

Competition Tribunal



Tribunal de la Concurrence

Citation: *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 14

File No.: CT-2019-005

Registry Document No.: 160

**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.

BETWEEN:

**The Commissioner of Competition**  
(applicant)

and

**Parrish & Heimbecker, Limited**  
(respondent)



Date of case management conference: December 4, 2020

Before: D. Gascon J. (Chairperson)

Date of order: December 9, 2020

**ORDER ON THE HEARING FORMAT**

[1] **FURTHER TO** the application filed by the Commissioner of Competition (“**Applicant**”) on December 19, 2019 against the Respondent Parrish & Heimbecker, Limited (“**Respondent**”), pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34, with respect to the acquisition by the Respondent of a primary grain elevator located in Virden, Manitoba (“**Application**”);

[2] **AND FURTHER TO** the Scheduling Order issued by the Tribunal on March 4, 2020 and its various subsequent amendments, which led to the most recent revised schedule for the remaining pre-hearing steps and the hearing of the Application issued by way of an Order dated November 13, 2020;

[3] **AND WHEREAS**, in light of the constraints imposed by the COVID-19 pandemic, the Tribunal and counsel for the parties have explored various options to hold the hearing remotely by way of video conference while allowing for the examinations and cross-examinations of some fact and expert witnesses in person;

[4] **AND WHEREAS**, in the Scheduling Order dated October 16, 2020 setting out the format for the hearing of the Application in November-December 2020, the Tribunal had contemplated that, for the testimonies of the fact witnesses, counsel and witnesses would appear in person in a hearing room facility located in Winnipeg, Manitoba, while the Tribunal panel members would be in the Tribunal hearing room in Ottawa, and that all participants would be connected via a Zoom video conferencing platform to be used by the Tribunal;

[5] **AND WHEREAS**, following the sudden and unexpected unavailability of the Respondent’s expert witness, the hearing of the Application had to be adjourned and was eventually postponed to January-February 2021;

[6] **AND WHEREAS**, in the Scheduling Order dated November 13, 2020, the Tribunal established a new schedule for the pre-hearing steps and for the hearing of the Application, but reserved the determination of the hearing format for the testimonies of the fact witnesses;

[7] **AND WHEREAS**, at the case management conference held on December 4, 2020, counsel for the parties discussed the hearing format to be retained by the Tribunal for the first two weeks of the evidentiary portion of the hearing, when the fact witnesses are scheduled to testify;

[8] **AND WHEREAS**, in light of the most recent developments in the COVID-19 pandemic, counsel for the parties no longer agree on the preferred format for the hearing of the testimonies of the fact witnesses. More specifically, counsel for the Applicant submits that, because of the increased health risks and government restrictions, the fact witnesses should testify remotely by way of video conference whereas counsel for the Respondent submits that a hybrid virtual hearing could still be arranged, with the fact witnesses testifying in person in a hearing room facility located in Virden, Manitoba. Counsel for the Respondent has obtained the required exemption under Manitoba’s COVID-19 Prevention Orders and the protocols they have proposed for the hearing room facility in Virden, Manitoba comply with the public health orders currently in place.

[9] **AND WHEREAS** the Tribunal recognizes the importance of reducing the spread of COVID-19 and prioritizes the health and safety of all Tribunal participants, including panel

members, Registry officers, other Tribunal staff, counsel, witnesses, stenographers and security personnel.

[10] **AND UPON** considering that, for the immediate future and until a vaccine against COVID-19 is widely available in Canada, or until public health officials otherwise relax the current gathering and travel restrictions, the Tribunal hearings will preferably have to be conducted remotely using the appropriate, available technology.

[11] **AND UPON** considering that the hearing of this Application is scheduled to start in less than a month and the Tribunal now has to determine with a sufficient degree of certainty how the hearing can proceed in the current exceptional circumstances created by the COVID-19 pandemic, taking into consideration logistical requirements.

[12] **AND UPON** determining that, for the following reasons, the examinations and cross-examinations of the fact witnesses shall be conducted remotely by way of video conference:

- (a) The Tribunal had already indicated, in its Scheduling Orders dated October 16, 2020 and November 13, 2020, that the panel members and the Tribunal Registry staff would not be travelling to Manitoba and would be hearing any witnesses appearing in person in Manitoba by way of video conference;
- (b) The COVID-19 pandemic has considerably worsened in Canada in the last two weeks, with the number of cases reaching unprecedented record levels in most Canadian provinces, including Ontario and Manitoba;
- (c) The health authorities across Canada expect that the situation will continue to worsen between now and mid-January 2021, and in the early months of 2021;
- (d) On November 27, 2020, the Federal Court of Appeal decided to suspend all hearings between December 21, 2020 and January 17, 2021 and the Federal Court suspended all in-person hearings between those dates;
- (e) In light of the recent guidance from the federal health authorities, the recent federal government's recommendations and measures, and the recent decisions of the Federal Courts to suspend in-person hearings in the coming weeks, the Tribunal has determined that the panel members as well as the Tribunal Registry staff, stenographers and security personnel will not be present in person in the Tribunal hearing room in Ottawa until at least January 17, 2021;
- (f) Furthermore, as a federal quasi-judicial body, the Tribunal acts in compliance with the directions and recommendations of the federal public health authorities, which strongly advise against any form of public gatherings;
- (g) On balance, the evolution of the COVID-19 pandemic, the current health considerations and the governments' orders, recommendations and measures now in place across Canada no longer justify that the examinations and cross-examinations of the fact witnesses be held in person in early January 2021 and

instead require that the first two weeks of the hearing shall be held entirely remotely by way of video conference;

- (h) As explained in more detail below, the Tribunal is satisfied that proceeding to hear the testimonies of the fact witnesses remotely by way of video conference will offer a fair, effective and equitable process to all parties in this Application.

[13] **AND WHEREAS** counsel for the Applicant has indicated that all fact witnesses to be called by the Applicant will be able to testify from a secured location in Virden, Manitoba where a proper fibre optic connection will allow the testimonies of these fact witnesses to occur remotely through the Zoom video conferencing platform to be used by the Tribunal.

[14] **AND WHEREAS** the Tribunal understands that all fact witnesses to be called by the Respondent will be able to testify remotely from locations having adequate fibre optic connections, and that counsel for the Applicant has no objection to conducting the cross-examinations of the Respondent's fact witnesses remotely by way of video conference.

[15] **AND UPON** considering that, in their submissions, counsel for the Respondent however raised concerns with having to proceed with the cross-examinations of the Applicant's fact witnesses by way of video conference;

[16] **AND UPON** being satisfied that, for the following reasons, proceeding with the cross-examinations of the fact witnesses by way of video conference does not, in and of itself, raise procedural fairness issues:

- (a) The Tribunal acknowledges that counsel for the Respondent may perceive and be of the view that it would be fairer and more effective for them to conduct their cross-examinations in the usual in-person format, and that a hearing by video conference will be different from a hearing in person;
- (b) The Tribunal also acknowledges that having to conduct cross-examinations by video conference with counsel in a physical location other than the witness' may be discomfoting for litigators accustomed to in-person cross-examinations, that it may be inconvenient, that it may lead to some lack of spontaneity, and that it goes against the habits and experiences of many litigators;
- (c) The Tribunal further recognizes that it may be easier to prefer the familiar to the lesser known, or the tried to the untried. But a process does not become unfair or ineffective because it is new or less convenient. Having to do things differently does not mean that they are being done unfairly, or even in a less fairly manner;
- (d) Here, the Tribunal is not persuaded that a fair hearing that respects the interests of the parties and allows their cases to be fully presented and argued cannot be conducted by video conference, or that cross-examinations of the fact witnesses by way of video conference will cause prejudice to the Respondent, to the point where the process would become unfair or ineffective;

- (e) In other words, procedural unfairness concerns are not inherent to the format of cross-examinations by video conference, nor is the assessment of the credibility of witnesses rendered inherently more difficult for the Tribunal in this context;
- (f) The Tribunal will have all the necessary arrangements and protocol in place to ensure a fair and equitable hearing for all parties, and the Tribunal remains open to comments from the parties regarding the contents of the draft Direction on witness protocol it will be issuing concurrently with this Order;
- (g) Furthermore, if at any point, counsel for the Respondent has any specific concerns about an alleged prejudice or about a potential abuse of technology by any witness, they will be able to raise it with the Tribunal during the examinations or cross-examinations and the Tribunal will be able to address such concerns as they arise;
- (h) The Tribunal underlines that, if any procedural fairness concerns arise, it will be up to counsel to raise them immediately as they occur so that the Tribunal can make any appropriate adjustments to ensure a fair and equitable hearing;
- (i) When all circumstances are considered and balanced, the Tribunal is satisfied that conducting cross-examinations by way of video conference with counsel not necessarily physically present in the same room as the witness will provide a fair and effective opportunity for cross-examination in this matter. Although the Tribunal understands that it may be a less preferable option for counsel for the Respondent, it is not convinced that proceeding in this way will necessarily be less fair or less effective, let alone unfair or ineffective, to the point where it cannot be an acceptable and procedurally fair solution in these exceptional circumstances caused by the COVID-19 pandemic.

[17] **AND WHEREAS** the Tribunal is satisfied that the hearing format set out herein respects the principles found in subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2<sup>nd</sup> Supp) and will allow it to deal with the Application as informally and expeditiously as the circumstances and considerations of fairness permit. In the Tribunal's view, the requirement for an informal, expeditious and fair determination of matters before it does not mandate that parties invariably have the mode of hearing they prefer, or that hearings necessarily have to occur in person despite the exigencies of a pandemic.

**THE TRIBUNAL ORDERS THAT:**

[18] The format of the hearing for the first two weeks of the evidentiary portion of the hearing (i.e., on January 6-7 and 11-15, 2021) will be entirely virtual, with the panel members, the fact witnesses and counsel for the parties joining remotely via the Zoom video conferencing platform to be used by the Tribunal.

[19] As indicated in the Tribunal Order of November 13, 2020, the format of the hearing for the testimony of expert witnesses (i.e., on January 19-21, 2021) and for the final oral argument (i.e., on February 3-4, 2021) will remain as follows for the time being:

For the testimony of expert witnesses, some counsel and witnesses will appear in person in the Tribunal hearing room located at 90 Sparks Street in Ottawa (where the Tribunal panel members will also be), with other participants joining the hearing virtually via the video conferencing platform. For the final oral argument, the Tribunal panel members will be in the Tribunal hearing room in Ottawa, and counsel may appear in person or virtually via the video conferencing platform.

**[20]** In the event that public health restrictions are modified or that governments issue new orders or recommendations regarding the COVID-19 pandemic, alternative arrangements may have to be made to the hearing format for the testimony of expert witnesses and/or for the final oral argument.

**[21]** Concurrently with this Order, the Tribunal will be issuing a draft Direction setting out the protocol to be followed by witnesses and counsel for the testimonies by way of video conference, on which the parties will be invited to provide comments.

DATED at Ottawa this 9<sup>th</sup> day of December 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

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