs, there would be no evidence before the Tribunal on this issue.

(iv) Disputed Paragraph Relating to Mr. Heimbecker's Observations and Perceptions Regarding Expansion [Paragraph 152]

47. At paragraph 152 of his Witness Statement, Mr. Heimbecker states as follows:

> Based on P&H's experience with its own capacity and throughput expansions, I believe that rival Elevators could easily add significant grain purchasing capacity, if needed, in less than 2 years. More particularly, P&H has been able to complete rail and storage expansions at several of its Elevators in nine months or less. In each case, those projects significantly increased throughput capacity at the facility in question.

48. The Commissioner ask the Tribunal to strike the entire paragraph as improper lay opinion evidence. Clearly, however, the second sentence in that paragraph is purely factual and merely summarizes the facts recited in paragraphs 153 to 155 of the P&H Statement regarding P&H's experience with several of its previous rail and storage expansion projects (including the time and cost it took P&H to complete those expansions as well as the resulting throughput capacity increases realized by P&H). Notably, this evidence from Mr. Heimbecker is the only evidence on the record as the timing, cost and scope of rail and storage expansions.

49. As for the first sentence in paragraph 152, this is permissible lay opinion evidence based directly on facts that he has observed (and of which he is aware). Mr. Heimbecker is not purporting to testify "about the greater economic consequences of the 'but for' world" or the impact of the Acquisition on "competition generally". Any inferences or conclusions in these regards are for the Tribunal.

(v) Disputed Paragraphs Relating to Mr. Heimbecker's Perceptions and Observations Regarding the Value of the Increased Throughput at the Virden Elevator [Paragraphs 178 and 179]

50. At paragraphs 178 and 179 of his witness statement, Mr. Heimbecker states as follows:

> [178] P&H has increased the actual throughput at Virden from 2019 to 2020 over the seven months from January through July. P&H is forecasting further increases in Virden's post-Transaction throughput in 2020. The increases at Virden have not come at the expense of reduced purchases at Moosomin, as described above. Further, P&H has expanded throughput at Virden without the need for any additional investment. Increased throughput at Virden is an efficiency that accrues entirely to the Canadian economy.
>
> [179] To quantify the value of these increased volumes, I apply P&H's FY19 "grain margin"[31] [redacted] to the increased volumes at Virden.[32] Based on 12 months of throughput data ending in December 2020, which includes P&H's forecasts from August through December 2020, the increase in Virden's post-Transaction throughput in 2020 equates to an annual efficiency of $327,578 for CWRS and $86,771 for canola.

51. As indicated by the turquoise highlighting, the Commissioner seeks to strike the last sentence of paragraph 178 and all of paragraph 179 (with the exception of the words "P&H's FY19 "grain margin" [redacted]).

52. The Commissioner objects to these paragraphs the ground that Mr. Heimbecker is "not qualified – nor does he have the requisite independence – to give the opinion that […] P&H has achieved a cognizable efficiency". There is no merit in this submission.

53. What constitutes a "cognizable efficiency" within the meaning of section 96 is a question of law and no lay or expert witness is competent to provide an

[31] Footnote 15 to paragraph 179 states: "See note 8". Note 8 of the P&H Statement reads: [redacted]

[32] Footnote 16 to paragraph 179 states: [redacted] see **Exhibit "38"**)". Exhibit "38" appears at Tab 7 of P&H's Responding Motion Record.

opinion on the ultimate issue under section 96. Accordingly, the words "cognizable efficiency" do not appear in the P&H Statement and nowhere does Mr. Heimbecker opine that P&H has achieved a cognizable efficiency for the purpose of section 96 of the *Competition Act* or that what he describes at paragraph 179 as an "efficiency" qualifies as a "cognizable efficiency".

54. There can also be no proper objection to Mr. Heimbecker's quantification (in paragraph 179) of the value of the increased throughput at the Virden Elevator. Based on P&H business records attached to the P&H Statement (and available for use on cross-examination), Mr. Heimbecker calculates that value by determining the grain margins for canola and CWRS and then multiplying those margins with the actual and forecasted throughput data for the Virden Elevator. The annual value of that additional throughput as perceived by Mr. Heimbecker and P&H is a mathematical fact, not a matter of opinion, and as CEO, Mr. Heimbecker is well placed to give that evidence on behalf of P&H.

55. The calculations performed by Mr. Heimbecker and the conclusions he draws from those calculations are indistinguishable from the lost savings and increased expenses calculations and related conclusions in respect of which the Air Transat and Jazz witnesses were permitted to testify in *VAA*.

56. As for Mr. Heimbecker's statement in paragraph 178 that the "increased throughput at Virden is an efficiency that accrues entirely to the Canadian economy", this is permissible lay opinion evidence constituting an inference based on observed fact, including, as described in the P&H Statement, the efficiency resulting from increased throughput at the Virden Elevator will be achieved in Canada and, as P&H is a family-owned, privately held Canadian company, will flow back to shareholders in Canada.

B. The Alleged Hearsay is Admissible [Paragraphs 166, 167, 170 and 174]

57. In paragraphs 166, 167, 170 and 174, Mr. Heimbecker states as follows:

> [166] At paragraph 14 of his Witness Statement, ██████ suggests that P&H has a different and stricter approach to grading than LDC did.

In support for this assertion, Mr. [redacted] points to P&H's assessment of the "falling number" and suggests that by virtue of his personal relationship with certain unidentified people at LDC they would not grade his grain as strictly. As mentioned above, the CGC prescribes detailed grading standards and procedures for the grain companies and P&H abides by and applies those standards and procedures. Andy Klippenstein, the General Manager of Virden Elevator now and when it was owned by LDC, advises that LDC (like P&H) also abided by and followed those standards and procedures. He also advises that, like P&H, LDC's practice and policy was to purchase and record grain at the actual grade in order to maintain accurate inventory records and avoid delivering sub-par grain to its grain customers. Finally, he confirms that LDC did not grade the wheat or canola delivered by a given farm less strictly because the Elevator may have had a good relationship with that farm.

[167] As for the falling number ("**FN**"), the facts are the opposite to what Mr. [redacted] claims – LDC Virden did assess FN and they did so more, not less, strictly than P&H. By way of background, while it is not a grading factor in the CGC Grain Grading Guide, FN is a world standard in the grain and flour milling industries for wheat, durum, triticale, rye, and barley. A low FN indicates that wheat is not sound or satisfactory for most baking processes. P&H's wheat sales contracts with its Grain Customers who require wheat for baking-related purposes will specify a minimum FN and P&H is required to check the FN in order to ensure that it meets its contractual obligations. I am advised by Mr. Klippenstein that when LDC owned the Virden Elevator it sold a significant amount of its wheat to ADM Milling and that ADM's specifications for wheat were for a minimum 300 FN. Mr. Klippenstein further advises that for most wheat sales an FN below 285 would not be accepted by LDC's end-use customers. For our part, and in contrast, based on our Grain Customers' specifications, P&H would (and does) purchase and accept below 300 FN, and all the way down to 250 FN.

[170] Second, after P&H acquired Virden, it learned that LDC's spreads for low protein wheat were consistent with P&H's Further, I am advised by Mr. Klippenstein that LDC did not buy wheat that could not be blended to a minimum 13.0 protein, meaning that LDC generally did not buy CWRS below 12.5 protein. Consistent with the foregoing, when P&H acquired Virden, there was no inventory below CWRS 13.0 and no contracts below CWRS 13.0.

[174] At paragraph 13 of his Witness Statement, [redacted] suggests that, after P&H acquired the Virden Elevator, he was forced to take samples of his grain to the Moosomin Elevator. [redacted]

[redacted] continues to deliver his wheat and canola to

the Virden Elevator, as he did prior to the Acquisition.

58. The Commissioner alleges that the sentences highlighted in turquoise constitute inadmissible hearsay.

59. However, the Federal Court of Appeal has held that affidavit evidence on information and belief that is corporate in nature is admissible. More particularly, the Court of Appeal has confirmed, as an exception to the hearsay rule, that an affiant is entitled to give evidence of a corporate character on information and belief from a subordinate for which he is responsible (the "**Corporate Subordinate Exception**").[33]

60. In *O'Grady v. Canada (Attorney General*), the applicant brought an application for judicial review of the decision of the Privacy Commissioner of Canada to dismiss her complaint under the *Privacy Act*; her complaint was that Statistics Canada had used her personal information in a study without her consent. In opposing the application, the respondent filed two affidavits by the responsible Director General at Statistics Canada (who was responsible for all Statistics Canada Research Data Centres) averring, on information and belief, that the applicant's records were not used in the study. The applicant moved to have an adverse inference drawn (as permitted by Rule 81(2) of the *Federal Court Rules*) from the fact that the affidavits filed by the respondent were based on information and belief from a subordinate.[34] In refusing to draw the requested inference, the motions judge first ruled on admissibility, holding:

> [19] The Supreme Court of Canada developed a principled approach to the admissibility of hearsay evidence, which has been adopted by the Federal Court of Appeal in Éthier v Canada, [1993] 2 FC 659, 63 FTR 29 and by the Federal Court in Twentieth Century Fox Home Entertainment Canada Limited v Canada (Attorney General), 2012 FC 823, 414 FTR 291 [Twentieth Century Fox] regarding the admissibility of

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[33] *O'Grady v Canada (Attorney General)*, 2016 FC 9 at paras. 19-20 ("***O'Grady FC***"), aff'd 2016 FCA 221 ("***O'Grady FCA***"); P&H Book of Authorities, Tab 5. See also *Coldwater First National v Canada (Attorney General)*, 2019 FCA 292 at paras 36-60; P&H Book of Authorities, Tab 6 and *Lukacs v Canada (Transportation Agency)*, 2019 FC 1256 at paras at paras 34-35 and 51; P&H Book of Authorities, Tab 7.

[34] See *O'Grady*, *supra* at para 21; P&H Book of Authorities, Tab 5.

> hearsay evidence given by way of affidavit. In Twentieth Century Fox, Justice Phelan held that an affiant is in a position to know that the facts are true where evidence is "corporate" in nature in that the affiant acts in a supervisory capacity and is responsible for his subordinates (at para 22). In my view, the Affiant, who at the time the Study was conducted was Director General, Census Subject Matter, Social and Demographic Statistics Branch at Statistics Canada and was responsible, in that capacity, of all Statistics Canada Research Data Centres, is in a position to know that the facts sworn in her affidavit are true.
>
> [20] … Thus, the Affiant need not provide evidence of persons having personal knowledge of material facts but be in a position to "be aware" of the particular facts. In my view, in her position as Director General, Census Subject Matter, Social and Demographic Statistics Branch and being responsible for all Statistics Canada Research Data Centres, including the Data Centre where the data at issue was accessed, the Affiant was probably aware of the particular facts and therefore in a position to swear the affidavit without providing evidence of persons having personal knowledge of material facts.[35]

61. Further, in declining to draw the requested inference, the motions judge stated:

> [20] For similar reasons, I am of the opinion that while the Affiant swore her affidavit on belief and information, she was not obliged to "provide evidence of persons having personal knowledge of material facts." This Court has taken the position that no adverse inference will be drawn where it is probable that an affiant's qualifications or office places an affiant in a position where he or she would, of his or her own knowledge, be aware of the particular facts (Smith, Kline & French Laboratories Ltd v Novapharm Ltd (1984) 79 CPR (2d) 103, at para 9, 25 ACWS (2d) 470).[36]

62. The applicant's appeal was dismissed by the Federal Court of Appeal. Speaking for the Court, Justice Rennie held as follows:

> [10] While the appellant in the present case brought a motion for an adverse inference to be drawn, the Judge, in effect, conducted an admissibility analysis based on the personal knowledge of the affiant. In our view, there is no error in his decision that the affidavits were admissible. The judge correctly determined that the affiant, by virtue of her responsibilities in the Government of Canada, was in a position to depose to the matters in question without necessarily having personal knowledge: *Twentieth Century Fox Home Entertainment Canada*

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[35] *O'Grady v Canada (Attorney General)*, 2016 FC 9 at paras. 19-20 ("***O'Grady FC***"), aff'd 2016 FCA 221 ("***O'Grady FCA***"); P&H Book of Authorities, Tab 5.

[36] *O'Grady FC*, *supra* at para 20; P&H Book of Authorities, Tab 5.

Limited v Canada (Attorney General), 2012 FC 823.[37]

63. As well as being CEO, Mr. Heimbecker is in charge of P&H's grain business for all of Canada in his role as the President Grain Division Canada. As reflected in the P&H Statement, Mr. Heimbecker was closely involved in the transaction to acquire the former LDC Elevators and in the ongoing management of P&H's relationship with farms which sold to the Virden or Moosomin Elevators, or both, after the Acquisition was completed.

64. The impugned statements in paragraphs 166, 167 and 170 of the P&H Statement on information and belief from the manager of the Virden Elevator (Mr. Klippenstein) satisfy both elements of the Federal Court of Appeal's Corporate Subordinate Exception. First, the evidence is corporate in nature. More particularly, the evidence relates to the ordinary course of business at the Virden Elevator at the time it was acquired by P&H and concerns adherence to CGC grading standards and procedures, the assessment of FN and the purchase of low protein wheat at that Elevator. Second, Mr. Klippenstein is Mr. Heimbecker's subordinate and, as President Grain Division Canada, Mr. Heimbecker is ultimately responsible for Mr. Klippenstein. Accordingly, like the Director General in *O'Grady*, Mr Heimbecker, by virtue of his responsibilities at P&H, was in a position to depose to the matters in question without necessarily having personal knowledge.

65. Similarly, the impugned statements in paragraph 174 of the P&H Statement on information and belief from [redacted] also meet the Corporate Subordinate Exception. That evidence is corporate in nature, relating to the ordinary course of business at the Moosomin and Virden Elevators; namely, whether P&H had forced Mr. [redacted] to take samples of his grain to the Moosomin Elevator and whether Mr. [redacted] has, in fact, continued to deliver his grain to the Virden Elevator, as he did prior to P&H's Acquisition of that Elevator. [redacted] is Mr. Heimbecker's subordinate and Mr. Heimbecker

[37] *O'Grady FCA*, *supra* para 10; P&H Book of Authorities, Tab 5.

is ultimately responsible for [redacted]. As such, under the exception stated by the Court of Appeal, Mr. Heimbecker was in a position to depose to the matters in question without necessarily having personal knowledge. Additionally, P&H has produced a business record corroborating that Mr. [redacted] continues to deliver his grain to the Virden Elevator, as he did prior to the Acquisition.[38]

66. There is no unfairness to the Commissioner from this result. The Commissioner has various means available to him to deal with the issues in dispute and to conduct effective cross-examination of Mr. Heimbecker, including (but not limited to) seeking documents and information from Mr. [redacted] and Mr. [redacted], LDC and/or ADM, as he has previously.[39]

C. In the Alternative, the Tribunal Should Exercise its Discretion to Defer Ruling on Admissibility Until the Hearing or its Decision on the Merits

67. In the alternative, if the concerns raised by the Commissioner with respect the Disputed Paragraphs were found by the Tribunal to have any merit at all (which is not admitted), this is not a clear case in which the Tribunal should rule on the admissibility of evidence on a preliminary motion. Rather, the Tribunal should exercise its discretion to determine whether or not the Disputed Paragraphs constitutes improper lay opinion evidence or inadmissible hearsay at the hearing of this matter or at the time of its decision on the merits, after Mr. Heimbecker has been subject to cross-examination by counsel for the Commissioner and questioning by the panel.

68. The Tribunal's jurisprudence establishes that only in clear cases will the Tribunal be ready to find proposed lay witness evidence inadmissible on a preliminary motion, prior to the witness being examined, cross-examined and questioned by the panel. *Canada (Commissioner of Competition) v Vancouver Airport Authority* and other decisions of the Tribunal establish that, as long as fairness is respected, rulings on the admissibility of evidence, including evidence

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[38] See Tab 8 of P&H's Responding Motion Record.

[39] See Witness Statement of Archer-Daniels-Midland Company dated September 3, 2020, Witness Statement of [redacted] dated August 11, 2020 and the Witness Statement of Louis Dreyfus Company Canada ULC dated September 3, 2020; P&H Motion Record, Tab 9.

alleged to constitute improper lay opinion evidence and/or inadmissible hearsay, should wait until the hearing or the Tribunal's decision on the merits.[40]

69. For example, in *Nadeau Poultry Farm Ltd v Groupe Westco Inc*, the Tribunal deferred ruling on the admissibility of alleged hearsay evidence in certain witness statements until its decision on the merits.[41]

70. Similarly, in *VAA*, the Tribunal deferred determining whether witness statements filed by Air Transat and Jazz constituted improper lay opinion evidence and/or inadmissible hearsay until it issued its decision on the merits.[42] In that case, the Tribunal explained its decision to defer ruling on admissibility with reference to the following considerations:

- that an assumption of lack of personal knowledge needs to be established in order to convince the Tribunal that proposed evidence should be ruled inadmissible at an early stage;

- that VAA had not persuaded the Tribunal that the facts as set out in the Witness Statements are not within the knowledge, understanding, observation or experience of Ms. Stewart and Ms. Bishop, or that Ms. Stewart and Ms. Bishop did not observe the facts contained in their respective Witness Statements with respect to the Disputed Evidence;

- that the Tribunal considered that it would be best placed at the hearing, after the witnesses had been called to testify by the Commissioner under oath and subject to cross-examination and questioning by the panel, to determine whether or not the Disputed Evidence constitutes improper lay opinion evidence and/or inadmissible hearsay, and to rule on its admissibility;

- that the testimonies of Mss. Stewart and Bishop will provide better factual context to assist the Tribunal in making a determination on the admissibility of the Disputed Evidence and, in particular, that the scope of personal knowledge of Mss. Stewart and Bishop with respect to the Disputed Evidence is a matter that will be clarified at the time of their testimonies before the Tribunal;

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[40] See *VAA Preliminary Motion*, *supra* at paras 12-22; P&H Book of Authorities, Tab 2.
[41] *Nadeau Poultry Farm Ltd v Groupe Westco Inc*, 2009 Comp Trib 6 at paras 80-81; Commissioner's Book of Authorities, Tab 6.
[42] See *VAA Merits*, *supra* at paras 128-61; P&H Book of Authorities, Tab 2.

- that VAA had not established that it would suffer prejudice if the Disputed Evidence was not ruled inadmissible prior to the hearing and, since VAA will have the ability to test the Disputed Evidence on cross-examination, the Tribunal is satisfied that no issue of procedural fairness arises if the Tribunal rules on the admissibility of the Disputed Evidence at a later stage; and

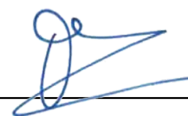
- that in exercising its discretion to defer ruling on the admissibility of the Disputed Evidence at this stage, the Tribunal still retained the ability to reject such evidence as inadmissible at the hearing, after the testimonies of each of Ms. Stewart and Ms. Bishop, or at the time of its decision on the merits.

71. The Tribunal's reasoning in *VAA* applies with equal force to the present matter.

PART V: ORDER SOUGHT

72. P&H respectfully requests that the Commissioner's motion be dismissed with costs or that the Tribunal grant such other relief as may be just and reasonable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2ND DAY OF DECEMBER, 2020



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Authorities and Statutes

***Canada Grain Regulations*, CRC, c 889**

Primary Elevator Reports

26 Each primary elevator licensee shall submit to the Commission

- **(a)** every week, in an electronic format acceptable to the Commission, a report respecting the licensee's operations during the preceding week; and

- **(b)** no later than October 15 in each crop year, on the appropriate form supplied by the Commission or in an electronic format acceptable to it, a report respecting the licensee's operations during the preceding crop year for each primary elevator operated by the licensee.

Terminal Elevator Reports

27 Every day, the operator of a terminal elevator shall submit to the Commission, in an electronic format acceptable to the Commission, a report respecting the elevator's operations during the preceding day.

***Competition Tribunal Act*, RSC, 1985, c 19 (2nd Supp)**

Proceedings

9 (2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

***Notifiable Transactions Regulations*, SOR/87-348**

Information Required

16 (1) For the purposes of subsection 114(1) of the Act and subject to subsection (2), the following information is to be supplied to the Commissioner:

> **(d)** in respect of each party, and each of its affiliates referred to in subparagraph (c)(iii), all studies, surveys, analyses and reports that were prepared or received by an officer or director of the corporation — or in the case of an unincorporated entity, an individual who serves in a similar

capacity — for the purpose of evaluating or analysing the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into new products or geographic regions and, if not otherwise set out in that document, the names and titles of the individuals who prepared the document and the date on which it was prepared.

***Federal Court Rules*, SOR/98-106**

Content of affidavits

81 (1) Affidavits shall be confined to facts within the deponent’s personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent’s belief, with the grounds for it, may be included.

Affidavits on belief

(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.