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Date: October 23, 2020

CT- 2019-005

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Annie Ruhlmann for / pour  
REGISTRAR / REGISTRAIRE

CT-2019-005

OTTAWA, ONT.

Doc. # 205

**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**

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**AFFIDAVIT OF ANDREW C. HARINGTON  
(AFFIRMED OCTOBER 23, 2020)**

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1. My name is Andrew C. Harington. I am a Chartered Professional Accountant (formerly referred to as a Chartered Accountant), Chartered Financial Analyst charterholder, and Chartered Business Valuator. I am a Principal in the Toronto office of The Brattle Group. Prior to joining The Brattle Group in 2016, I was a Managing Director at Duff & Phelps since 2010, and a partner at its predecessor

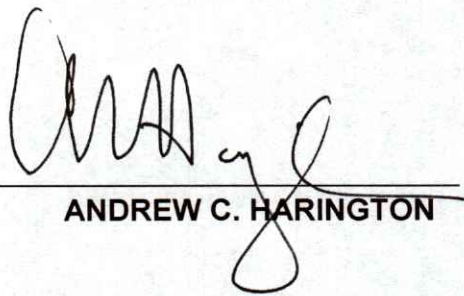
firm, Cole & Partners. Before this, I had over 7 years of experience in mergers and acquisitions, advisory, corporate restructuring and financial advisory services.

2. I have extensive experience in quantifying efficiencies in competition-related matters including for the Competition Bureau and private parties regarding mergers, or proposed mergers, involving, among others, Agrium Inc., BCE Inc, Cintas Corporation, Superior Plus Corp, CCS Corporation (subsequently renamed Tervita Corporation), West Fraser Timber Co. Ltd., Rogers Wireless Communications Inc., Labatt Brewing Company Limited, Yellow Pages Group Inc., American Iron & Metal Company Inc. and Suncor Energy Inc. I have also been qualified by the Tribunal as an expert in the quantification of efficiencies.
3. I have been asked by the Commissioner of Competition to prepare a report examining the efficiencies under section 96 of the Act, if any, with respect to the acquisition of grain elevators and related assets from Louis Dreyfus Company by Parrish & Heimbecker, Limited.
4. I attach as Exhibit "A" to this affidavit my report setting out my opinion and attached as Appendix A to my report is my curriculum vitae.
5. I attach as Exhibit "B" to this affidavit my Acknowledgement of Expert Witness.

**AFFIRMED before me at the** )  
 City of Ottawa, Province of Ontario )  
 October 23, 2020 in accordance )  
 With O.Reg 431/20, Administering Oath )  
 Or Declaration Remotely. )



\_\_\_\_\_  
 A Commissioner for Taking Affidavits, etc. )



\_\_\_\_\_  
**ANDREW C. HARINGTON**



CT-2019-005

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**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**

---

**AFFIDAVIT OF ANDREW C. HARINGTON**  
**(AFFIRMED OCTOBER 23, 2020)**

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Exhibit A to the Affidavit of  
**Andrew C. Harington**  
Affirmed on October 23, 2020



# The Commissioner of Competition v. Parrish & Heimbecker, Limited

Reply to the Witness Statement of Mr. John  
Heimbecker as it Relates to Section 96 Efficiencies

**PREPARED BY**

Andrew C. Harington CPA, CA, CFA, CBV



October 23, 2020

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**CONFIDENTIAL LEVEL A**

Ms. Ellé Nekiar  
50 Victoria St  
Gatineau, Quebec K1A 0C9

Mr. Jonathan Hood  
151 Yonge Street  
Toronto, Ontario M5C 2W7

Attention: Ms. Nekiar and Mr. Hood

**Re: CT-2019-005 The Commissioner of Competition v. Parrish & Heimbecker, Limited**

## I. Introduction

1. On December 10, 2019, Parrish & Heimbecker, Limited (“P&H” or the “Respondent”) acquired all ten primary grain elevators owned by Louis Dreyfus Company Canada ULC (“Louis Dreyfus” or “LDC”) in Western Canada (the “Transaction”).<sup>1</sup> On December 19, 2019, the Commissioner of Competition filed a Notice of Application (the “Notice of Application”) with the Competition Tribunal (the “Tribunal”) seeking, among other things, an order under section 92 of the *Competition Act*<sup>2</sup> (“Act”) for P&H to divest either the elevator previously owned by Louis Dreyfus on the TransCanada Highway in Virden, Manitoba (the “Virden Elevator”) or P&H’s elevator located on the TransCanada Highway in Moosomin, Saskatchewan (the “Moosomin Elevator”) (the “Order”).<sup>3</sup>

<sup>1</sup> Notice of Application, December 19, 2019, The Commissioner of Competition v. Parrish & Heimbecker, Limited, CT-2019-005, ¶2.

<sup>2</sup> Competition Act, R.S.C. 1985, c. C-34.

<sup>3</sup> Notice of Application, ¶36.a.



2. Mr. John Heimbecker, the Chief Executive Officer and President Grain Division Canada of P&H (“Mr. Heimbecker”), prepared a witness statement (the “Heimbecker Statement”) in which he provides testimony on, among other things, matters relating to efficiencies.<sup>4</sup>
3. The Commissioner of Competition (the “Commissioner”) has asked me to comment, where appropriate, on the Heimbecker Statement as it relates to an assessment of efficiencies under section 96 of the Act.

## II. Professional Qualifications and Expertise

4. I am a Chartered Professional Accountant (formerly referred to as a Chartered Accountant), Chartered Financial Analyst charterholder, and Chartered Business Valuator. I am a Principal in the Toronto office of The Brattle Group. Prior to joining The Brattle Group in 2016, I was a Managing Director at Duff & Phelps since 2010, and a partner at its predecessor firm, Cole & Partners. Before this, I had over 7 years of experience in mergers and acquisitions, advisory, corporate restructuring and financial advisory services.
5. I have extensive experience in quantifying efficiencies in competition-related matters including for the Competition Bureau and private parties regarding mergers, or proposed mergers, involving, among others, Agrium Inc., BCE Inc., Cintas Corporation, Superior Plus Corp, CCS Corporation (subsequently renamed Tervita Corporation), West Fraser Timber Co. Ltd., Rogers Wireless Communications Inc., Labatt Brewing Company Limited, Yellow Pages Group Inc., American Iron & Metal Company Inc. and Suncor Energy Inc. I have also been qualified by the Tribunal as an expert in the quantification of efficiencies.
6. A copy of my curriculum vitae is attached as Appendix A.

<sup>4</sup> Witness Statement of John Heimbecker, October 13, 2020, The Commissioner of Competition v. Parrish & Heimbecker, Limited, CT-2019-005.

7. I have no interest, financial or otherwise, in the subject of my opinion. I understand that I have an obligation to be independent as an expert witness and I confirm that I have read, understood and signed the Acknowledgement of Expert Witness.
8. I have prepared this report with the assistance of other professionals at The Brattle Group under my direction and supervision. The Brattle Group is being compensated on an hourly basis for the time I have taken to prepare my report and to testify.
9. This report constitutes an Expert Report as defined by the CBV Institute (formerly the Canadian Institute of Chartered Business Valuators) and is prepared in the context of an “Investigative and forensic accounting engagement” as defined in the “Standard Practices for Investigative and Forensic Accounting Engagements” issued by CPA Canada (formerly the Chartered Accountants of Canada), and has been prepared in conformity with those standards by persons acting independently and objectively. The fees payable under the terms of my engagement agreement are not contingent upon an action or event resulting from the use of my report. See the Restrictions and Limitations section of this report (section XI) for further discussion.

### III. Mandate

10. The Commissioner has asked me to comment, where appropriate, on the Heimbecker Statement as it relates to an assessment of efficiencies under section 96 of the Act. In doing so, the Commissioner has asked me to comment on whether, and if so the extent to which, the efficiencies that Mr. Heimbecker identifies (whether or not Mr. Heimbecker has quantified these claimed efficiencies) are cognizable under section 96 of the Act and would likely be lost if the Order were made.
11. My report should be read in conjunction with the Heimbecker Statement.
12. For clarity, the Commissioner has not asked me to opine on the trade-off assessment whereby the cognizable efficiencies are compared to the anti-competitive effects.

Therefore, my report does not consider issues beyond the scope of cognizable efficiencies, including anti-competitive effects, the appropriate welfare standard, or other matters of interpretation regarding the comparison of efficiencies to anti-competitive effects (including the balancing of qualitative and quantitative evidence).

## IV. Summary of Conclusions

13. Based on the scope of my review and subject to the assumptions, restrictions, and limitations noted herein, in my opinion, the Heimbecker Report has not identified and quantified any cognizable efficiencies under section 96 of the Act that would be lost in the event of the Order.
14. As it relates to Mr. Heimbecker's claimed efficiencies associated with the actual and forecast increases in 2020 throughput at the Virden Elevator, in order to qualify as a cognizable efficiency, any increased throughput on P&H's network must:
  - a. Result from an increase in farmers' grain production that would not likely have occurred absent the Transaction;
  - b. Result from an increase in farmers' grain production and not simply increases in throughput at P&H's facilities achieved by cannibalizing volume from other facilities;  
and
  - c. Not be likely to occur in the event of the Order.
15. Based on the documents I have seen, in my opinion:
  - a. The Transaction is not likely to have caused the actual increase in grain production in the first seven months of 2020;
  - b. The forecast increase in throughput at the Virden Elevator in the last five months of 2020 [REDACTED]

c. [REDACTED]  
[REDACTED]  
[REDACTED] and

d. Any efficiencies generated by the Transaction could be equally achieved by a likely purchaser and therefore not be lost in the event of the Order.

16. For further discussion on Mr. Heimbecker’s claimed throughput efficiencies at the Virden Elevator, see section IX.

17. Mr. Heimbecker also raises other benefits to P&H from the Transaction. As it relates to these other benefits to P&H, in my opinion:

a. **Network Logistics Benefits**

Mr. Heimbecker explains that the Transaction allows [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED] while still meeting customer demand, could potentially be a cognizable efficiency. However, Mr. Heimbecker has failed to (1) quantify these cost savings or provide any information to do so, and (2) demonstrate that, or the extent to which, any such savings would be lost in the event of the Order.

For further discussion, see section X.A.

<sup>5</sup> Heimbecker Statement, ¶43, 44, and 53.

b. **P&H's Efficient Vancouver Area Terminals**

[REDACTED]

[REDACTED] Increased volume on P&H's network directed to [REDACTED] could potentially be a cognizable efficiency. However, (1) [REDACTED] and (2) there is no evidence in the Heimbecker Statement that, or the extent to which, [REDACTED] [REDACTED] would be lost in the event of the Order. In particular, all of the likely purchasers operate in Vancouver and one of them (GrainsConnect Canada) even operates out of FGT, the same facility as P&H.

For further discussion, see section X.B; and

c. **Crop Inputs ("CI") Expansion**

Mr. Heimbecker explains that P&H will make capital investments in each of the acquired Louis Dreyfus facilities, including the Virden Elevator, to convert standalone grain facilities to dual grain and retail crop inputs facilities, which will benefit P&H through increased CI sales. Specifically, Mr. Heimbecker explains that 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."<sup>7</sup>

[REDACTED]

[REDACTED]

[REDACTED] This is the case even if, as Mr. Heimbecker claims, some portion of those CI sales at a converted Virden Elevator are new sales rather than cannibalization of retail suppliers. Further, any economic output expansion from a future increase in grain production as a result of P&H's planned CI conversion at the

<sup>6</sup> Heimbecker Statement, ¶44. See also ¶54.

<sup>7</sup> Heimbecker Statement, ¶55.

Viriden Elevator needs to consider only incremental output from increased farmers' CI application, and also needs to consider the costs and timing to implement the CI conversion such that there may be no likely cognizable section 96 efficiencies.

For further discussion, see section X.C.

18. Unless otherwise indicated, all figures in this report are in Canadian dollars.

## V. Scope of Review

19. In reaching my conclusions, I have reviewed and relied upon information from the documents listed in Appendix B.
20. Except as otherwise noted herein, I have not audited or otherwise verified the information listed in Appendix B. My conclusions are dependent upon the accuracy of this information.

## VI. Cognizable Efficiencies Under Section 96 of the Act

21. In this section, I set out my understanding of the framework for quantifying cognizable efficiencies under section 96 of the Act. This understanding informs my opinion on the validity of Mr. Heimbecker's efficiency and benefit claims, which are outlined in sections IX and X below.
22. My understanding of the framework for quantifying cognizable efficiencies under section 96 of the Act is based on the relevant legislation (particularly section 96 of the Act), the relevant jurisprudence on efficiencies (outlined below), the Competition Bureau's 2011 Merger Enforcement Guidelines ("MEGs"),<sup>8</sup> and my professional experience summarized above relating to evaluating efficiencies under section 96 of the Act.

<sup>8</sup> Merger Enforcement Guidelines, Competition Bureau Canada, October 6, 2011.

23. Section 96 of the Act states the following:

**Exception where gains in efficiency**

**96 (1)** The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

**Factors to be considered**

**(2)** In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

- (a) a significant increase in the real value of exports; or
- (b) a significant substitution of domestic products for imported products.

**Restriction**

**(3)** For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

24. The following four cases have interpreted section 96:

- a. The Tribunal's Reasons and Order in "*Hillsdown*" (1992);<sup>9</sup>
- b. The Tribunal's Reasons and Order Regarding the Sufficiency of Particulars in "*Canadian Pacific*" (1997);<sup>10</sup>
- c. The series of Tribunal and Federal Court of Appeal ("FCA") decisions in "*Superior Propane*";<sup>11</sup> and

<sup>9</sup> Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd., 1992 (CanLII) 2092 (CT), 41 C.P.R. (3d) 289 (Comp. Trib.).

<sup>10</sup> Canada (Director of Investigation & Research) v. Canadian Pacific Ltd., 1997 73 C.P.R. (3d) 573 (Comp. Trib.).

<sup>11</sup> Canada (Commissioner of Competition) v. Superior Propane Inc., 2000 CACT 15 (CanLII), 2000 Comp. Trib. 15, 7 C.P.R. (4th) 385 ("*Superior Propane I*"); Canada (Commissioner of Competition) v. Superior Propane Inc., 2001 FCA 104, [2001] 3 F.C. 185 ("*Superior Propane II*"); Canada (The Commissioner of

- d. The series of Tribunal, FCA, and Supreme Court of Canada (“SCC”) decisions in “*Tervita*” (or previously, “CCS”).<sup>12</sup>
25. As it relates to assessing cognizable efficiencies under section 96, the Tribunal’s ruling in *Tervita* provides significant guidance in that it sets out “five screens to eliminate efficiencies that are not cognizable under [section 96].”<sup>13</sup> These are referred to in this report simply as the “five screens.”
26. In addition, the MEGs “provide general direction on [the Competition Bureau’s] analytical approach to merger review.”<sup>14</sup> As noted in *Superior Propane I*, “[a]lthough the Tribunal and the Federal Court of Appeal have held [...] that the MEG’s are not sacrosanct nor legally binding, the Tribunal notes that they provide important enforcement guidelines reflecting the Commissioner’s view on how the Act should be interpreted.”<sup>15</sup>
27. Section 96 contains three components, identified below, that directly address what efficiencies qualify as cognizable (and which I will address in the following sequence despite their ordering in the wording of section 96):
- a. The first component, in section 96(1), states “the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency.” [Emphasis added]
  - b. The second component, in section 96(3), states “the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in

Competition) v. Superior Propane Inc., 2002 CACT 16 (CanLII), 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417 (“*Superior Propane III*”), aff’d 2003 FCA 53, [2003] 3 F.C. 529 (“*Superior Propane IV*”).

<sup>12</sup> The Commissioner of Competition v. CCS Corporation et al., 2012 Comp. Trib. 14 (“*Tervita Tribunal*”); *Tervita Corporation v. Commissioner of Competition*, 2013 FCA 28 (CanLII) (“*Tervita FCA*”); *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 (CanLII), [2015] 1 SCR 161 (“*Tervita SCC*”).

<sup>13</sup> *Tervita Tribunal*, ¶261.

<sup>14</sup> MEGs, p. 1 (Foreward).

<sup>15</sup> *Superior Propane I*, ¶393.



efficiency by reason only of a redistribution of income between two or more persons.”  
[Emphasis added]

- c. The third component, in section 96(1), states “the gains in efficiency would not likely be attained if the order were made.” [Emphasis added]
28. In the remainder of this section of my report, I summarize my understanding of the case law and the MEGs as they relate to interpreting each of these three components of section 96 of the Act.

### A. The merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency

29. Two elements of this language from section 96(1) need to be addressed to understand its implication for efficiencies analysis. One is, simply, what is an “efficiency”? The other, broadly speaking, is that the efficiencies must be brought about by the merger.

## 1. Gains in Efficiency

30. Section 96 of the Act does not explain what “gains in efficiency” are. Even the purpose clause of the Act refers only generally to the concept of efficiency.<sup>16</sup>
31. The first of the five screens in *Tervita*, however, provides guidance in this regard by stating that the first screen “eliminates [efficiency] claims that do not involve a type of productive or dynamic efficiency, or that are not otherwise likely to result in any increase in allocative efficiency.”<sup>17</sup>

<sup>16</sup> Act, section 1.1: “The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.”

<sup>17</sup> *Tervita Tribunal*, ¶262.

32. The Tribunal also explains gains in efficiency in *Hillsdown*:

“Mergers can increase the efficiency of firms, for example, by enabling them to benefit from economies of scale (the unit cost of production decreases as the amount of output product increases); economies of scope (when lower costs are included in producing two or more products together than in producing them separately); dynamic efficiencies which arise because of improvements to product quality or innovation.”<sup>18</sup>

33. Relatedly, the MEGs, in setting out the types of efficiencies relevant under section 96 of the Act, state:

“In general, categories of efficiencies that are relevant to the trade-off analysis in merger review include the following:

- allocative efficiency: the degree to which resources available to society are allocated to their most valuable use;
- technical (productive) efficiency: the creation of a given volume of output at the lowest possible resource cost; and
- dynamic efficiency: the optimal introduction of new products and production processes over time.”<sup>19</sup>

34. With regards to productive efficiencies, the MEGs go on to state:

“Productive efficiencies result from real cost savings in resources, which permit firms to produce more output or better quality output from the same amount of input. [...]

<sup>18</sup> *Hillsdown*, p. 76.

<sup>19</sup> MEGs, ¶12.4.

Productive efficiencies include the following:

- cost savings at the product, plant and multi-plant levels;
- savings associated with integrating new activities within the firm; and
- savings arising from transferring superior production techniques and know-how from one of the merging parties to the other.”<sup>20</sup> [Emphasis added]

35. The Tribunal in *Tervita* also found that gains in efficiency must accrue to the Canadian economy. In particular, the fourth screen “filters out claimed efficiency gains that would be achieved outside Canada and would not flow back to shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders.”<sup>21</sup>
36. In this regard, the MEGs provide the following example of efficiency gains achieved outside of Canada that are excluded under section 96: “productive efficiency gains arising from the rationalization of the parties’ facilities located outside Canada that do not benefit the Canadian economy.”<sup>22</sup>

## 2. Efficiencies Must be Brought About by the Merger

37. Section 96 requires that efficiencies must be brought about or likely to be brought about by the merger. The jurisprudence elaborates on the test applied in evaluating whether efficiencies are brought about the merger, and also the evidentiary threshold for proving the efficiencies.
38. The second screen from *Tervita* “narrows the claimed efficiencies to those that the Tribunal is satisfied are likely to be brought about by the Merger. Efficiencies that cannot be

<sup>20</sup> MEGs, ¶12.14-15.

<sup>21</sup> *Tervita Tribunal*, ¶262.

<sup>22</sup> MEGs, ¶12.20.

demonstrated to be more likely than not to be attained in the Merger are filtered out at this stage.”<sup>23</sup> [Emphasis added]

39. Further, as the Tribunal found in *Hillsdown*, one must also consider “whether the efficiency gains would likely have been realized in the absence of the merger.”<sup>24</sup> [Emphasis added] In other words, likely alternatives to the merger (for example, in the event an order is made prohibiting the merger) are relevant to assessing cognizable efficiencies.

40. The MEGs further state, in this regard, that:

“The parties’ burden includes proving that the gains in efficiency

- are likely to occur. In other words, the parties must provide a detailed explanation of how the merger or proposed merger would allow the merged firm to achieve the gains in efficiency. In doing so, the parties must specify the steps they anticipate taking to achieve the gains in efficiency, the risks involved in achieving these gains and the time and costs required to achieve them.
- are brought about by the merger or proposed merger (i.e., that they are merger-specific). The test under section 96(1) is whether the efficiency gains would likely be realized in the absence of the merger. Thus, if certain gains in efficiency would likely be achieved absent the merger, those gains are not counted for the purposes of the trade-off.”<sup>25</sup>

41. More generally, with regards to the evidence required to substantiate claimed efficiencies, the MEGs state that “the parties must be able to validate efficiency claims to allow the

<sup>23</sup> *Tervita Tribunal*, ¶262.

<sup>24</sup> *Hillsdown*, p. 77-78: “The Director’s position is that cost savings that do not arise uniquely out of the merger are not to be considered as efficiency gains. The respondents’ position is that the test to be applied is whether the efficiency gains would likely have been realized in the absence of the merger. The Tribunal accepts the respondents’ position.”

<sup>25</sup> MEGs, ¶12.13.

Bureau to ascertain the nature, magnitude, likelihood and timeliness of the asserted gains, and to credit (or not) the basis on which the claims are being made.”<sup>26</sup>

42. In *Canadian Pacific*, the Tribunal required the respondents to provide additional and more meaningful particulars on claimed efficiencies, and found that, to be a meaningful list of efficiency gains, “the further particulars are to include a brief description of the manner by which efficiency gains were or will be achieved...”<sup>27</sup>
43. Christine Lloyd’s dissent opinion in *Superior Propane I*, while not adopted by the majority, builds on this to illustrate the evidence that might be considered in an evaluation of the likelihood of a merger achieving claimed efficiencies. Ms. Lloyd states:

“regardless of the quantum of efficiencies that theoretically could be realized, the Tribunal has not been provided, in my opinion, with any evidence that they are likely to materialize post-merger.

In my view, the term “likely” used in section 96 requires more than the sole demonstration of the quantum of possible efficiencies. Rather, I believe that the term “likely” requires some evidence of the implementation process leading to the materialization of the claimed efficiencies. It is my opinion that evidence of this nature is necessary to provide the Tribunal with a level of assurance necessary to conclude that the efficiencies are likely to be realized post-merger (i.e., implemented by management). [...]

A business plan setting out the implementation process/action plan outlining time frames for each step of the integration of the merger is necessary to achieve the claimed efficiencies.<sup>28</sup> [Emphasis added]

<sup>26</sup> MEGs, ¶12.3.

<sup>27</sup> *Canadian Pacific*, p. 5.

<sup>28</sup> *Superior Propane I*, Dissent Opinion of Ms. Christine Lloyd, ¶486-487 and ¶490.

44. The Tribunal's majority reasons in *Superior Propane I* on the parties' claimed procurement efficiencies are illustrative of the likelihood threshold in practice. The Tribunal found as follows:

"The Commissioner submits that the procurement savings of \$3.28 million per year are largely pecuniary and not well documented. Indeed, in their report in rebuttal, the Commissioner's experts [...] note that the estimates are based solely on [the merging parties' expert's] experience in negotiating transportation contracts for other clients (confidential exhibit CA-3131 at 19).

The Tribunal finds that there is insufficient evidence to support the claimed savings in the [the merging parties' expert's] report. The Tribunal accepts the Commissioner's criticisms and consequently concludes that no savings have been established."<sup>29</sup>

45. On the issue of whether efficiency gains would likely be realized in the absence of the merger, alternative means of achieving efficiencies identified in the MEGs include "internal growth, a merger with a third party, a joint venture, a specialization agreement, and a licensing, lease or other contractual arrangement."<sup>30</sup> In *Hillsdown*, for example, the Tribunal discounted many of the claimed efficiencies on the basis that the merger did not give rise to the efficiencies (i.e., the merging parties did not successfully prove the efficiencies to have arisen from the merger as opposed to other means that would have occurred irrespective of the merger):

"The respondents have the onus of proving the existence of the efficiencies claimed, or the likelihood of their existence when the merger has not been consummated, on the balance of probabilities in the normal way. Many of the claimed efficiency gains in this case, as has been noted, have not been proven to have arisen out of the

<sup>29</sup> *Superior Propane I*, ¶¶347-348.

<sup>30</sup> MEGs, ¶12.20.

merger as opposed to having arisen as a result of the restructuring caused by the expropriation.”<sup>31</sup>

B. The Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons

46. The third screen from *Tervita* relates to the restriction on qualifying efficiencies provided in section 96(3):

“The third screen filters out claimed efficiency gains that would be brought about by reason only of a redistribution of income between two or more persons, as contemplated by subsection 96(3). These types of gains include savings that result solely from a reduction in output, service, quality or product choice, as well as from increases in bargaining leverage and reductions in taxes.”<sup>32</sup>

47. My understanding of the principle of section 96(3) is that efficiency gains must be real productive resource savings for the Canadian economy as a whole. This means that if efficiencies to the merging parties are counterbalanced by inefficiencies for other firms or consumers in the economy (i.e., represent a reallocation of wealth rather than a freeing up of productive resources), the efficiencies do not qualify as cognizable under section 96. Non-cognizable efficiencies of this nature are commonly referred to as “pecuniary” savings.<sup>33</sup>

<sup>31</sup> *Hillsdown*, p. 83.

<sup>32</sup> *Tervita Tribunal*, ¶262.

<sup>33</sup> See, e.g., *Superior Propane I*, ¶430: “it is important to distinguish true efficiencies, those savings that enable the firm to produce the same amount with fewer inputs, from “pecuniary” economies, those savings that increase shareholder profits but do not allow the firm to be more productive. This distinction is recognized in subsection 96(3) which excludes pecuniary efficiencies from consideration.”

48. In my experience, there are three types of non-cognizable efficiencies which do not pass the third screen:
- a. First are efficiencies that are simply a wealth transfer between organizations in Canada. For example, these may be cost savings from improved bargaining leverage or reductions in taxes. These types of pecuniary savings, in my view, should generally not qualify as “gains in efficiency” under section 96(1) to begin with – i.e., would not pass the first *Tervita* screen – because they are not real productive resource savings. Section 96(3), therefore, only provides further reassurance that the savings should not qualify under section 96. While perhaps pedantic, I believe it is important to distinguish real productive efficiencies that are excluded under section 96 *solely* because they are a redistribution of income between persons from those that would likely be excluded in any event because they are not real productive resource savings.
  - b. Second are true productive efficiencies to the merging parties that are offset by inefficiencies to other organizations in Canada. An example is increased economies of scale to the merging parties offset by decreased scale to another organization. While passing the first screen as “gains in efficiency,” these savings are eliminated under section 96(3).
  - c. Third are cost savings that result solely from a reduction in output, service, quality or product choice, as noted explicitly in the third screen. In my experience, in practice, cognizable productive efficiencies are often quantified on the basis of the reduced resource costs to produce the same level of output. In some cases, the efficiencies are measured based on constant costs with increasing output. Regardless, the same principle applies: efficiencies come from lower costs per unit of output, but savings that result from lower output do not qualify as cognizable efficiencies.



49. In *Hillsdown*, the Tribunal referred to excerpts of a speech from the Director of Investigation and Research, which it notes provides useful reference for the interpretation of section 96(3):

“... gains in efficiency that are pecuniary in nature, that is arising as a result of a distribution of income between two or more persons, are unacceptable.

By way of illustration, cost savings that result when a firm is able to use increased bargaining leverage to extract volume discounts from suppliers are not eligible per se for consideration. The fact that the purchaser is able to obtain products at a reduced cost in these circumstances is only a transfer of income from suppliers. However, cost savings resulting from larger volume orders, which enable the purchaser to attain economies of scale or incur lower transaction costs, may reflect real efficiency gains and consequently may be accepted for consideration. If the placement of larger volume orders also enables the supplier to reduce costs, part of which are transferred to the purchaser in the form of lower prices, then that part may also qualify as real efficiency gains. Other examples where such pecuniary gains in efficiency may arise, and are thus not allowable, might be found in labour procurement situations and tax savings matters. (C.S. Goldman, "Mergers, Efficiency and the Competition Act: Notes for an Address", Commercial and Consumer Workshop, Faculty of Law, McGill University, Montreal, Quebec, October 15, 1988).”<sup>34</sup>

50. In *Superior Propane I*, the Tribunal outlined how certain services and taxes might be considered under 96(3):

“At the hearing, the Tribunal suggested a principled way of distinguishing between pecuniary and real savings in the area of local services and taxes. If the firm receives an invoice for products or services provided by local government (e.g., the water

<sup>34</sup> *Hillsdown*, p. 81-82 at footnote 73.

bill from the local authority) and if the merged entity will use less of that product or service, then the savings are appropriately regarded as resource savings. Where it is not possible to determine whether property tax savings represent real resource savings or a pecuniary redistribution, the Tribunal agrees with the Commissioner that no claimed efficiency savings should be allowed.”<sup>35</sup>

51. The MEGs also provide illustrative examples of efficiencies that are redistributive in nature and thus do not qualify pursuant to 96(3): “examples include gains anticipated to arise from increased bargaining leverage that enables the merging parties to extract wage concessions or discounts from suppliers that are not cost-justified, and tax-related gains.”<sup>36</sup> The MEGs further state:

“[d]iscounts from a supplier resulting from larger orders that would enable the supplier to achieve economies of scale, reduced transaction costs or other savings may qualify, to the extent that the savings by the supplier can be substantiated. Mere redistribution of income from the supplier to the merged firm in the form of volume or other discounts is not an efficiency.”<sup>37</sup>

52. The MEGs also note that the Bureau excludes “savings resulting from a reduction in output, service, quality or product choice.”<sup>38</sup>

<sup>35</sup> *Superior Propane I*, ¶376.

<sup>36</sup> MEGs, ¶12.20.

<sup>37</sup> MEGs, ¶12.20 at footnote 65.

<sup>38</sup> MEGs, ¶12.20.

## C. The gains in efficiency would not likely be attained if the order were made

53. Efficiencies must be “order specific” to qualify under section 96. As stated in the Tribunal’s redetermination in *Superior Propane III*:

“The Commissioner may require that efficiency gains be merger-specific when deciding whether to challenge a merger. However, once an application is brought under the Act, included efficiency gains are “order-driven” rather than “merger-specific”. Since an order of the Tribunal is formulated based on its findings under section 92 of the Act, efficiency gains are evaluated in light of the order. Hence, efficiencies can have no influence on the order that the Tribunal formulates.”<sup>39</sup>

[Emphasis added]

54. The fifth screen from *Tervita* “filters out claimed efficiencies that either (1) would likely be attained through alternative means if the Tribunal were to make the order that it determines would be necessary to ensure that the merger in question does not prevent or lessen competition substantially, or (2) would likely be attained through the Merger even if that order were made.”<sup>40</sup>

55. To put this another way, as Justice Crampton states in his concurring reasons in *Tervita*, “[i]t bears emphasizing that, under section 96, the relevant counterfactual is the scenario in which the Section 92 Order is made. This is not necessarily the scenario in which the merger does not occur.”<sup>41</sup> With regards to assessing alternative means of achieving efficiencies if the order is made, Justice Crampton also states:

“In assessing whether efficiencies are likely to be achieved through alternative means, the Tribunal will assess the realities of the market(s) concerned, and will

<sup>39</sup> *Superior Propane III*, ¶149.

<sup>40</sup> *Tervita Tribunal*, ¶264.

<sup>41</sup> *Tervita Tribunal*, ¶396 (Justice Crampton Concurring Reasons).

not exclude efficiencies from its analysis on the basis of speculation that the efficiencies could *possibly* be achieved through such alternative means.”<sup>42</sup>

56. The MEGs also provide guidance on the order-specific language in section 96:

“To be considered under section 96(1), it must be demonstrated that the efficiency gains “would not likely be attained if the order (before the Tribunal) were made.” This involves considering the nature of potential orders that may be made, including those that may apply to the merger in its entirety or are limited to parts of the merger. Each of the anticipated efficiency gains is then assessed to determine whether these gains would likely be attained by alternative means if the potential orders are made. Where the order sought is limited to parts of a merger, efficiency gains that are not affected by the order are not included in the trade-off analysis.”

<sup>43</sup> [Emphasis added]

57. In *Tervita*, the Tribunal considered the efficiencies that would be achieved by a potential purchaser of divestiture assets as an alternative means of achieving efficiencies if the order was made. Even though the identity of the prospective purchaser was unknown, the Tribunal was satisfied that the divestiture would ultimately be made to a purchaser that would achieve many of the efficiencies that the respondent claimed, and thus excluded such efficiencies from consideration under section 96.<sup>44</sup> More generally:

“The Tribunal has decided that, absent exceptional circumstances, it will not be prepared to conclude that the claimed efficiencies that would be realized by any acceptable alternative purchaser should be included in the trade-off assessment, on

<sup>42</sup> *Tervita Tribunal*, ¶395 (Justice Crampton Concurring Reasons).

<sup>43</sup> MEGs, ¶12.9.

<sup>44</sup> *Tervita Tribunal*, ¶265-266.

the basis that it is not possible to identify any particular likely purchaser of the shares or assets contemplated by the divestiture order.”<sup>45</sup>

58. In my experience, the practical application of the Act’s order-specific requirement is a two-step process. First, one must assess the relevant “counterfactual” or “but for” world in the event the merger does not proceed in its entirety as contemplated due to a Tribunal order to that effect.<sup>46</sup> For example, an order to prevent the merger in its entirety could mean one of two things for the counterfactual: status quo, whereby the two parties continue to operate as they did pre-merger; or an alternative to the merger, such as the sale of the target or part thereof to an alternative purchaser. The appropriate counterfactual will depend on the facts and evidence involving a particular merger and sale process. My understanding is that, generally speaking, it is not the role of the expert to speculate on a hypothetical alternative purchaser or whether such a purchaser would be competitively acceptable, but if one or more acceptable purchasers is readily identifiable then the expert may appropriately consider this in assessing likely cognizable efficiencies.
59. Second, one must determine the differential between the cognizable efficiencies (net of costs to achieve the efficiencies, as discussed further below) in two states of the world: (1) the world with the merger as contemplated, and (2) the counterfactual world where a Tribunal order has prevented or amended the merger. This differential represents the lost cognizable efficiencies from the order, or as Justice Crampton states in his Concurring Reasons in *Tervita*, “the ‘cost’ to the economy that would be associated with making the order that the Tribunal has determined should otherwise be made under section 92.”<sup>47</sup>

<sup>45</sup> *Tervita Tribunal*, ¶267.

<sup>46</sup> As noted above, as Justice Crampton states in his Concurring Reasons in the Tribunal’s decision in *Tervita*, “the relevant counterfactual is the scenario in which the Section 92 Order is made.” *Tervita Tribunal*, ¶396.

<sup>47</sup> *Tervita Tribunal*, ¶391.

## D. Other Considerations

60. In addition to the wording of section 96 of the Act and its interpretations discussed above, there are several other considerations to quantifying cognizable efficiencies set out in the jurisprudence, MEGs, or based on my professional experience. I discuss each of these below.

### 1. Costs to Achieve the Efficiencies

61. The Tribunal has accepted that costs the merging parties incur to achieve claimed efficiencies are deducted for determining cognizable efficiencies. As the Tribunal found in *Superior Propane I* with respect to certain managerial compensation costs of achieving the efficiencies:

“The Tribunal agrees with the Commissioner that, in all relevant respects, the Management Agreement provides additional compensation to the managers for supplying additional managerial effort. Thus, these additional management fees are a true economic cost of achieving the efficiencies claimed by the respondents and hence are properly deducted from those efficiencies.”<sup>48</sup>

62. The MEGs more broadly state the Competition Bureau’s approach in considering costs required to achieve the efficiencies under section 96:

“Once all efficiency claims have been valued, the costs of retooling and other costs that must be incurred to achieve efficiency gains are deducted from the total value of the efficiency gains that are considered pursuant to section 96(1). Integrating two complex, ongoing operations with different organizational cultures can be a costly undertaking and ultimately may be unsuccessful. Integration costs are deducted from the efficiency gains.”<sup>49</sup>

<sup>48</sup> *Superior Propane I*, ¶340.

<sup>49</sup> MEGs, ¶12.19.

63. A common example of costs required to achieve efficiencies is severance costs when terminating redundant employees.<sup>50</sup> In my experience, employee termination costs are, technically, pecuniary, because no resource is utilized; these costs are quite literally income transfers between an employer and an employee. However, termination costs are generally considered a value proxy for the time delay between an employee's termination and his or her redeployment into productive use in the economy. In that sense, termination costs are a true resource cost of achieving the efficiencies in that they reflect the value lost to the economy from time a worker is not deployed productively. In this same vein, however, excessive termination costs (e.g., "golden parachute" payments to senior management) that do not properly reflect the value of lost productive time would be pecuniary and not true resource costs of achieving efficiencies.<sup>51</sup>
64. My understanding is that the same consideration of integration costs would apply to costs that a potential purchaser would incur to achieve efficiencies following a divestiture order. Such costs would serve to lessen the value of the efficiencies that would be deducted for the merging parties (or increase the cognizable efficiencies) on the basis that the efficiencies would likely be achieved in any event if the order were made.

<sup>50</sup> See, e.g., *Superior Propane I*, ¶320: "The report states that estimated annualized savings of \$15.4 million will arise from the elimination of redundancies and that, over 10 years, total projected savings will be \$141.5 million taking into account certain one-time gains (e.g., on asset disposals) and costs (such as severance) of achieving those savings (ibid. at 9-12 and appendix 1 at section A)."

<sup>51</sup> In my experience, the cost to the organization of employees exercising options or accelerated bonus entitlements are not considered costs of achieving efficiencies, because, while triggered by the transaction, these costs would have been incurred by the organization absent the transaction and are therefore not considered costs of the transaction.

## 2. Order Implementation Efficiencies

65. The SCC in *Tervita*, in agreement with the Tribunal and the FCA, found that efficiencies associated with the implementation of the order – referred to as “Order Implementation Efficiencies” or “OIEs” – are not cognizable under section 96 of the Act:

“Efficiencies that are the result of the regulatory processes of the Act are not cognizable efficiencies under s. 96. The OIEs result from the operation and application of the legal framework regulating competition law in Canada. The provision states that the *merger or proposed merger* must bring about or be likely to bring about gains in efficiency. The OIEs are efficiencies which are not attributable to the merger. They are attributable to the time associated with the implementation of the divestiture order.”<sup>52</sup>

66. Specifically, the Order Implementation Efficiencies that did not qualify as cognizable efficiencies in *Tervita* were efficiencies that the respondents claimed it would achieve more quickly than a purchaser of the divestiture assets.<sup>53</sup> As the SCC found, Order Implementation Efficiencies are:

“efficiency gains resulting not from the merger itself, but from the implementation time associated with a divestiture order (F.C.A. decision, at para. 135). Put simply, if these efficiencies are properly classified as OIEs, they would be achieved by Tervita, and not by a third party, only by virtue of Tervita being in operation one year earlier than a third party purchaser following a divestiture order, and only because of the time that it would take for the Tribunal’s order to be implemented.”<sup>54</sup>

[Emphasis added]

<sup>52</sup> *Tervita SCC*, ¶115.

<sup>53</sup> *Tervita Tribunal*, ¶269-270.

<sup>54</sup> *Tervita SCC*, ¶114.



67. The SCC draws a noteworthy distinction in *Tervita* between Order Implementation Efficiencies and what it refers to as “early-mover” efficiencies.<sup>55</sup> Early mover efficiencies, which are “efficiencies claimed because a merging party would be able to bring those efficiencies into being faster than would be the case but for the merger,”<sup>56</sup> are cognizable under the Act. This is because, as the SCC explains:

“early-mover efficiencies are real economic efficiencies that are caused by the merger, and not by delays associated with legal proceedings; were it not for the merger, the economy would not gain the benefit of those efficiencies that would have accrued in the time period between the merger and the actions of a future competitor.”<sup>57</sup>

### 3. Timing, Term and Net Present Value of Efficiencies

68. In my experience, merging parties typically achieve efficiencies over a period of time following implementation of a merger. Efficiencies range from one-time cost savings incurred immediately or within short order following a merger, to recurring savings achieved annually for a period of time or in perpetuity.
69. The reason the timing of efficiencies is important is that the final dollar value of cognizable efficiencies that will ultimately be compared to the anti-competitive effects must appropriately reflect the timing of the efficiencies. As the Tribunal explained in *Superior Propane I*, “[i]n the Tribunal’s view, the appropriate way to value all costs and receipts resulting from the merger, whether one-time or recurring, is through discounting the cashflows at the time of disbursement or receipt at an appropriate discount rate to a present value.”<sup>58</sup> [Emphasis added] The Tribunal goes on to note that “[it] is well aware that a one-

<sup>55</sup> *Tervita SCC*, ¶107.

<sup>56</sup> *Tervita SCC*, ¶107.

<sup>57</sup> *Tervita SCC*, ¶107.

<sup>58</sup> *Superior Propane I*, ¶371.

time cash receipt is more valuable the earlier it is received, while a one-time cost is more valuable the later the disbursement is made.”<sup>59</sup>

70. As the MEGs state: “[i]nformation respecting gains in efficiency that relate to cost savings should be broken down according to whether they are one-time savings or a recurring savings.”<sup>60</sup> The MEGs also require, as noted above, that merging parties “specify the steps they anticipate taking to achieve the gains in efficiency, the risks involved in achieving these gains and the time and costs required to achieve them.”<sup>61</sup> [Emphasis added]
71. In practice, the quantification of the net present value of the efficiencies is a two-step process:
- a. First, determining the term of the analysis, i.e., the period of time beyond the implementation of the merger over which efficiencies are quantified. This time horizon should be appropriate for the industry in question and the nature of the integration. In particular, certain industries have a long business cycle to fully implement the integration plan and realize the cost savings, while for other industries this period is shorter. At the same time, the cost savings may appear increasingly speculative as one looks further into the future. Balancing these two considerations, in my experience efficiencies are typically analyzed over a time horizon that approximates the business cycle of the merging parties. It is important to note, however, that, as discussed below with reference to the discount rate, so long as the anti-competitive effects are assessed on the same basis as the efficiencies, the choice of time horizon should not have a significant impact on the trade-off assessment.
  - b. Second, discounting the efficiencies achieved over the course of the appropriate term to their net present value.

<sup>59</sup> *Superior Propane I*, ¶372.

<sup>60</sup> MEGs, ¶12.16.

<sup>61</sup> MEGs, ¶12.13.

## 4. Determining the Discount Rate

72. The Tribunal's decision in *Tervita* provides considerations for selecting an appropriate discount rate for calculating the net present value of efficiencies:

“The Tribunal accepts the evidence of Mr. Harrington [*sic*], the Commissioner's expert, that, in broad terms, the discount rate used in calculating the net present value of efficiencies typically does not matter, so long as the same discount rate is used to calculate the net present value of the Effects. That said, the Tribunal also accepts Mr. Harrington's [*sic*] evidence that, (i) as a general principle, the appropriate discount rate to use in discounting a set of future cash flows is a function of the risk of those cash flows being wrong...”<sup>62</sup> [Emphasis added]

73. Finance principles dictate that, generally, a higher discount rate is appropriate in cases where the riskiness of the cash flows is higher, and will result in a lower net present value of cash flows than had a lower discount rate been used.<sup>63</sup>

## VII. Assumptions

74. All assumptions are as set out in this report, including in the footnotes to the Schedules.

<sup>62</sup> *Tervita Tribunal*, ¶260.

<sup>63</sup> Neither the MEGs nor the preceding 2004 version of the MEGs suggest the appropriate discount rate. The 1991 version of the MEGs, however, state at paragraph 5.7.1: “The real discount rate employed to compute present values should be consistent with the discount rates used to evaluate investment projects funded in whole or in part by the federal government. These standard rates are generally found in the Treasury Board's Benefit - Cost Guidelines and similar federal government documents.”

## VIII. Background

### A. Industry Overview

75. Canadian farmers typically sell the grain they produce to companies that provide handling and logistics services and market the grain to customers.<sup>64</sup> These companies then sell the grain in North American and export markets to grain processors, such as flour and feed mills and canola oil crushing plants, for use in end products including food, animal feeds, and fuels.<sup>65</sup>
76. In 2018, for example, Canadian farmers produced 31.8 million tonnes of wheat, 20.3 tonnes of barley, and 3.4 million tonnes of oats.<sup>66</sup> Canadian farmers typically transport their grain by truck to a local primary grain elevator or a processing facility.<sup>67</sup>
77. Grain is then moved by rail or truck to domestic customers or to port terminals along the east or west coast of Canada for export.<sup>68</sup> Indeed, Canada is one of the world's largest exporters of grain products.<sup>69</sup>

### B. P&H and the Transaction

78. P&H is a privately held and vertically integrated agribusiness. It was incorporated in 1909 and is headquartered in Winnipeg, Manitoba.<sup>70</sup> P&H has four primary operating segments: (1) grain handling and trading; (2) crop inputs and services, which supplies fertilizer, seed, pesticides, and agronomic services to grain farmers; (3) new-life mills, which manufactures

<sup>64</sup> ARC Request, p. 3.

<sup>65</sup> ARC Request, p. 3.

<sup>66</sup> ARC Request, p. 2.

<sup>67</sup> ARC Request, p. 3-4.

<sup>68</sup> ARC Request, p. 4.

<sup>69</sup> The Observatory of Economic Complexity, "Wheat Overview," accessed October 21, 2020, <https://oec.world/en/profile/hs92/21001/>.

<sup>70</sup> P&H Limited, "About P&H," accessed October 21, 2020, <https://parrishandheimbecker.com/>.

- animal feed and operates poultry farms; and (4) P&H Milling Group, which sources wheat to produce flour and cereal products.<sup>71</sup>
79. P&H has an interest, together with North West Terminal and Paterson Grain, in AGT, an export terminal at the Port of Vancouver.<sup>72</sup> P&H also has an interest, together with Cargill Limited, in the Superior Terminal in the Port of Thunder Bay.<sup>73</sup>
80. P&H is constructing FGT, a terminal in Surrey, British Columbia, in partnership with GrainsConnect Canada Operations Inc. P&H has invested [REDACTED] into this facility and hopes to use it to “compete more effectively” with its peers.<sup>74</sup> The facility will have a storage capacity of 92,000 tonnes, and be able to export [REDACTED].<sup>75</sup> P&H expects the facility to open in [REDACTED].<sup>76</sup>
81. On September 3, 2019, P&H agreed to acquire ten grain elevators in Western Canada and related assets from Louis Dreyfus. The Transaction closed on December 10, 2019.<sup>77</sup> Louis Dreyfus is an indirectly wholly owned subsidiary of Louis Dreyfus Company BV, a global merchant and agriculture firm headquartered in the Netherlands.<sup>78</sup> Louis Dreyfus purchases, stores, transports, and sells grains and oilseeds to domestic and overseas customers.<sup>79</sup>

<sup>71</sup> P&H Request for an Advance Ruling Certificate in respect of the Transaction (“ARC Request”), December 19, 2019, p. 6.

<sup>72</sup> Heimbecker Statement, ¶21.

<sup>73</sup> Heimbecker Statement, ¶26.

<sup>74</sup> Heimbecker Statement, ¶23.

<sup>75</sup> Heimbecker Statement, ¶24-25.

<sup>76</sup> Heimbecker Statement, ¶81.

<sup>77</sup> Response of Parrish & Heimbecker, Limited, February 3, 2020, *The Commissioner of Competition v. Parrish & Heimbecker, Limited*, CT-2019-005, ¶8-9.

<sup>78</sup> ARC Request, p. 6.

<sup>79</sup> ARC Request, p. 6.

82. Following the Transaction, P&H now owns 29 grain elevators in Western Canada.<sup>80</sup> Most notably for this matter, P&H owns both the Moosomin Elevator, which it owned pre-Transaction, and the Virden Elevator, which it acquired from Louis Dreyfus through the Transaction.
83. P&H offers a variety of purchasing contracts with farmers and trades grains such as corn, soybeans, canola, oats, and barley.<sup>81</sup> In addition to providing crop inputs to grain farmers, P&H also provides agronomic services such as crop planning, soil sampling, and farm credit services.<sup>82</sup> P&H owns three merchandising offices in Vancouver (BC), Winnipeg (MB), and Guelph (ON).<sup>83</sup>

### C. Order Sought by the Commissioner

84. On December 19, 2019, shortly following closing of the Transaction, the Commissioner filed his Notice of Application with the Tribunal seeking, among other things, an Order under section 92 of the Act for P&H to “dispose of all of the assets of the ongoing business of an Elevator in the Relevant Markets, as well as such other assets, if any, as are required for an effective remedy.”<sup>84</sup> Based on the definition of Relevant Markets, which includes “the aggregated locations of farmers that benefited from competition between the Virden Elevator and Moosomin Elevator,”<sup>85</sup> I understand that in effect the Order would require P&H to divest at minimum one of these two elevators.
85. The Commissioner has asked me to assume that, should the Tribunal grant the Order, P&H would sell either the Virden Elevator or Moosomin Elevator to a competitively acceptable

<sup>80</sup> Heimbecker Statement, ¶6.

<sup>81</sup> P&H Limited, “P&H National Grain Asset Network,” accessed October 21, 2020, <https://parrishandheimbecker.com/grain/>.

<sup>82</sup> ARC Request, p. 6.

<sup>83</sup> P&H Limited, “P&H National Grain Asset Network,” accessed October 21, 2020, <https://parrishandheimbecker.com/grain/>.

<sup>84</sup> Notice of Application, ¶36.a.

<sup>85</sup> Notice of Application, ¶21.

purchaser. Based on instructions from the Commissioner and information available to me at this time, I consider five potential purchasers, each of which is discussed below. I have been asked not to consider Viterro or Richardson as potential competitively acceptable purchasers.

## D. Overview of Potential Purchasers for the Divestiture Assets Should the Order be Allowed

### 1. G3 Canada Limited

86. G3 Canada Limited (“G3”) is a privately held purchaser, merchandiser, and distributor of grain and oilseed products. G3 was incorporated in 2015<sup>86</sup> and is headquartered in Winnipeg, Manitoba.<sup>87</sup> Its major shareholders are (1) Bunge Canada Limited (“Bunge Canada”), a food and feed ingredient company, (2) SALIC Canada Limited (“SALIC”), an investor in Canadian agribusiness ventures, and (3) Farmers Equity Trust, an investment fund composed of Western Canadian farmers established by Canadian Wheat Board.<sup>88</sup> G3 was formed when Bunge Canada and SALIC acquired a majority ownership stake in Canadian Wheat Board and combined it with Bunge Canada’s grain assets.<sup>89</sup> G3 has grown its network since its inception, including expanding its network of elevators in Alberta and opening an additional port terminal in Vancouver, British Columbia.

87. [REDACTED]

<sup>86</sup> Real Agriculture, “G3 Global Grain Group (Bunge & SALIC Canada) Takes on Majority Ownership of CWB – Updated,” accessed October 21, 2020, <https://amp-realagriculture.com.cdn.ampproject.org/c/s/amp.realagriculture.com/2015/04/g3-bunge-salic-canada-buys-cwb/>.

<sup>87</sup> G3 Canada Limited, “About Us,” accessed October 21, 2020, <https://www.g3.ca/en/about-us>.

<sup>88</sup> G3 Terminal Vancouver, “Project Details,” accessed October 21, 2020, <https://g3terminalvancouver.ca/project-details/#>.

<sup>89</sup> Real Agriculture, “G3 Global Grain Group (Bunge & SALIC Canada) Takes on Majority Ownership of CWB – Updated,” accessed October 21, 2020, <https://amp-realagriculture.com.cdn.ampproject.org/c/s/amp.realagriculture.com/2015/04/g3-bunge-salic-canada-buys-cwb/>.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>94</sup>

88. G3's facilities consist of a network of grain elevators in Western Canada and port terminals in Eastern and Western Canada.<sup>95</sup> G3 owns seventeen grain elevators across Alberta (six elevators), Saskatchewan (nine elevators), and Manitoba (two elevators), the largest of which have storage capacities of 42,000 tonnes.<sup>96</sup> G3's elevators have access to CN or CP railways, which transport grain to G3's port terminals for sale to global markets.<sup>97</sup> G3's closest elevators to the Virden Elevator or Moosomin Elevator are located in Melville, Saskatchewan and Macgregor, Manitoba (Bloom). The Melville elevator is approximately 150 km from the Moosomin Elevator, and is on the CN railway.<sup>98</sup> The Bloom elevator is approximately 190 km from the Virden Elevator, and is also on the CN railway.<sup>99</sup>

<sup>90</sup> LDC00005347.

<sup>91</sup> LDC00001980.

<sup>92</sup> LDC00002121, p. 3 (value in Canadian dollars) and LDC00002115, p. 11 (value is US dollars).

<sup>93</sup> LDC00002115, p. 11.

<sup>94</sup> LDC00004142.

<sup>95</sup> G3 Canada Limited, "Our Network," accessed October 21, 2020, <https://www.g3.ca/en/our-network>.

<sup>96</sup> Bulk Online, "G3 Canada to build two new grain elevators with 42,000 T storage capacity, each," accessed October 21, 2020, <https://news.bulk-online.com/news-english/g3-canada-to-build-two-new-grain-elevators-with-42000-t-storage-capacity-each.html>.

<sup>97</sup> G3 Canada Limited, "Our Network," accessed October 21, 2020, <https://www.g3.ca/en/our-network>.

<sup>98</sup> G3 Canada Limited, "G3 Melville," accessed October 21, 2020, <https://www.g3.ca/en/our-network/g3-melville>.

<sup>99</sup> G3 Canada Limited, "G3 Bloom," accessed October 21, 2020, <https://www.g3.ca/en/our-network/g3-bloom>. All distances in this report are calculated as driving distances using Google Maps, as of October 21, 2020.



89. G3 has four port terminals, two in Ontario (Hamilton and Thunder Bay) and two in Quebec (Quebec and Trois-Rivières), which together provide access to the Atlantic via the Great Lakes and Saint Lawrence Seaway System. G3's new port terminal in Vancouver, British Columbia provides access to the Pacific.<sup>100</sup>
90. G3 has been expanding its operations via the construction of additional facilities, most recently the terminal at Port of Vancouver and two elevators in Alberta.<sup>101</sup> The terminal, which began construction in March 2017 and opened July 2020, is a limited partnership between G3 and Western Stevedoring Company Limited, a B.C. terminal operator and logistics company.<sup>102</sup> The terminal handles commodities such as wheat, soybeans, canola, peas, corn, and some specialty by-products.<sup>103</sup> G3 envisions it to “act as an essential conduit for Canadian farmers and marketers to ensure global competitiveness in moving agricultural commodities to world markets.”<sup>104</sup>
91. In the Witness Statement of Brett Malkoske, VP Business Development and Communications at G3, Mr. Malkoske states, [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

<sup>100</sup> G3 Canada Limited, “Our Network,” accessed October 21, 2020, <https://www.g3.ca/en/our-network>.

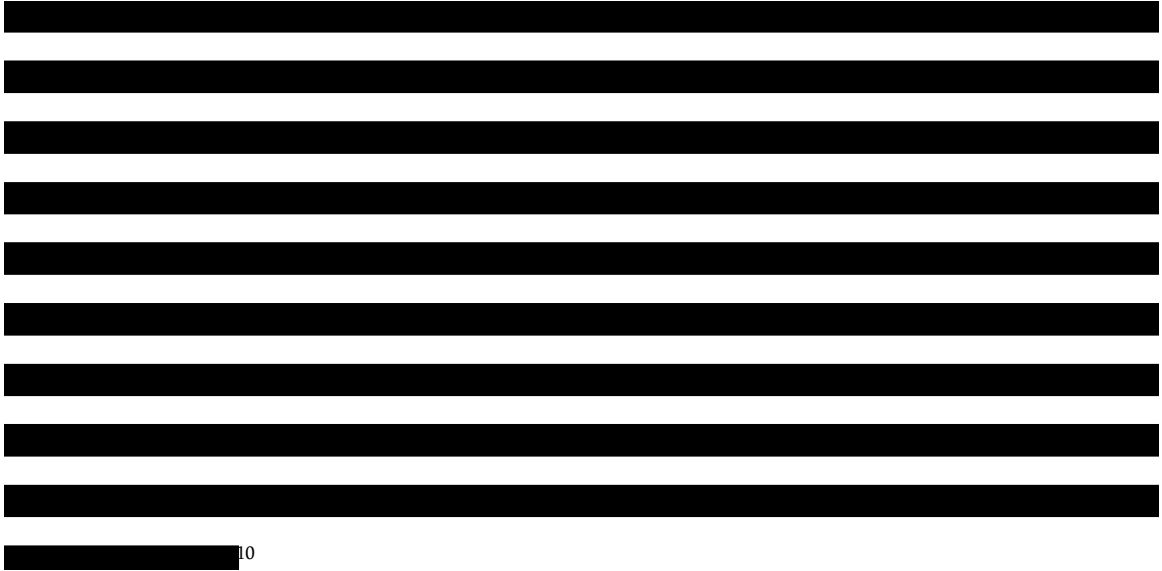
<sup>101</sup> Swift Current Online, “G3 Officially Opens Grain Export Terminal At Port Of Vancouver,” accessed October 21, 2020, <https://swiftcurrentonline.com/ag-news/g3-officially-opens-grain-export-terminal-at-port-of-vancouver>.

<sup>102</sup> G3 Terminal Vancouver, “Project Details,” accessed October 21, 2020, <https://g3terminalvancouver.ca/project-details/#>.

<sup>103</sup> G3 Terminal Vancouver, “Project Details,” accessed October 21, 2020, <https://g3terminalvancouver.ca/project-details/#>.

<sup>104</sup> G3 Terminal Vancouver, “Project Details,” accessed October 21, 2020, <https://g3terminalvancouver.ca/project-details/#>.

<sup>105</sup> Witness Statement of Brett Malkoske, VP Business Development and Communications at G3 Canada Limited, October 21, 2020, *The Commissioner of Competition v. Parrish & Heimbecker, Limited*, CT-2019-005 (“Malkoske Statement”), ¶4.



## 2. GrainsConnect Canada

92. GrainsConnect Canada (“GrainsConnect”) is a privately held grain merchandiser whose supply chain connects Western Canadian farmers with global markets.<sup>111</sup> GrainsConnect was formed in 2015 as a joint venture between GrainCorp, an Australian-based global agribusiness and food-ingredients processor, and Zen-Noh Grain Corporation, a Japanese-based global agricultural cooperative.<sup>112</sup>

<sup>106</sup> Malkoske Statement, ¶6.

<sup>107</sup> Malkoske Statement, ¶5.

<sup>108</sup> Malkoske Statement, ¶7.

<sup>109</sup> Malkoske Statement, ¶8.

<sup>110</sup> Malkoske Statement, ¶8.

<sup>111</sup> GrainsConnect Canada, “About Us,” accessed October 21, 2020, <https://www.grainsconnect.com/overview.php>.

<sup>112</sup> GrainsConnect Canada, “GrainsConnect vows efficiency with new western Canadian grain facilities,” accessed October 21, 2020, <http://www.grainsconnect.com/press/grainsconnect-vows-efficiency-with-new-western-canagian-grain-facilities.pdf>.

93. GrainsConnect leverages “GrainCorp’s grain origination operations with existing global demand from both joint venture partners.”<sup>113</sup> It is managed out of GrainCorp’s office in Calgary, Alberta.<sup>114</sup>
94. GrainsConnect owns four grain terminals across Saskatchewan (Reford and Maymont) and Alberta (Huxley and Vegreville). Each elevator offers 35,000 tonnes of storage capacity<sup>115</sup> and access to CN railway.<sup>116</sup> GrainsConnect’s closest elevator to the Virden Elevator or Moosomin Elevator is located in Maymont, Saskatchewan, approximately 565 km from the Moosomin Elevator.
95. Farmers sign contracts with and receive consultation from GrainsConnect merchants posted at each terminal.<sup>117</sup> Grain is transported from each terminal by rail to GrainCorp’s existing distribution network, which exports grain to over 30 countries across Asia, Africa, and the Americas.<sup>118</sup>
96. As noted above, GrainsConnect is in partnership with P&H to construct FGT.<sup>119</sup>

<sup>113</sup> GrainCorp Limited, “GrainCorp’s new Canadian supply chain – GrainsConnect Canada,” accessed October 21 2020, <http://www.graincorp.com.au/grains/canadian-supply-chain>.

<sup>114</sup> GrainCorp Limited, “Canadian Supply Chain,” accessed October 21, 2020, <http://www.graincorp.ca/grains/canadian-supply-chain/contact-us>.

<sup>115</sup> GrainsConnect Canada, “Terminals & Port,” accessed October 21, 2020, <https://www.grainsconnect.com/locations.php>.

<sup>116</sup> Canadian National Railway, “GrainsConnect Canada Huxley, AB Site Nearing Completion,” accessed October 21, 2020, <https://www.cn.ca/en/stories/20190507-grainsconnect-huxley/>.

<sup>117</sup> GrainsConnect Canada, “GrainCorp,” accessed October 21, 2020, <http://grainsconnect.com/graincorp.php>.

<sup>118</sup> GrainsConnect Canada, “Are you connected?” accessed October 21, 2020, <https://grainsconnect.com/pdf/GrainCorp-AreYouConnected.pdf>.

<sup>119</sup> Heimbecker Statement, ¶23.

### 3. Paterson Grain

97. Paterson Grain is a privately held and vertically integrated grain company headquartered in Winnipeg, Manitoba.<sup>120</sup> It is a division of Paterson GlobalFoods Inc., a family owned group of food businesses and agribusinesses founded in 1908.<sup>121</sup>
98. Paterson Grain works with farmers at every stage of the grain handling process. It provides a variety of crop inputs services such as soil testing, crop nutrition, crop protection, and seed sales.<sup>122</sup> It also provides financial services such as marketing and budgeting planners<sup>123</sup> as well as short- and long-term financing.<sup>124</sup> Farmers sign contracts with Paterson Grain to sell grains such as wheat, canola, chickpeas, and specialty products (e.g., mustard).<sup>125</sup>
99. Paterson Grain's facilities consist of a network of primary elevators (which receive and store grain directly from farmers) and terminal elevators (which store, weigh, clean, and treat grain) across Western Canada.<sup>126</sup> It owns 25 primary elevators across Manitoba (fourteen) and Saskatchewan (eleven) and the largest of which has a storage capacity of 6,710 tonnes. It also owns eleven terminal elevators across Alberta (four), Manitoba (four),

<sup>120</sup> Paterson Grain, "About," accessed October 21, 2020, <https://www.patersongrain.com/about/>.

<sup>121</sup> Paterson GlobalFoods Inc., "Paterson Grain," accessed October 21, 2020, <https://www.patersonglobalfoods.com/companies/paterson-grain/>.

<sup>122</sup> Paterson Grain, "Locations," accessed October 21, 2020, <https://www.patersongrain.com/contact/locations/>.

<sup>123</sup> Paterson Grain, "Your Profit Plan," accessed October 21, 2020, <https://www.patersongrain.com/for-farmers/crop-inputs/profit-plan/>.

<sup>124</sup> Paterson Grain, "Financial Services," accessed October 21, 2020, <https://www.patersongrain.com/for-farmers/financial-services/>.

<sup>125</sup> Paterson Grain, "Domestic Origin," accessed October 21, 2020, <https://www.patersongrain.com/domestic-and-international-customers/products/the-worlds-best/domestic-origin/>.

<sup>126</sup> Paterson Grain, "Locations," accessed October 21, 2020, <https://www.patersongrain.com/contact/locations/>. Canada Grain Commission, "Grain elevator type descriptions," accessed October 21, 2020, <https://web.archive.org/web/20131120014736/http://grainscanada.gc.ca/wa-aw/geic-sgc/help-aider-eng.htm>.

and Saskatchewan (three), the largest of which have storage capacities of 42,000 tonnes. Most of Paterson Grain's facilities are connected to CP railway.<sup>127</sup> Paterson Grain's closest elevator to the Virden Elevator or Moosomin Elevator is located in Binscarth, Manitoba, approximately 85 km from the Moosomin Elevator and is on the CP railway.

100. Paterson Grain has access to global markets through a number of arrangements: (1) it is a shareholder in AGT (together with P&H), providing it access to markets in Asia-Pacific; (2) it has shipping agreements on the Great Lakes and St. Lawrence Seaway System, providing it access to markets in Eastern Canada, the U.S., and Europe; and (3) it has rail partnerships that provide it access to markets in the U.S. Gulf Coast, Pacific Northwest, Mississippi River ports, and the Gulf of Mexico.<sup>128</sup>

#### 4. Ceres Global Ag Corp.

101. Ceres Global Ag Corp. ("Ceres") is a publicly held (TSX:CRP) agribusiness and supply chain company operating in the U.S. and Canada.<sup>129</sup> Ceres is headquartered in Minneapolis, Minnesota and was founded in 2007.<sup>130</sup> It procures, distributes, and sells agricultural commodities (e.g., grain) and industrial products (e.g., fertilizer, hydrocarbons) to

<sup>127</sup> Canada Pacific Railway, "Canadian Grain Elevator and Terminal Directory," accessed October 21, 2020, <https://www.cpr.ca/en/customer-resources-site/Documents/canada-grain-directory.pdf>. Information as of January 2015.

<sup>128</sup> Paterson Grain, "Logistics," accessed October 21, 2020, <https://www.patersongrain.com/domestic-and-international-customers/logistics/>.

<sup>129</sup> Ceres Global Ag Corp, Ceres Global Annual Information Form for the year ended June 30, 2019, September 17, 2019, p. 7.

<sup>130</sup> Ceres Global Ag Corp, Ceres Global Annual Information Form for the year ended June 30, 2019, September 17, 2019, p. 2.

customers around the globe.<sup>131</sup> Ceres employs about 200 people across its facilities and offices.<sup>132</sup>

102. Ceres has three operating divisions: (1) grain services, which procures and merchandises grains and oilseeds; (2) supply chain services, which provides logistics, storage, and transloading for agricultural commodities and industrial products; and (3) seed and processing, which includes a soybean crush in Manitoba and involves the sale and distribution of soybean and corn seeds across Western Canada.<sup>133</sup> Ceres' grain division generates the most revenue of the three.<sup>134</sup>
103. Ceres has recently completed strategic acquisitions, which have expanded the scope and scale of its operations. On August 16, 2019, Ceres acquired Delmar Commodities, an agricultural processing and supply chain company based in Manitoba.<sup>135</sup> Ceres expanded its presence in Western Canada through the acquisition of Delmar Commodities' four grain elevators and one crop inputs facility.<sup>136</sup> On September 2, 2020, Ceres acquired the Nicklen Siding grain elevator and its associated assets from Cargill.<sup>137</sup> The elevator is located in

<sup>131</sup> Ceres Global Ag Corp, Ceres Global Annual Information Form for the year ended June 30, 2019, September 17, 2019, p. 7.

<sup>132</sup> Ceres Global Ag Corp, "2019 Annual Meeting Presentation", accessed October 21, 2020, <https://ceresglobalagcorp.com/app/uploads/2019/11/Ceres-Nov-2019-AGM-V3.pdf>, p. 4.

<sup>133</sup> Ceres Global Ag Corp, "2019 Annual Meeting Presentation", accessed October 21, 2020, <https://ceresglobalagcorp.com/app/uploads/2019/11/Ceres-Nov-2019-AGM-V3.pdf>, p. 6.

<sup>134</sup> Ceres Global Ag Corp, "Unaudited Interim Condensed Consolidated Financial Statements of Ceres Global For the three-month and six-month periods ended December 31, 2019 and 2018," accessed October 21, 2020, <https://ceresglobalagcorp.com/app/uploads/2020/02/Ceres-Global-Financial-Statements-Q2-FY2020.pdf>, p. 23.

<sup>135</sup> Ceres Global Ag Corp, Ceres Global Annual Information Form for the year ended June 30, 2019, September 17, 2019, p. 8.

<sup>136</sup> Delmar Commodities, "Facility Locations," accessed October 21, 2020, <https://delmarcommodities.com/locations/>.

<sup>137</sup> Ceres Global Ag Corp, "Ceres Global Ag Corp. Completes Acquisition of Nicklen Siding, SK Elevator from Cargill Limited," accessed October 21, 2020, <https://ceresglobalagcorp.com/ceres-completes-purchase-of-nicklen-siding-elevator-from-cargill-ltd/>.

Northern Saskatchewan and has a storage capacity of 13,100 tonnes.<sup>138</sup> Ceres' CEO, Robert Day, described the acquisition as a continuation of Ceres' goal of adding "strategic origination capabilities for [its] core products while also further expanding [its] geographic footprint in Canada."<sup>139</sup> He describes the Northern Saskatchewan region as "critical for Ceres due to the highly efficient grower community, its product mix and competitive access to [Ceres'] terminal assets and customers."<sup>140</sup> In both acquisitions, Ceres integrated existing personnel into its operations.<sup>141</sup>

104. Ceres' grain division now consists of thirteen elevators, terminals, and crop inputs facilities located in Minnesota (four), Manitoba (six), Saskatchewan (two), and Ontario (one).<sup>142</sup> Ceres' facilities have access to a variety of railways (e.g., CN, CP, BNSF, UP, depending on the facility) and its largest facility in Duluth, Minnesota has a storage capacity of 12 million bushels, or over 300,000 tonnes.<sup>143</sup> Ceres' closest elevator to the Virden Elevator or Moosomin Elevator is located in Northgate, Saskatchewan, approximately 185 km from the Moosomin Elevator. Ceres' logistics network distributes grain purchased at these facilities to vessels and barges travelling along the Great Lakes and Minnesota River. Ceres delivers

<sup>138</sup> Canadian National Railway, "Western Canada Grain Elevator Directory", accessed October 21, 2020. Information as of August 2013.

<sup>139</sup> Ceres Global Ag Corp, "Ceres Global Ag Corp. Completes Acquisition of Nicklen Siding, SK Elevator from Cargill Limited," accessed October 21, 2020, <https://ceresglobalagcorp.com/ceres-completes-purchase-of-nicklen-siding-elevator-from-cargill-ltd/>.

<sup>140</sup> Ceres Global Ag Corp, "Ceres Global Ag Corp. Signs Agreement to Purchase Nicklen Siding, SK Elevator from Cargill Limited," accessed October 21, 2020.

<sup>141</sup> Canadian Grain Handling and Transportation System, "Annual Report 2018 – 2019 Crop Year," accessed October 21, 2020, <http://grainmonitor.ca/Downloads/AnnualReports/AnnualReport201819.pdf>. p. 35. Ceres Global Ag Corp, "Ceres Global Ag Corp. Completes Acquisition of Nicklen Siding, SK Elevator from Cargill Limited," accessed October 21, 2020, <https://ceresglobalagcorp.com/ceres-completes-purchase-of-nicklen-siding-elevator-from-cargill-ltd/>.

<sup>142</sup> Ceres Global Ag Corp, "Locations," accessed October 21, 2020, <https://ceresglobalagcorp.com/locations/>.

<sup>143</sup> Ceres Global Ag Corp, "Duluth Storage," accessed October 21, 2020, <https://ceresglobalagcorp.com/location/duluth-storage/>.

grain to primarily U.S. customers by ship and rail, and international customers by ship through U.S. export gateways.<sup>144</sup>

105. Ceres, in its 2019 Annual General Meeting, identified expanding its grain origination capabilities in Western Canada as a core strategic initiative for FY2020.<sup>145</sup> This involves: (1) acquiring and constructing grain origination assets in areas with competitive access to rail logistics; (2) investing in existing ventures with independent grower cooperatives; (3) increasing volumes and efficiencies in its existing assets; and (4) deepening relationships and forming long-term partnerships with its existing suppliers.<sup>146</sup>

## 5. Cargill Limited

106. Cargill Limited (“Cargill”) is a wholly-owned Canadian subsidiary of Cargill Inc., a privately held global agribusiness founded in 1928.<sup>147</sup> Cargill is headquartered in Winnipeg, Manitoba while Cargill Inc. is headquartered in Minneapolis, Minnesota. Cargill has a large scope of operations including: (1) beef, poultry, malt, and oilseed processing; (2) livestock feed manufacturing; (3) crop inputs retailing; and (4) grain handling, milling, distribution, and merchandising.<sup>148</sup> Cargill employs approximately 8,000 people across Canada.<sup>149</sup>

<sup>144</sup> Ceres Global Ag Corp, “2019 Annual Meeting Presentation”, accessed October 21, 2020, <https://ceresglobalagcorp.com/app/uploads/2019/11/Ceres-Nov-2019-AGM-V3.pdf>, p. 6.

<sup>145</sup> Ceres Global Ag Corp, “2019 Annual Meeting Presentation”, accessed October 21, 2020, <https://ceresglobalagcorp.com/app/uploads/2019/11/Ceres-Nov-2019-AGM-V3.pdf>, p. 10.

<sup>146</sup> 2019 Ceres Global Annual Meeting Presentation, <https://ceresglobalagcorp.com/app/uploads/2019/11/Ceres-Nov-2019-AGM-V3.pdf>, accessed October 21, 2020, p. 10.

<sup>147</sup> S&P Capital IQ, “Cargill Limited Private Company with Public Debt Profile,” accessed October 21, 2020.

<sup>148</sup> Cargill Limited, “About Cargill,” accessed October 21, 2020, <https://www.cargill.ca/en/about-cargill>.

<sup>149</sup> Cargill Limited, “About Cargill,” accessed October 21, 2020, <https://www.cargill.ca/en/about-cargill>.



107. Cargill is the third largest grain company in Canada by number of elevators and total storage capacity (after Viterra and Richardson).<sup>150</sup> Cargill's network of grain facilities consists of three merchandising offices in Vancouver (BC), Winnipeg (MB), and Montreal (QC), two port terminals in Vancouver (BC) and Thunder Bay (ON),<sup>151</sup> and 26 grain elevators across Alberta (ten), Manitoba (six),<sup>152</sup> Ontario (one), and Saskatchewan (nine). Its elevators are connected to CP or CN railways and the largest of them have storage capacities of 52,000 tonnes. Its terminals have storage capacities of 200,000 tonnes (Vancouver) and 176,000 tonnes (Thunder Bay).<sup>153</sup>
108. Of Cargill's elevators in Manitoba, three reside within approximately 100 km of P&H's Virden Elevator:<sup>154</sup> (1) Elva, which is connected to CP railway and has a 24,330 tonne storage capacity; (2) Nesbitt, which is connected to CP railway and has a 17,700 tonne storage capacity; and (3) Oakner, which is connected to CN railway and has a 14,000 tonne storage capacity. Each of these elevators is also a crop inputs retailer location.

## IX. Detailed Response to the Heimbecker Statement – P&H Throughput Increases and Claimed Efficiencies at the Virden Elevator

109. Mr. Heimbecker's efficiency and benefit claims fall into two general categories. In the first category, Mr. Heimbecker claims that, through various mechanisms, the Transaction has

<sup>150</sup> Canadian Grain Handling and Transportation System, "Annual Report 2018 – 2019 Crop Year," accessed October 21, 2020, <http://grainmonitor.ca/Downloads/AnnualReports/AnnualReport201819.pdf>. p. 22.

<sup>151</sup> Cargill Limited, "Agriculture," accessed October 21, 2020, <https://www.cargill.ca/en/agriculture>.

<sup>152</sup> Cargill Limited, "Find a location," accessed October 21, 2020, <https://www.cargillag.ca/locations>.

<sup>153</sup> Canada Pacific Railway, "Canadian Grain Elevator and Terminal Directory," accessed October 21, 2020, <https://www.cpr.ca/en/customer-resources-site/Documents/canada-grain-directory.pdf>. Information as of January 2015. Canadian National Railway, "Western Canada Grain Elevator Directory", accessed October 21, 2020. Information as of August 2013.

<sup>154</sup> Cargill Limited, "Find a location," accessed October 21, 2020, <https://www.cargillag.ca/locations>.

increased, or will increase, turn rates and throughput at the former Louis Dreyfus elevators, including the Virden Elevator.<sup>155</sup> Mr. Heimbecker quantifies “efficiencies” based on the increased margin at the Virden Elevator from higher throughput in 2020 as compared to 2019.<sup>156</sup> In the second category, Mr. Heimbecker claims other benefits to P&H.

110. In this section, I address the first category and explain why Mr. Heimbecker’s claimed benefits from the increase in P&H’s throughput, and in particular the claimed “efficiencies” associated with the alleged increase in throughput at the Virden Elevator, are not cognizable efficiencies under section of the Act that would be lost in the event of the Order.
111. Mr. Heimbecker states that “P&H has increased actual throughput at Virden from 2019 to 2020 over the seven months from January through July [and] is forecasting further increases in Virden’s post-Transaction throughput in 2020.”<sup>157</sup> Mr. Heimbecker then quantifies the value of these increased volumes to be ██████████ in aggregate.<sup>158</sup>
112. Before I discuss the evidence that Mr. Heimbecker relies on to support his statement that the Transaction will increase throughput in P&H’s elevator and terminal network, leading to the claimed efficiencies at the Virden Elevator, it is important to consider the circumstances in this matter that would allow increases in throughput to be a cognizable efficiency under section 96.
113. To qualify as a cognizable efficiency, any increase in throughput on P&H’s network must come about from increased Canadian grain production and not a pecuniary redistribution of throughput between P&H’s facilities and other facilities. Put another way, in order to

<sup>155</sup> Heimbecker Statement, ¶45-50.

<sup>156</sup> Heimbecker Statement, ¶178-179.

<sup>157</sup> Heimbecker Statement, ¶178.

<sup>158</sup> This total comprises \$█████████ for CWRS and \$█████████ for canola (Heimbecker Statement, ¶179).

qualify as a cognizable efficiency, any increase in throughput must meet all of the following criteria:

- a. First, it must result from an increase in farmers' grain production that would not likely have occurred absent the Transaction. If an increase in grain production would have occurred irrespective of the Transaction (i.e., P&H increases its throughput because of fortuitous timing with grain production trends), this cannot be a cognizable efficiency because it is not a gain in efficiency brought about the merger; i.e., the efficiency would have arisen in any event. See section VI.A.2 above ("Efficiencies Must be Brought About by the Merger").
- b. Second, it must result from an increase in farmers' grain production and not simply an increase in P&H's throughput by cannibalizing volume from other entities. If the increase in P&H throughput comes through cannibalization of volumes in this manner, this is not a cognizable efficiency because it represents a redistribution of income in Canada and not a real resource saving to the Canadian economy.<sup>159</sup> See section VI.B above ("The Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons").

**AND**

- c. Third, it must be the case that the increase in throughput would not likely occur in the event of the Order. If the increase were to occur in any event with the sale of the Virden Elevator to a likely purchaser (either because the efficiency is still achieved by P&H without owning the Virden Elevator or because the efficiency is achieved by the purchaser), this is not a cognizable efficiency. The basis for section 96 efficiencies is to

<sup>159</sup> The only way such a redistribution would result in an efficiency to the Canadian economy is if the entity from which the increased throughput is being taken operates at a higher per unit variable operating cost than P&H. There is no evidence in the Heimbecker Statement that this is the case.

identify, and quantify, the economic benefits to Canada by a comparison of (1) the position with the Transaction and (2) the position where the Order is made by the Tribunal (which, in this case, would result in a divestiture of either the Virden Elevator or the Moosomin Elevator).<sup>160</sup> Changes in volumes that would have occurred regardless of the Transaction, and similarly would have occurred regardless of the Order, are not cognizable efficiencies under section 96 of the Act. See section VI.C above (“The gains in efficiency would not likely be attained if the order were made”).

114. Below I explain why the Heimbecker Report does not meet any of these three criteria and why, therefore, the claimed efficiencies for 2020 at the Virden Elevator of [REDACTED] are not cognizable under the Act.

### A. The Transaction is not likely to have caused the actual increase in grain production in the first seven months of 2020

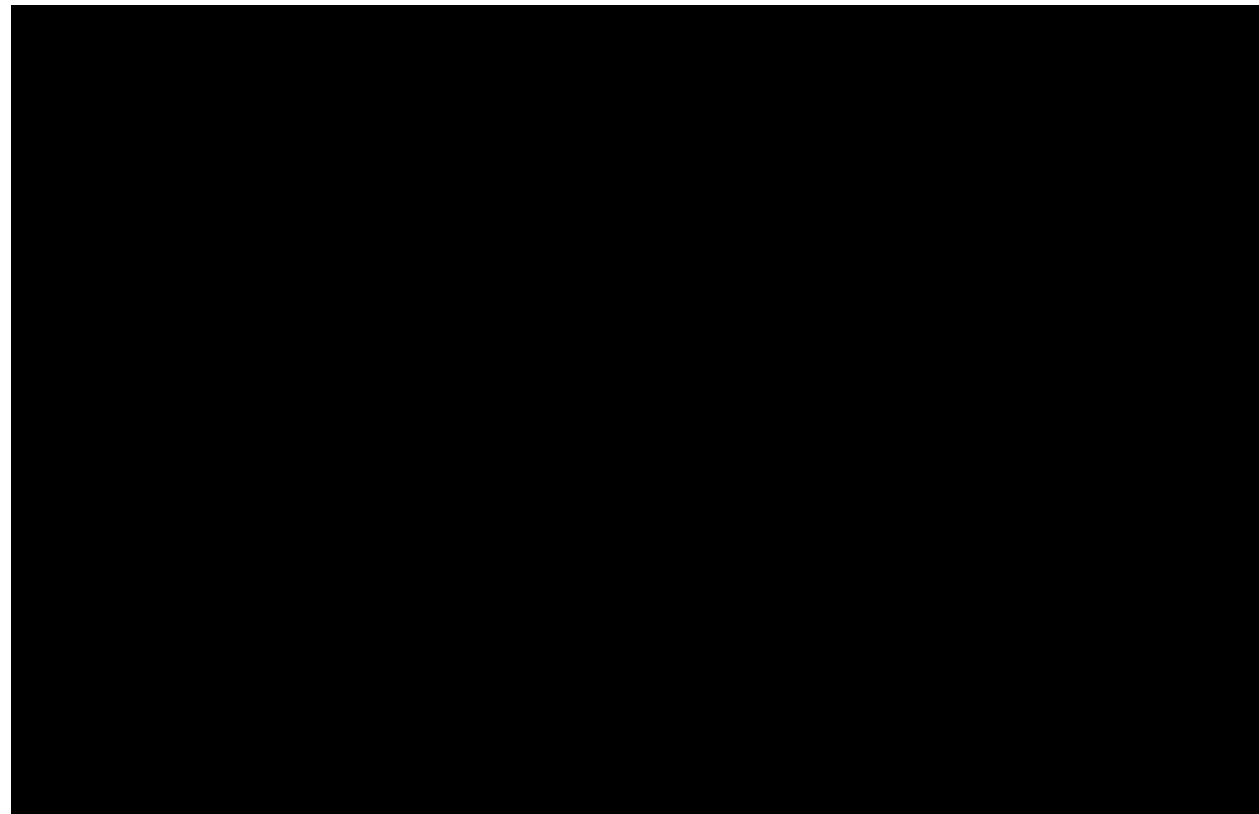
115. As noted above, Mr. Heimbecker explains that P&H has increased throughput at the Virden Elevator during the seven months following the Transaction—January 2020 through July 2020—compared to the same seven-month period in 2019. Specifically, P&H’s data indicates that throughput for CWRS at the Virden Elevator has increased by [REDACTED] [REDACTED].<sup>161</sup> This actual increase in throughput, along with P&H’s forecast increase for the last five months of 2020 and P&H’s grain margin, is the basis of his claimed efficiencies of [REDACTED] in aggregate.<sup>162</sup> In Table 1 below, I replicate Mr.

<sup>160</sup> As noted above, I understand that the Commissioner seeks a divestiture of either the Virden Elevator or Moosomin Elevator, but as Mr. Heimbecker has addressed only the Virden Elevator, I will limit the remainder of my report to the Virden Elevator.

<sup>161</sup> Heimbecker Statement, ¶51.

<sup>162</sup> Heimbecker Statement, ¶179. As discussed in this section, in my opinion this is not a cognizable efficiency because it was not likely caused by the Transaction and it is not likely to be lost in the event of the Order. If the Tribunal disagrees, however, and finds the increased throughput at the Virden Elevator to have likely been caused by the Transaction and not lost in the event of the Order, the value determined by Mr. Heimbecker is, at best, an export enhancing benefit to the Canadian economy

Heimbecker's efficiencies calculation and show the percentage increases in throughput from 2019 to 2020 for the actual and forecast periods.



116. National and provincial trends in grain production in 2020, however, demonstrate that P&H's achieved increase in throughput is not unique. According to data from Statistics Canada, and shown in Schedule 2, production of CWRS has increased by 10.7% in Canada, 10.4% in Saskatchewan, and 5.2% in Manitoba in the 2019-20 crop year as compared to the 2018-19 crop year.<sup>163</sup> While Statistics Canada does not provide aggregate monthly production data for CWRS in particular, as shown in Schedule 3, grain production overall has increased by 13.1% in Canada, 17.9% in Saskatchewan, and 7.0% in Manitoba between

pursuant to section 96(2). The value of any efficiency pursuant to section 96(1) would need to be calculated as the reduction in the average cost of existing output as described in the MEGs at paragraph 12.16.

<sup>163</sup> Statistics Canada, 2015 – 2020, "Area, Yield, Production of Canadian Principal Field Crops," accessed October 21, 2020. In this dataset, crop years run from August through the following July.

the same seven-month periods Mr. Heimbecker uses in his analysis of actual (as compared to forecast) throughput volumes.<sup>164</sup>

117. Based on these trends in grain production, there does not appear to be any reason to believe that Louis Dreyfus or another operator of the Virden Elevator would not have mirrored P&H’s performance over the first seven months of 2020. These increases in grain production, in other words, likely would have come about irrespective of the Transaction.

118. In particular, P&H is not a farming entity that directly controls grain production; rather, P&H purchases grain from farmers. As Mr. Heimbecker explains:

[REDACTED]

119. The only mechanism that Mr. Heimbecker identifies through which P&H may influence grain production through the Transaction, as opposed to taking share of existing grain from

<sup>164</sup> Statistics Canada, 2019 – 2020, “Producer deliveries of major grains,” accessed October 21, 2020.

<sup>165</sup> Heimbecker Statement, ¶31-32.

third parties, is CI expansion at Louis Dreyfus elevators. I discuss this in section X.C below. Because no crop inputs expansion has occurred to date,<sup>166</sup> the Transaction is unlikely to have caused increases in grain production that have already been observed.

B. The forecast increase in throughput at the Virden Elevator in the last five months of 2020 [REDACTED]

120. The one year period that Mr. Heimbecker uses to calculate the claimed “efficiencies” from throughput increases at the Virden Elevator [REDACTED]

[REDACTED]<sup>167</sup>

121. In respect of the five month forecast period, as noted above, Mr. Heimbecker states the forecast is:

[REDACTED]

<sup>166</sup> Examination of John Heimbecker dated July 17, 2020, p. 627-628, questions 1468 and 1469:

[REDACTED]

This is further confirmed as of a recent date by Mr. Heimbecker’s statement that “P&H has expanded throughput at Virden without the need for any additional investment” (Heimbecker Statement, ¶178).

<sup>167</sup> Heimbecker Statement, ¶51 and 52. See also Schedule 1.

[REDACTED]

122. In order to assess the reliability of this “target,” I compare Virden Elevator throughput for the first three months in the forecast period (May to July 2020) as contained in Exhibit 7 to the Heimbecker Statement to the actual results achieved over this time period.<sup>169</sup> This comparison is set out in Table 2 below.

[REDACTED]

Source: Schedule 1; Heimbecker Statement, ¶51 and Exhibit 7, page 206 of the exhibits to the Heimbecker Statement.

123. As Table 2 demonstrates, the actual CWRS throughput for this period was [REDACTED] for 2019.

124. While canola purchases in this period were [REDACTED] this appears to be the result of a delay from earlier months based on Mr. Heimbecker’s statement that:

[REDACTED]

<sup>168</sup> Heimbecker Statement, ¶32.

<sup>169</sup> This period from May to July 2020 is the only period for which both forecast and actual volumes at the Virden Elevator are available.



[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>170</sup>

Notwithstanding this benefit in the May to July 2020 period, the actual throughput was still [REDACTED]

125. Combining both CWRS and canola, the actual levels in these months were [REDACTED]  
[REDACTED], as shown in Table 2.<sup>171</sup>

126. Given that P&H [REDACTED] for CWRS volumes for the period May to July 2020 [REDACTED]  
[REDACTED] (see Table 2), in my opinion, [REDACTED]  
[REDACTED]  
[REDACTED]

127. Given that P&H [REDACTED] canola volumes for the period May to July 2020 [REDACTED]  
[REDACTED] (see Table 2) and that this period benefited from delayed sales from earlier in the year,  
in my opinion, [REDACTED]  
[REDACTED]  
[REDACTED]

128. Further, [REDACTED] as described in section IX.A above, P&H is not a farming entity that directly controls grain production; rather, P&H purchases grain from farmers and, therefore, any increase in grain production likely would have come about irrespective of the Transaction.

<sup>170</sup> Heimbecker Statement, ¶51.

<sup>171</sup> I note further, from Appendices V and W to the Answers to Undertakings Given on the Examination of John Heimbecker on July 15, 16, and 17, 2020, that [REDACTED]  
[REDACTED] for CWRS or Canola, in either of the fiscal years ending April 30, 2019 and 2020. See Schedule 4.

C. Any increase in P&H's throughput at the Virden Elevator beyond that which would have come about absent the Transaction [REDACTED]  
[REDACTED]

129. As I explained above, I have seen nothing that would indicate that the Transaction is likely to have caused the actual increase in grain production in the first half of 2020, and P&H's [REDACTED] in throughput in the second half of 2020 is [REDACTED].  
[REDACTED] As a result, any increase in P&H's throughput (and resulting claimed efficiencies at the Virden Elevator) that would not have come about absent the Transaction [REDACTED].  
[REDACTED] In that case, the increased throughput is a benefit to P&H (a synergy), but represents a redistribution of throughput between entities rather than a real output increase in the Canadian economy.
130. The only way such a redistribution would result in an efficiency to the Canadian economy [REDACTED]  
[REDACTED] I have seen no evidence that would indicate this.

D. Any efficiencies generated by the Transaction could be equally achieved by a likely purchaser and therefore not be lost in the event of the Order

131. Even if I assume that the efficiencies that Mr. Heimbecker claims from increased throughput at the Virden Elevator are efficiencies brought about by the Transaction (which, in my opinion, they are not), Mr. Heimbecker has not demonstrated whether or the extent to which the claimed Virden Elevator throughput efficiencies would be lost in the event of the Order. For example, Mr. Heimbecker has not explained why an alternative purchaser of the Virden Elevator would have been (or be) unlikely to achieve some or all of these same benefits.

132. Mr. Heimbecker identifies several factors that contribute to increased turn rates or throughput at Louis Dreyfus elevators, including the Virden Elevator, “to bring these in line with the current turn rates at other P&H Elevators.”<sup>172</sup>
- a. First, Mr. Heimbecker explains that “P&H’s Elevators have a higher turn rate than former LDC Elevators.”<sup>173</sup> Mr. Heimbecker states that this is due to “P&H’s superior port access and port storage, P&H’s larger grain network and the fact that P&H purchases a larger variety of grains than LDC did.”<sup>174</sup>
  - b. Second, Mr. Heimbecker explains that “P&H’s AGT facility has significantly more storage and can move grain onto boats at faster speeds than the Kinder Morgan (“KM”) Vancouver Wharves facility through which LDC used to export wheat and canola on the West Coast.”<sup>175</sup>
  - c. Third, Mr. Heimbecker explains that FGT, once operational in [REDACTED] will enhance P&H’s ability to increase elevator turn rates and bypass certain rail and bridge congestion.<sup>176</sup>
133. However, these factors, which according to Mr. Heimbecker bring about the increased throughput at the Virden Elevator, could be equally achieved by a potential purchaser and would therefore not qualify as cognizable efficiencies.

134. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>172</sup> Heimbecker Statement, ¶50.

<sup>173</sup> Heimbecker Statement, ¶45.

<sup>174</sup> Heimbecker Statement, ¶46.

<sup>175</sup> Heimbecker Statement, ¶47.

<sup>176</sup> Heimbecker Statement, ¶49.

[REDACTED]

135. However, the constraints of the Kinder Morgan facility previously used by LDC are not relevant to a consideration of what would be lost in the event of the Order. By contrast, what is relevant is a comparison between the facilities used by P&H and those that would be used by the alternative purchaser. All of the statements made in the Heimbecker Statement similarly reflect simply a comparison of P&H's facilities to those used by Louis Dreyfus.

136. As Mr. Heimbecker stated in discovery:

[REDACTED]

<sup>177</sup> Examination of John Heimbecker dated July 17, 2020, p. 608, question 1420.

<sup>178</sup> Examination of John Heimbecker dated July 17, 2020, p. 585, question 1368.

137. This would apply to all of the factors that Mr. Heimbecker refers to, including the reduced congestion from bringing FGT operational on the south shore.<sup>179</sup>
138. Further, in the event that the purchaser pursuant to the Order would not have sufficient throughput capacity to achieve the same volumes as P&H, these volumes would likely be redirected to other facilities that did have the capacity and, again, this would not represent an efficiency lost as a result of the Order.
139. If the purchaser were to operate from a facility that has higher per unit variable operating costs than the P&H facility that would receive the incremental volume from the Virden Elevator then such a saving may qualify as an efficiency that would not be lost in the event of the Order. However, I have seen no evidence that would indicate this.

## X. Detailed Response to the Heimbecker Statement – Other Claimed Benefits to P&H

140. Mr. Heimbecker's efficiency and benefit claims fall into two general categories. The first category was addressed above in section IX.
141. In the second category, which I address in this section, Mr. Heimbecker claims other benefits to P&H. These other benefits that Mr. Heimbecker identifies include network logistics benefits, [REDACTED] and crop inputs expansion. While Mr. Heimbecker does not appear to be claiming efficiencies beyond those relating to the alleged Virden Elevator throughput expansion, I explain below

<sup>179</sup> I note that the potential purchasers listed in section VIII.D have the following terminals in Vancouver (number references are to the sites listed on the Vancouver Harbour map attached to the Heimbecker Statement at Exhibit 2):

North Shore: G3 (location 18); Cargill (location 20);

Other locations: Paterson Grain (AGT – location 4), GrainsConnect (FGT – location 29)

why these benefits are not cognizable efficiencies under section 96 of the Act that would be lost in the event of the Order.

## A. Network Logistics Benefits

142. [REDACTED]

Mr. Heimbecker does not quantify this category of savings.

143. [REDACTED]  
terminals (which I understand to mean at a lower shipping cost) *may*, in theory, qualify as efficiencies under section 96 of the Act. However, Mr. Heimbecker has failed to (1) quantify these cost savings or provide the information to do so, and (2) demonstrate that (or the extent to which) the savings would be lost in the event of the Order.

144. Mr. Heimbecker has not provided evidence to support that the Virden Elevator is a necessary addition to P&H's elevator network to achieve the logistics benefits described.

[REDACTED]

145. Further, a potential purchaser of the Virden Elevator may achieve some, if not all, of these same types of logistics savings through its own network integration.

<sup>180</sup> Heimbecker Statement, ¶43, 44, and 53.

<sup>181</sup> Heimbecker Statement, ¶44 and 53.

## B. P&H's Efficient Vancouver Area Terminals

146. In addition to logistics savings from [REDACTED]  
[REDACTED]  
[REDACTED]<sup>182</sup>
147. This benefit to P&H from the Transaction [REDACTED]  
[REDACTED] is not a cognizable efficiency that would be lost in the event of the Order. This is because the same volume is still going through the [REDACTED]  
[REDACTED] – the only difference is the elevators from which these volumes to [REDACTED]  
[REDACTED] are coming.
148. Any benefit from [REDACTED] is coming from either an increase in output at the expense of efficiency at third-party terminals that would have received the volumes absent the Transaction (which would likely offset benefits to P&H) or an increase in Canadian grain production. As explained above, Mr. Heimbecker has not provided evidence that the Transaction would lead to an increase in Canadian grain production. With regards to third-party facilities that would have received the volumes absent the Transaction, there is no evidence in the Heimbecker Statement that [REDACTED]  
[REDACTED] one of which (GrainsConnect) also operates FGT.

## C. Crop Inputs Expansion

149. Mr. Heimbecker explains that P&H will make capital investments in each Louis Dreyfus facility, including the Virden Elevator, in order to convert standalone grain facilities to dual grain and retail crop inputs facilities, which will benefit P&H through increased sales and will increase overall grain production. Specifically, Mr. Heimbecker explains that the “Transaction allows P&H to compete more effectively with rival grain companies,

<sup>182</sup> Heimbecker Statement, ¶44. See also ¶54.

including Richardson, and others in the CI business by converting the LDC Elevators, which were pure grain facilities, into dual, CI retail/grain facilities.”<sup>183</sup>

150. Mr. Heimbecker quantifies this benefit to P&H as the [REDACTED] [REDACTED] at the Virden Elevator. He also identifies the implementation costs needed to achieve these savings. On this basis, assuming estimated CI sales at the Virden Elevator, Mr. Heimbecker claims that this conversion would [REDACTED]

[REDACTED]<sup>184</sup>

151. As noted above in relation to P&H’s increased throughput, the benefits from increased volume to P&H from the Transaction are not efficiencies to Canada if those benefits come at the expense of other stakeholders. In this case, the benefit of increased CI sales would be a redistribution of income rather than a real resource saving. [REDACTED] that P&H earns from converting the Virden Elevator to a dual grain and CI retail facility is, in and of itself, a pecuniary redistribution of income between P&H and farmers. This is the case even if, as Mr. Heimbecker claims, [REDACTED]

152. In this regard, Mr. Heimbecker notes:

“the application of additional fertilizer and crop protection is expected to increase grain production in the Virden area, which is expected to increase Canadian exports. [...]

[REDACTED]  
[REDACTED]  
[REDACTED] Instead, based on our experience, I believe that there will be an increase in CI sales made within the area. As grain yields

<sup>183</sup> Heimbecker Statement, ¶55.

<sup>184</sup> Heimbecker Statement, ¶58.



continue to improve, farms may use more fertilizer and apply more crop protection products to support higher priced and better yielding seed varieties.”<sup>185</sup>

153. Further, I have not seen any evidence, aside from Mr. Heimbecker’s opinion, that an additional CI retail location in the Virден area would (1) increase CI sales in the area, rather than redistribute sales within the area, or (2) lead to more use of CI by farmers and increase grain production in the Virден area.<sup>186</sup>
154. Regardless, even if such evidence had been provided and was sufficient to conclude grain production was likely to increase through the Transaction, Mr. Heimbecker has not quantified the corresponding section 96 efficiencies from this output expansion, such as any economies of scale at its elevators or terminals resulting from this incremental output expansion from the Transaction that would be lost in the event of the Order. He has, however, identified that “it will cost [REDACTED] to convert each of the LDC locations to a combined grain/CI facility.”<sup>187</sup> These costs would represent necessary costs to achieve the efficiencies,<sup>188</sup> and would therefore need to be deducted from any cognizable efficiencies such that there would not likely be any cognizable section 96 efficiencies.

<sup>185</sup> Heimbecker Statement, ¶55 and ¶59.

<sup>186</sup> I note from my review of P&H’s productions (see, in particular, P&H\_0006470) and public information that the following appear to be existing CI suppliers in the Virден area, among others: Redfern Farm Services (“Virден,” accessed October 21, 2020, <http://redferns.ca/our-team/locations-virden/>); Sharpe’s Crop Services (“Locations,” accessed October 21, 2020, <https://www.sharpes.ca/locations/>); Core AG Inputs (“Virден,” accessed October 21, 2020, <https://www.coreag.ca/virden/>); Nutrien Ag Solutions (“Locations,” accessed October 21, 2020, <https://www.nutrienagsolutions.ca/find-a-location/>); and Richardson (“Locations,” accessed October 21, 2020, <https://www.richardson.ca/about-us/richardson-locations/>).

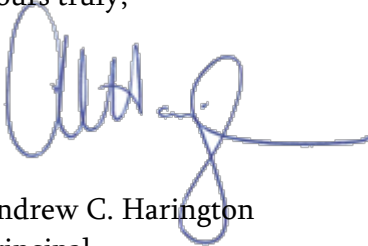
<sup>187</sup> Heimbecker Statement, ¶57.

<sup>188</sup> See section VI.D.1 above (“Costs to Achieve the Efficiencies”).

## XI. Restrictions and Limitations

155. This report is not intended for general circulation or publication nor is it to be reproduced or used for any purpose other than that outlined above without my written permission in each specific instance. The Brattle Group does not assume any responsibility or liability for losses occasioned to you or any other party as a result of the circulation, publication, reproduction, or use of this report contrary to the provisions in this paragraph.
156. I reserve the right (but will be under no obligation) to review and/or revise any and all assumptions and/or calculations included or referred to in this report and, if considered necessary, to revise any calculations in light of any information which becomes known to me after the date of this report.
157. This report was prepared for the Commissioner, in accordance with The Brattle Group's engagement terms, and is intended to be read and used as a whole and not in parts.
158. The report reflects my analyses and opinions and does not necessarily reflect those of The Brattle Group's clients or other consultants.
159. There are no third party beneficiaries with respect to this report, and The Brattle Group does not accept any liability to any third party in respect of the contents of this report or any actions taken or decisions made as a consequence of the information set forth herein.

Yours truly,

A handwritten signature in blue ink, appearing to read "Andrew C. Harington", with a long horizontal flourish extending to the right.

Andrew C. Harington  
Principal  
The Brattle Group

## Appendix A

### Curriculum Vitae of Andrew C. Harington CPA, CA, CFA, CBV

I am a Principal in the Toronto office of The Brattle Group and am part of the firm's Litigation and Finance practice area.

I have provided business and intellectual property valuation and mergers and acquisition advisory services for over 25 years and specialize in:

- Financial aspects of Canadian competition law;
- The valuation of intellectual property and commercial businesses;
- The quantification of loss and accounting of profits in intellectual property disputes; and
- The quantification of loss in commercial litigation and international arbitration disputes.

I have been qualified as an expert in the valuation of intellectual property and commercial businesses and the quantification of loss and accounting of profits in intellectual property and commercial litigation damages in both the Federal Court of Canada and the Ontario Superior Court of Justice and as an expert in the quantification of efficiencies by the Competition Tribunal of Canada. I have also given evidence before the International Court of Arbitration of the ICC as well as in domestic arbitrations and mediations.

#### BUSINESS EXPERIENCE

2016 to date	Principal, The Brattle Group
2010 – 2016	Managing Director, Duff & Phelps
2000 – 2010	Partner, Cole & Partners, Toronto
1993 – 2000	Manager, Transaction Advisory Services, Audit and Consulting, Andersen

#### PROFESSIONAL MEMBERSHIPS

I am a member of the Canadian Institute of Chartered Accountants, CFA Institute, Toronto CFA Society, the Licensing Executives Society, the Intellectual Property Institute of Canada, the Toronto Intellectual Property Group and the Canadian Institute of Chartered Business Valuators

#### EDUCATIONAL QUALIFICATIONS

2005	Chartered Business Valuator
2002	Chartered Financial Analyst
1998	Chartered Accountant (Canada)
1995	Chartered Accountant (South Africa)
1992	Post Graduate Diploma in Accounting (University of Cape Town)
1992	Bachelor of Commerce (Honours) Financial Accounting (University of Cape Town)
1991	Bachelor of Commerce (University of Cape Town)

## SELECTED EXPERIENCE

For over 25 years, I have been providing financial litigation consulting, financial advisory and business and intellectual property valuation services in numerous industries. Selected experience includes<sup>1</sup>:

### In connection with the Canadian Competition Act:

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1. Authored an expert report as to whether, absent the acquisition of Total Metal Recovery (TMR) Inc. by American Iron & Metal Company Inc., the business of TMR was likely to fail (<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04528.html>)
2. Authored an expert report as to whether the closing of the acquisition of Total Metal Recovery (TMR) Inc. by American Iron & Metal Company Inc. under the terms of the proposed preservation order would preserve the ability of the Competition Tribunal to, if necessary, issue a remedial order
3. Retained by Commissioner of Competition to review the submissions of the parties and advise as to the quantum of Efficiencies likely to arise as a result of acquisition by Canadian National Railway Company of H&R Transport Ltd. (<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04527.html>)
4. Retained by counsel to assist them in providing legal advice to both merging parties as to the quantum of section 96 efficiencies likely to arise from a transaction in the food products industry
5. Authored an expert report and presented to the Competition Bureau as to the quantum of section 96 efficiencies likely to be lost in the event of a specific remedial order in connection with an acquisition in the retail crop inputs industry
6. Retained by counsel to assist them in providing legal advice to both merging parties as to the quantum of section 96 efficiencies likely to arise from a transaction in the chemicals industry
7. Retained by counsel to assist them in providing legal advice to both merging parties as to the quantum of section 96 efficiencies likely to arise from a transaction in the transportation industry

<sup>1</sup> Note that the listed experience does not include active or past engagements where my involvement was not in the public domain or is not known by other parties involved and/or for which authorization to disclose my involvement has not been provided by clients

8. Retained by counsel to assist them in providing legal advice to a potential target as to the quantum of section 96 efficiencies likely to arise from a transaction in the airline industry
9. Retained by counsel to assist them in responding to a SIR on behalf of a potential acquirer as to the quantum of section 96 efficiencies likely to arise from an acquisition in the forestry industry
10. Retained by counsel to assist them in providing legal advice to a potential acquirer as to the quantum of section 96 efficiencies likely to arise from an agreement in the airline industry
11. Retained by counsel to assist them in providing legal advice to a potential acquirer as to whether a proposed transaction exceeds the transaction notification thresholds
12. Retained by counsel to assist them in providing legal advice to a potential acquirer as to the quantum of section 96 efficiencies likely to arise from an acquisition in the heavy equipment industry
13. Retained by counsel to assist them in providing legal advice to a potential target as to the quantum of section 96 efficiencies likely to arise from an acquisition in the food products industry
14. Retained by Commissioner of Competition to advise in connection with a transaction in the newspaper industry in which failing firm and efficiencies were alleged by the parties
15. Authored an expert report and presented to the Competition Bureau as to the quantum of section 96 efficiencies likely to be lost in the event of a specific remedial order in connection with an acquisition in the retail crop inputs industry
16. Authored an expert report and presented to the Competition Bureau as to the quantum of section 96 efficiencies likely to arise from an acquisition in the forestry sector
17. Retained by counsel to assist them in providing legal advice to a potential acquirer as to the quantum of section 96 efficiencies likely to arise from an acquisition in the transportation services industry
18. Authored an expert report as to the quantum of section 96 efficiencies likely to arise from an acquisition in the waste management industry

19. Authored an expert report as to the quantum of section 96 efficiencies likely to arise from an acquisition in the media industry
20. Retained by counsel to assist them in providing legal advice to a potential acquirer as to the quantum of section 96 efficiencies likely to arise from an acquisition in the propane industry
21. Retained by counsel to assist them in providing legal advice to a potential acquirer as to the quantum of section 96 efficiencies likely to arise from an acquisition in the fisheries sector
22. Retained by counsel to assist them in providing legal advice to a foreign investor as to the interpretation of operating liabilities so as to assess whether the transaction exceeded Investment Canada thresholds
23. Retained by counsel to assist them in providing legal advice to a potential acquirer as to the quantum of section 96 efficiencies likely to arise from an acquisition in the public exchange industry
24. Authored an expert report as to the quantum of section 96 efficiencies likely to arise from an acquisition in the oil and gas pipeline industry
25. Authored an expert report and presented to the Competition Bureau as to the quantum of section 96 efficiencies likely to arise from the acquisition by Superior Plus, LP. of the Retail Propane operations of Gibsons Energy ULC (Canwest) (See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04307.html>)
26. Retained by counsel to assist them in providing legal advice to a potential acquirer as to the quantum of section 96 efficiencies likely to arise from an acquisition in the aircraft services industry
27. Retained by counsel to assist them in providing legal advice to a potential acquirer as to the quantum of section 96 efficiencies likely to arise from an acquisition in the transport industry
28. Retained by counsel to assist them in providing legal advice to a potential acquirer as to the quantum of section 96 efficiencies likely to arise from an acquisition in the outdoor recreation retail industry
29. Retained by counsel to assist them in providing legal advice to a potential acquirer as to the quantum of section 96 efficiencies likely to arise from the home services industry

30. Authored an expert report and presented to the Competition Bureau as to the quantum of section 96 efficiencies likely to arise from the acquisition of G&K Services by Cintas Corporation
31. Authored an expert report and presented to the Competition Bureau as to the quantum of section 96 efficiencies likely to arise from the proposed merger of Agrium Inc. and Potash Corporation of Saskatchewan Inc. (See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04305.html>)
32. Authored an expert report and presented to the Competition Bureau as to the quantum of section 96 efficiencies likely to arise from the acquisition of Manitoba Telecom Services Inc. (MTS Inc.) by BCE
33. Authored an expert report and presented to the Competition Bureau as to the quantum of section 96 efficiencies likely to arise from the proposed acquisition by Superior Plus Corp. of Canexus Corporation (See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04111.html>)
34. Retained by Commissioner of Competition to advise in connection with a proposed agreement in which efficiencies were alleged by the parties
35. Retained by Commissioner of Competition to advise in connection with a proposed merger in the airline sector in which failing firm and efficiencies were alleged by the merging parties
36. Retained by counsel to assist them in providing legal advice to a potential acquirer as to the quantum of section 96 efficiencies likely to arise from an acquisition in the construction industry
37. Retained by Commissioner of Competition to advise in connection with the acquisition by Sobeys of the food and gas retail and wholesale operations of Co-op in which failing firm was alleged by the parties
38. Retained by Commissioner of Competition to advise in connection with a proposed merger in the newspaper industry in which failing firm was alleged by the merging parties
39. Retained by counsel to assist them in providing legal advice to a potential acquirer in connection with efficiencies that would likely arise from an acquisition in the newspaper industry

40. Retained by Commissioner of Competition to advise in connection with a proposed merger in the lumber industry in which efficiencies were alleged by the merging parties
41. Retained by Commissioner of Competition to advise in connection with a proposed merger in the sporting goods industry in which efficiencies were alleged by the merging parties
42. Retained by Commissioner of Competition to advise in connection with a proposed merger in the home services industry in which efficiencies were alleged by the merging parties
43. Authored a preliminary expert report as to the quantum of section 96 efficiencies likely to arise from a proposed merger in the television and radio industry and a preliminary expert affidavit in connection with alleged irreparable harm arising from a proposed hold-separate agreement
44. Consulted on financial aspects of assessing the quantitative appropriateness of administrative monetary penalties in the context of alleged unlawful multi-party agreements
45. Retained by parties to prepare a preliminary analysis as to the quantum of section 96 efficiencies likely to arise from a proposed agreement between two competitors in the airline sector
46. Retained by Commissioner of Competition to advise in connection with alleged misleading advertising in the car rental industry
47. Retained by parties to prepare a preliminary analysis as to likelihood of entry in connection with an allegation of a significant prevention of competition likely to arise from a proposed merger in the entertainment industry
48. Authored an expert report on behalf of the Competition Bureau and testified at the Competition Tribunal as an expert in the quantification of section 96 efficiencies that would be lost in the event of an order in connection with the proposed acquisition of Complete Environmental Inc. by Tervita Corporation (formerly CCS Corporation) (CT-2011-002) (2013 FCA 28) (2015 SCC 3)
49. Authored a preliminary expert report as to the quantum of section 96 efficiencies likely to arise from a merger in the paint and coatings industry and a preliminary expert affidavit in connection with alleged irreparable harm



50. Retained by parties to prepare preliminary analysis of section 96 efficiencies arising from a proposed merger in the pharmaceutical information sector
51. Consulted on financial aspects of assessing business incentives in response to allegations of unlawful multi-party agreements
52. Authored an expert report and presented to the Competition Bureau as to the quantum of section 96 efficiencies likely to arise from the merger of Suncor Energy Inc. and Petro-Canada
53. Retained by counsel to assist them in providing legal advice to a potential acquirer in connection with efficiencies that would likely arise from the acquisition of a target company in the telecommunications industry
54. Authored an expert report as to the quantum of section 96 efficiencies likely to arise from the proposed acquisition by American Iron & Metal Company Inc.'s of SNF Inc
55. Co-authored, with Stephen Cole, a preliminary expert report in connection with the acquisition of Canadian Phone Directories Holdings Inc (Canpages) by Yellow Pages Group Inc.
56. Authored an expert report as to the quantum of section 96 efficiencies likely to arise from a merger in the forestry sector
57. Co-authored, with Suzanne Loomer, a preliminary expert report as to the quantum of section 96 efficiencies likely to arise from the acquisition by West Fraser Timber Co. Ltd of Weldwood of Canada Limited
58. Assisted with the preparation of a preliminary expert report and an expert affidavit in connection with alleged irreparable harm arising from a proposed hold-separate agreement in the acquisition by Labatt Brewing Company Limited of Lakeport Brewing Income Fund
59. Assisted with the preparation of a preliminary expert report and an expert affidavit in connection with alleged irreparable harm arising from a proposed injunction in the coatings industry
60. Assisted with the preparation of an expert report for the Commissioner of Competition responding to a plan proposed by merging parties after findings of an anti-competitive merger in The Commissioner of Competition v. United Grain Growers Limited

61. Assisted with forensic investigations in connection with allegations of price fixing under the Competition Act on behalf of an intervenor in the hospital sector
62. Assisted with the analysis of allegations of predatory pricing in the airline sector under the Competition Act on behalf of an intervenor
63. Assisted merging or acquiring parties on financial aspects, including as applicable: efficiencies; failing firm; likelihood of entry; and/or affidavits in connection with section 100/104 applications in response to actual or anticipated competition challenges in mergers, proposed mergers or agreements

#### Commercial litigation and international arbitration:

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64. Authored affidavit on behalf of Horizon Pharma in connection with a review of the pricing of PROCYSBI® by the Patented Medicine Prices Review Board
65. Assisted counsel on financial matters on behalf of Vice-Admiral Mark Norman in connection with litigation against Her Majesty the Queen in Right of Canada
66. Assisted in the preparation of an expert report on the fair market value of the intellectual property assets of J. Crew Group in connection with litigation between Eaton Vance Management, holders of secured debt of J. Crew Group and J. Crew arising from the restructuring of the ownership of IP assets of the company for purposes of raising new debt
67. Authored responding expert affidavit on behalf of MDG Newmarket Inc, d/b/a Ontario Energy Group in connection with a proceeding under the Class Proceedings Act – 1850/16CP.
68. Provided testimony before the International Court of Arbitration of the International Chamber of Commerce on behalf of Origin & Co., Ltd (Republic of Korea) as to damages being sought by JFI Global Purchasing, Ltd (Barbados) for an alleged breach of contract (ICC Case No: 21763/CYK)
69. Co-authored an expert report on behalf of Atomic Energy of Canada Ltd quantifying financial loss relating to a construction insurance claim in the nuclear reactor sector

70. Authored a limited critique report in the quantification of alleged damages suffered by plaintiffs in the context of a claim by a property developer against a prospective tenant for wrongful inducement.
71. Provided valuation consulting services in the context of litigation between a master and sub-franchisor in the leisure products sector.
72. Assisted in the preparation of an expert report prepared for arbitration on behalf of Ontario Lottery and Gaming Corp. in connection with litigation by the Ontario First Nations Limited Partnership
73. Authored a responding expert report in the quantification of alleged damages suffered by plaintiffs in the context of a class action against investment advisors.
74. Co-authored expert reports on behalf of Atomic Energy of Canada Ltd in response to a claim by Nordion Inc. for alleged commercial damages for termination of a contract to construct two isotope production reactors, including alleged commercial damages alleged suffered as well as quantifying other financial aspects of the parties' positions (<https://ipolitics.ca/2012/09/10/nordion-shares-plummet-after-arbitrators-side-with-aecl/>; <http://www.world-nuclear-news.org/Articles/Settlement-deal-over-MAPLE-cancellation>)
75. Authored expert report on behalf of the plaintiff quantifying alleged damages suffered in connection with litigation relating to alleged wrongful dismissal in the investment management sector
76. Authored expert report on behalf of plaintiff on the economic benefits created by a hydro generation plant in connection with litigation in the power generation sector
77. Authored expert report on behalf of the defendant quantifying alleged damages suffered as a result of the termination of a commercial contract in the forestry sector
78. Authored expert reports quantifying alleged damages suffered by two plaintiffs in connection with litigation relating to alleged wrongful dismissal in the investment management sector
79. Authored expert report on behalf of the plaintiff quantifying alleged damages suffered as a result of the termination of a commercial contract in the music and software wholesaling sector

80. Co-authored an expert report on behalf of the defendant on alleged damages suffered as a result of a construction delay claim in the power generation sector
81. Co-authored expert report with Andrew Freedman on behalf of the municipal defendant on alleged damages suffered as a result of alleged unlawful acts inducing contract in the financial sector
82. Co-authored expert report with Andrew Freedman on behalf of the municipal plaintiff on alleged damages suffered as a result of alleged unlawful acts inducing contract in the financial sector

### Intellectual property litigation:

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83. Authored expert reports and testified on behalf of Rovi Guides, Inc. in the liability phase as to the ability to quantify BCE and Telus' profits in connection with its claims against BCE Inc. et al and Telus Communications Company et al arising from alleged patent infringement.
84. Authored expert reports and testified on behalf of Rovi Guides, Inc. as to the quantum of Videotron's profits in connection with its claim against Videotron Ltd for an accounting of profits arising from alleged patent infringement.
85. Authored an expert report for mediation on behalf of Robert Teti and ITET Corporation in connection with its claim against Mueller Water Products Inc.
86. Authored expert reports on behalf of Spin Master Ltd. in connection with its claim against Mattel Canada Inc. for an accounting of Mattel's profits for alleged patent infringement (2019 FC 385).
87. Authored and cross examined on an expert affidavit on behalf of Evolution Technologies Inc. in connection with the financial impact on the appellant's business arising from the trial judgment (2019 FCA 11).
88. Authored affidavit on behalf of Evolution Technologies Inc. in connection with its application for stay of the Federal Courts finding that Evolution infringed the patent of Human Care Canada Inc. (2019 FCA 11).
89. Authored expert reports on behalf of Apotex Inc. in connection with its claim against Pfizer Canada Inc. for commercial damages pursuant to section 8 of the Patent Medicine (Notice of Compliance) Regulations (T-1064-13).

90. Authored expert reports on behalf of Mylan Pharmaceuticals ULC in connection with its claim against Takeda Canada Inc. for commercial damages pursuant to section 8 of the Patent Medicine (Notice of Compliance) Regulations (T-85-16).
91. Retained as an expert by defendant in connection with damages and an accounting of profits for alleged patent infringement in the oil & gas sector.
92. Authored expert reports on behalf of Apotex Inc. in connection with its claim against Abbott Laboratories, Limited, Takeda Pharmaceuticals Company Limited and Takeda Pharmaceuticals Americas, Inc. for commercial damages pursuant to section 8 of the Patent Medicine (Notice of Compliance) Regulations and responding reports in connection with counterclaims by Abbott Laboratories Limited et al for an accounting of profits and reasonable royalty damages (CV-09-391938).
93. Retained as an expert by defendant in connection with damages and an accounting of profits for alleged trademark infringement in the telecommunications sector.
94. Retained as an expert by defendant in connection with alleged patent infringement in connection with the oil and gas fracking sector.
95. Authored expert affidavit on behalf of a plaintiff in the medical marijuana industry in connection with alleged irreparable harm arising from alleged trade-mark infringement and breach of fiduciary duty in the context of an injunction application (Ontario 97160-16).
96. Authored and cross-examined on two expert affidavits responding to allegations of irreparable harm in an injunction application by Sleep Country Canada Inc. in context of alleged trademark infringement by Sears Canada Ltd. in the retail sector (2017 FC 148).
97. Authored expert reports and testified before the Federal Court of Canada on behalf of AFD Petroleum Ltd as to damages, an accounting of profits, and reasonable royalty being sought by Frac Shack Inc for alleged patent infringement in the oil and gas sector (2017 FC 104).
98. Authored an expert affidavit on behalf of the defendants, Aird & McBurney LP et al, in connection with alleged irreparable harm in the context of an injunction application being sought by Sim & McBurney.

99. Authored and cross examined on a responding expert affidavit on behalf of Apotex Inc. in the context of a motion for a bifurcation order being sought by Alcon Canada Inc. in an intellectual property case alleging patent infringement (2016 FC 898).
100. Authored a responding expert affidavit in the context of a motion for further production of documents in an intellectual property case alleging patent infringement.
101. Authored an expert report on behalf of Apotex Inc. in connection with its claim against Pfizer Inc. for commercial damages pursuant to section 8 of the Patent Medicine (Notice of Compliance) Regulations and authored an expert report on behalf of Apotex responding to the quantification of alleged patent infringement damages suffered by Pfizer Inc. (T-1736-10)
102. Authored and cross-examined on affidavit on behalf of Apotex Inc. in connection with a motion sought by Pfizer Canada Inc. for proposed pleading amendments. (T-1736-10)
103. Authored expert reports and testified before the Federal Court of Canada on behalf of Arctic Cat, Inc. as to damages being sought by Bombardier Recreational Products Inc. for alleged patent infringement (2017 FC 207)
104. Authored expert reports and testified before the Ontario Superior Court of Justice on behalf of Exact Furniture Limited as to damages and profits being sought by Video Furniture International Inc. for alleged wrongful use of confidential information (2015 ONSC 3399)
105. Retained as an expert to quantify damages in connection with allegations of patent infringement in the pipeline infrastructure sector
106. Authored expert reports and testified before the Federal Court on behalf of Apotex Inc. as to damages being sought by Eli Lilly and Company for patent infringement (2014 FC 1254)
107. Assisted with the preparation of primary and responding expert reports, depositions and trial testimony in the Delaware Court in connection with valuation of intellectual property rights and allocation of sales proceeds following the bankruptcy of Nortel

108. Authored an expert report on behalf of Apotex Inc. in connection with its claim against Glaxosmithkline Inc. for commercial damages pursuant to section 8 of the Patent Medicine (Notice of Compliance) Regulations. (T-714-08)
109. Authored expert reports and testified on behalf of Apotex Inc. in connection with its claim against Takeda Canada Inc. for commercial damages pursuant to section 8 of the Patent Medicine (Notice of Compliance) Regulations. (2013 FC 1237)
110. Authored and cross-examined on an expert affidavit responding to allegations of irreparable harm in an injunction application by AstraZeneca Canada Inc. in the context of alleged patent infringement by Apotex Inc in the pharmaceutical sector (T-1668-10)
111. Authored expert report on behalf of the plaintiff quantifying alleged damages pursuant to Section 8 of the Patent Medicine (Notice of Compliance) Regulations
112. Authored and cross-examined on expert affidavit responding to allegations of irreparable harm in an injunction application by Target Corp. in context of alleged trademark infringement by Fairweather Ltd. in the retail sector (T-1902-10)
113. Retained to provide financial litigation assistance on behalf of a large multinational aerospace manufacturer in response to alleged misuse of confidential information
114. Co-authored draft expert report on behalf of branded pharmaceutical company in connection with alleged patent infringement by another branded pharmaceutical company
115. Authored, and in some cases cross-examined on, affidavits in connection with motions for proposed pleading amendments , bifurcation, further production of information, motion to strike and other matters in the context of litigation where my involvement is not in the public domain.

#### Intellectual property valuation and transfer pricing:

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116. Authored valuation reports in connection with the cross-border transfer of businesses and all forms of intellectual property in the context of global business restructuring of multi-national businesses in various sectors, including:
  - o commercial financing

- consumer staples manufacturing
  - electrical distribution technology
  - locomotive engine manufacturing
  - military technology
117. Authored report on behalf of a company in the oil sector in connection with an anticipated valuation challenge by Canada Revenue Agency.
118. Provided consulting services to a company in the oil and gas sector as to reasonable royalty rates for cross licensing intellectual property
119. Provided assistance with the preparation of an expert report in connection with litigation between Canada Revenue Agency and R. Daren Baxter relating to a valuation of software and algorithms underlying S&P commodity future trading structure.
120. Provided assistance with the preparation of an expert report in connection with litigation between Canada Revenue Agency and GE Capital Canada Inc. relating to the valuation of an inter-corporate guarantee.
121. Authored reports as to royalty rates for cross border licensing of intellectual property between non-arms length parties within multi-national enterprises for purposes of section 247 of the *Income Tax Act* and compliance with OECD.
122. Authored transfer pricing studies for income tax purposes in connection with cross border pricing of transactions between non-arms length parties within multi-national enterprises in the high tech sector for purposes of section 247 of the *Income Tax Act* and compliance with OECD.
123. Authored in excess of 100 reports valuing various forms of intellectual property, including patents, brands, trade-marks, know-how, customer relationships and goodwill for companies in a variety of sectors including: actuarial services, directory publishing , employer services, financial planning software , food products , mining , oil and gas, real estate services, residential and commercial door manufacturing, software services, spa manufacturing and technology manufacturing.



### Valuation of commercial interests:

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124. Authored numerous reports in connection with of the valuation of companies operating in various sectors, including:
- analytical laboratory services
  - directory publishing
  - portfolio valuation of private equity portfolio, primarily hotels
  - portfolio valuation of private equity technology portfolio
  - portfolio valuation of private equity diversified portfolio (five years)
  - energy marketing services
125. Authored or co-authored fairness opinions in connection with transactions in various sectors, including (note that these items are also included in Transaction Advisory):
- internalization of management contracts in the real estate sector
  - directory services
  - oil and gas management services
  - financial services
  - investment management
  - real estate software
126. Authored or co-authored reports responding to fairness opinions in connection with transaction in various sectors, including (note that these items are also included in Transaction Advisory):
- paper and pulp manufacturing
  - retail department stores

### Business consulting engagements:

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127. Preparation of a report to the Board of Directors in the brewing industry opining as to whether the terms of a commercial contract had been complied with
128. Business consulting projects (incorporating business viability analyses) in connection with, amongst others:
- operational efficiency review and restructuring of a retail department store chain
  - operational efficiency review and restructuring of an apparel retailer
  - restructuring of an airline
  - start-up of mid-stream gas refinery

129. Business viability analysis:
- the feasibility of a start-up charter airline
  - feasibility and restructuring of a plastics manufacturer
  - the feasibility of an apparel manufacturer
  - optician practice
  - operational efficiency review and restructuring of a retail department store chain
  - wholesale distributor
130. Advisory services to the Ontario Ministry of Health and Long-Term Care in connection with the design and implementation of a reporting / monitoring system to achieve the objectives of Bill 102 - An Act to amend the Drug Interchangeability and Dispensing Fee Act and the Ontario Drug Benefit Act

### Transaction advisory:

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131. Provision of M&A acquisition advisory services, due diligence and post-merger integration in a variety of business sectors, including:
- apparel manufacturer
  - apparel retailing
  - animated television and feature film
  - collectibles retailing
  - commercial and educational video
  - construction equipment
  - construction supplies
  - equipment financing
  - health services
  - hospitality – hotel
  - hospitality – restaurant
  - jewelry manufacturing and retailing
  - laser measurement services
  - oil and gas midstream and downstream
  - printing services
  - real estate appraisal and related services
  - windshield manufacturing

132. Preparation of post-transaction root cause analysis of failure to achieve synergy targets in the context of a valuation
133. Authored or co-authored fairness opinions in connection with transactions in various sectors, including (note that these items are also included in Valuation of Commercial Interests):
  - internalization of management contracts in the real estate sector
  - directory services
  - oil and gas management services
  - financial services
  - investment management
  - real estate software
134. Authored or co-authored reports responding to fairness opinions in connection with transaction in various sectors, including (note that these items are also included in Valuation of Commercial Interests):
  - paper and pulp manufacturing
  - retail department stores

## ARTICLES, PRESENTATIONS AND OTHER PUBLICATIONS

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I have authored numerous publications as well as articles for professional journals and have spoken at professional and academic conferences. Publications and representative presentations include:

### Publications

1. Contributing author of *Brand Value Special Task Force Report – February 2020* published by INTA, International Trademark Association
2. Lead author of *Calculating Monetary Remedies in Intellectual Property Cases in Canada – a Reference Book of Principles and Case Law – 2018 Edition*
3. Co-author of chapter on Monetary Relief – Quantum in the looseleaf publication *Intellectual Property Disputes: Resolutions and Remedies* edited by Ronald E. Dimock and published by Carswell in 2012
4. Co-author of two monographs “Damages Calculations in Intellectual Property Cases in Canada” and “Accounting of Profits Calculations in Intellectual Property Cases in Canada” published in 2012
5. Author of article entitled “Enhancing Synergy Realisation” published by Financier Worldwide in 2006
6. Co-author of monograph “Sharing Synergies” published in 2003

### Lectures and presentations

7. October 2020 York University Osgoode Hall Law School guest lecturer with Dr. Renée Duplantis on sections 92, 93 and 96 of the *Competition Act*
8. November 2019 University of Toronto Faculty of Law Global Professional Master of Laws guest lecturer on business, valuation, income tax and litigation aspects of intellectual property
9. March 2019 Ryerson University guest lecturer on business and litigation aspects of intellectual property

10. November 2018 University of Toronto Faculty of Law Global Professional Master of Laws guest lecturer on business, valuation, income tax and litigation aspects of intellectual property
11. November 2017 University of Toronto Faculty of Law Global Professional Master of Laws guest lecturer on business, valuation, income tax and litigation aspects of intellectual property
12. March 2017 Ryerson University guest lecturer on business and litigation aspects of intellectual property
13. February 2017 University of Toronto Faculty of Law Global Professional Master of Laws guest lecturer on business, valuation, income tax and litigation aspects of intellectual property
14. November 2016 Canadian Bar Association International Committee Panel Discussion on Dis-Synergies? Analyzing Efficiencies in Cross-Border Mergers with Trevor McKay, Andrew Lacy and Margaret Sanderson, moderated by Navin Joneja
15. June 2016 IPIC Webinar on Patent Case Law Review - Remedies with Trent Horne
16. March 2016 Ryerson University guest lecturer on business and litigation aspects of intellectual property
17. February 2016 University of Toronto Faculty of Law Global Professional Master of Laws guest lecturer on business, valuation, income tax and litigation aspects of intellectual property
18. January 2016 Canadian Bar Association Panel Discussion on the Section 96 Efficiencies Defense with Neil Campbell and Margaret Sanderson, moderated by Richard Annan
19. December 2015 Ontario Bar Association Panel Discussion on Intellectual Property Remedies – What Do You Need to Know? with Andrew Shaughnessy and Sangeetha Punniyamoorthy, moderated by Cameron Weir
20. October 2015 International Trademark Association (INTA) guest roundtable speaker on the valuation of brands
21. February 2015 University of Toronto Faculty of Law Global Professional Master of Laws guest lecturer on business, valuation, income tax and litigation aspects of intellectual property

22. November 2014 and January 2015 Competition Bureau guest lecturer on financial analysis in the context of competition reviews
23. June 2014 Licensing Executives Society, Toronto Chapter, titled Crossing the Border: The Intersection of Taxation and IP with Brandon Siegal, McCarthy Tetrault on business, valuation, income tax and litigation aspects of intellectual property
24. March 2014 Osgoode Hall Law School, York University guest lecturer on Administration of Civil Justice: Issues in Assessment of Litigation and Regulatory Risk
25. February 2014 University of Toronto Faculty of Law Global Professional Master of Laws guest lecturer on business, valuation, income tax and litigation aspects of intellectual property
26. May 2013 Acumen Financial Conference (on valuation of intellectual property)
27. March 2013 Federated Press 3rd Advanced Valuation Course (on valuation of intellectual property)
28. February 2013 University of Toronto Faculty of Law Global Professional Master of Laws guest lecturer on business, valuation, income tax and litigation aspects of intellectual property
29. October 2012 Intellectual Property Institute of Canada's 86<sup>th</sup> Annual Meeting in Vancouver (panel on The Basic Principles for Calculating Patent Damages)
30. May 2012 Tax Executive Institute's 46th Annual Canadian Tax Conference in Gatineau (panel on Tax and Valuation Issues in Restructuring Global Business Operations)
31. October 2011 Tax Executive Institute's 66th Annual Conference in San Francisco (panel on Tax and Valuation Issues in Restructuring Global Business Operations)
32. October 2011 Canadian Institute of Chartered Accountants Annual Investigative and Forensic Accounting Conference in Montreal (panel on Intellectual Property update)
33. October 2011 Canadian Institute's 10th Annual Forum on Pharma Patents (panel on Damages in Patent Infringement and Section 8 Cases)

## Appendix B – Scope of Review

In reaching my conclusions, I have reviewed and relied upon information from the documents and discussions set out below. Except as otherwise noted herein, I have not audited or otherwise verified the information contained in these documents. My conclusions are dependent upon the accuracy of this information.

### 1. Pleadings and Other Case Documents:

- a. Notice of Application, December 19, 2019, The Commissioner of Competition v. Parrish & Heimbecker, Limited, CT-2019-005.
- b. Response of Parrish & Heimbecker, Limited, February 3, 2020, The Commissioner of Competition v. Parrish & Heimbecker, Limited, CT-2019-005.
- c. Transcripts
  - i. Examination of John Heimbecker dated July 17, 2020.
- d. Answers to Undertakings
  - i. Appendix V to the Answers to Undertakings Given on the Examination of John Heimbecker on July 15, 16, and 17, 2020
  - ii. Appendix W to the Answers to Undertakings Given on the Examination of John Heimbecker on July 15, 16, and 17, 2020
- e. Witness Statements
  - i. Witness Statement of John Heimbecker, October 13, 2020, The Commissioner of Competition v. Parrish & Heimbecker, Limited, CT-2019-005.
  - ii. Exhibits to the Witness Statement of John Heimbecker, October 13, 2020.

- iii. Witness Statement of Brett Malkoske, VP Business Development and Communications at G3 Canada Limited, October 21, 2020, *The Commissioner of Competition v. Parrish & Heimbecker, Limited*, CT-2019-005.

2. Legislation and Guidelines:

- a. *Competition Act*, R.S.C. 1985, c. C-34.
- b. Merger Enforcement Guidelines, Competition Bureau Canada, October 6, 2011.
- c. Merger Enforcement Guidelines, Competition Bureau Canada, March 1991.

3. Case Law:

- a. Canadian Pacific: Canada (Director of Investigation & Research) v. Canadian Pacific Ltd., 1997 73 C.P.R. (3d) 573 (Comp. Trib.).
- b. Hillstown: Canada (Director of Investigation & Research) v. Hillstown Holdings (Canada) Ltd., 1992 (CanLII) 2092 (CT), 41 C.P.R. (3d) 289 (Comp. Trib.).
- c. Superior Propane I: Canada (Commissioner of Competition) v. Superior Propane Inc., 2000 CACT 15 (CanLII), 2000 Comp. Trib. 15, 7 C.P.R. (4th) 385.
- d. Superior Propane II: Canada (Commissioner of Competition) v. Superior Propane Inc., 2001 FCA 104, [2001] 3 F.C. 185.
- e. Superior Propane III & IV: Canada (Commissioner of Competition) v. Superior Propane Inc., 2002 CACT 16 (CanLII), 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417, *aff'd* 2003 FCA 53, [2003] 3 F.C. 529.
- f. Tervita FCA: Tervita Corporation v. Commissioner of Competition, 2013 FCA 28 (CanLII).
- g. Tervita SCC: Tervita Corp. v. Canada (Commissioner of Competition), 2015 SCC 3 (CanLII), [2015] 1 SCR 161.





- iv. Canadian Grain Handling and Transportation System, “Annual Report 2018 – 2019 Crop Year,” accessed October 21, 2020, <http://grainmonitor.ca/Downloads/AnnualReports/AnnualReport201819.pdf>.
  - v. The Observatory of Economic Complexity, “Wheat Overview,” accessed October 21, 2020, <https://oec.world/en/profile/hs92/21001/>.
  - vi. Statistics Canada, 2015 – 2020, “Area, Yield, Production of Canadian Principal Field Crops,” accessed October 21, 2020.
  - vii. Statistics Canada, 2020 – 2021, “Canada: Outlook for Principal Field Crops, 2020-09-24,” accessed October 21, 2020, <https://www.agr.gc.ca/eng/crops/reports-and-statistics-data-for-canadian-principal-field-crops/canada-outlook-for-principal-field-crops-2020-09-24/?id=1601038753716>.
  - viii. Statistics Canada, 2019 – 2020, “Producer deliveries of major grains,” accessed October 21, 2020.
- b. P&H Limited
- i. P&H Limited, “About P&H,” accessed October 21, 2020, <https://parrishandheimbecker.com/>.
  - ii. P&H Limited, “P&H National Grain Asset Network,” accessed October 21, 2020, <https://parrishandheimbecker.com/grain/>.
- c. G3 Canada Limited
- i. G3 Canada Limited, “About Us,” accessed October 21, 2020, <https://www.g3.ca/en/about-us>.
  - ii. G3 Canada Limited, “G3 Bloom,” accessed October 21, 2020, <https://www.g3.ca/en/our-network/g3-bloom>.
  - iii. G3 Canada Limited, “G3 Melville,” accessed October 21, 2020, <https://www.g3.ca/en/our-network/g3-melville>.

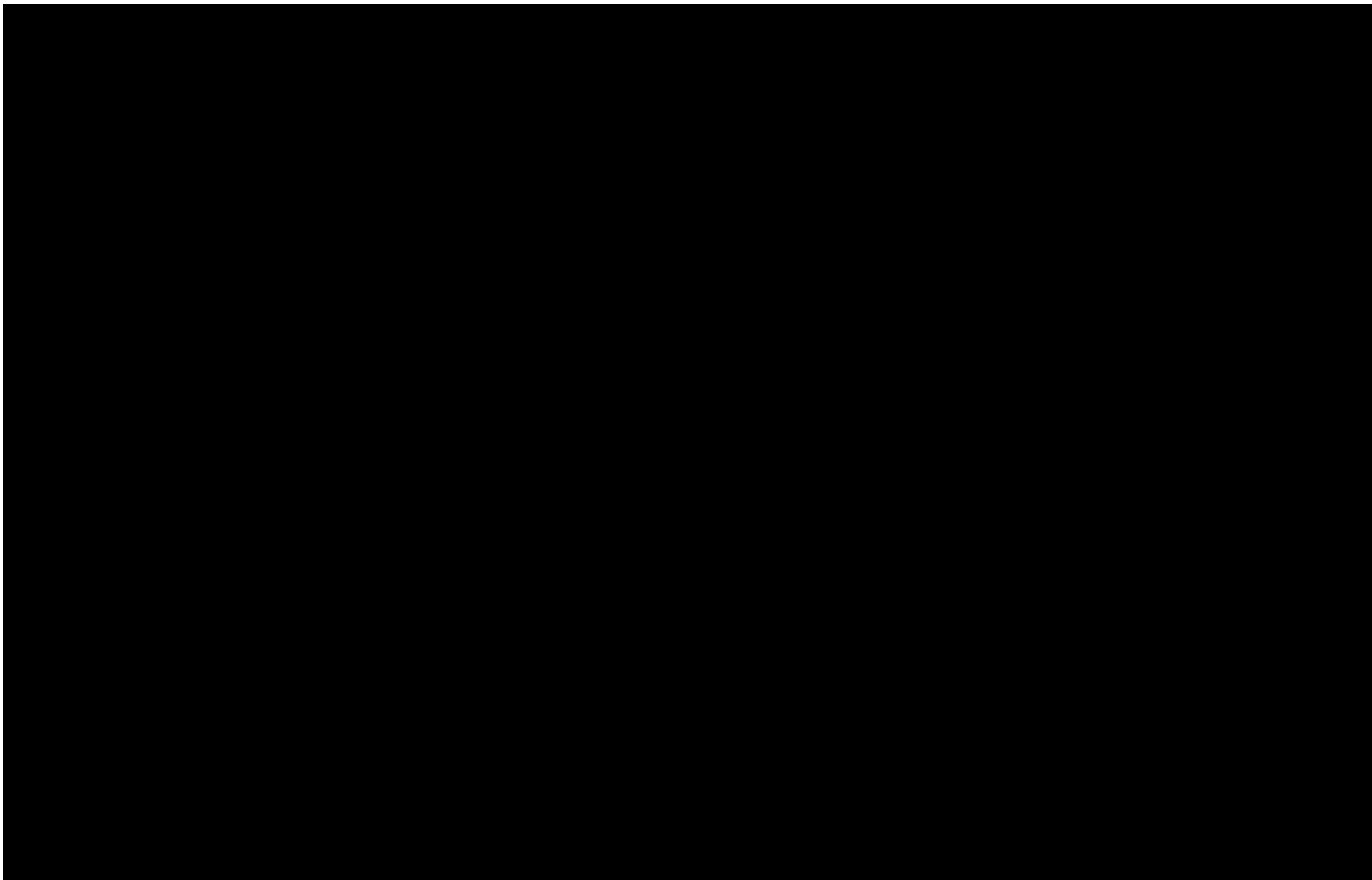
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  - viii. Swift Current Online, “G3 Officially Opens Grain Export Terminal At Port Of Vancouver,” accessed October 21, 2020, <https://swiftcurrentonline.com/ag-news/g3-officially-opens-grain-export-terminal-at-port-of-vancouver>.
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  - ii. GrainsConnect Canada, “Are you connected?” accessed October 21, 2020, <https://grainsconnect.com/pdf/GrainCorp-AreYouConnected.pdf>.
  - iii. GrainsConnect Canada, “GrainCorp,” accessed October 21, 2020, <http://grainsconnect.com/graincorp.php>.
  - iv. GrainsConnect Canada, “GrainsConnect vows efficiency with new western Canadian grain facilities,” accessed October 21, 2020,

<http://www.grainsconnect.com/press/grainsconnect-vows-efficiency-with-new-western-canadian-grain-facilities.pdf>.

- v. GrainsConnect Canada, “Terminals & Port,” accessed GrainCorp Limited, “Canadian Supply Chain,” accessed October 21, 2020, <http://www.graincorp.ca/grains/canadian-supply-chain/contact-us>.
  - vi. GrainCorp Limited, “GrainCorp’s new Canadian supply chain – GrainsConnect Canada,” accessed October 21, 2020, <http://www.graincorp.com.au/grains/canadian-supply-chain>.
  - vii. Canadian National Railway, “GrainsConnect Canada Huxley, AB Site Nearing Completion,” accessed October 21, 2020, <https://www.cn.ca/en/stories/20190507-grainsconnect-huxley/>.
- e. Paterson Grain
- i. Paterson Grain, “About,” accessed October 21, 2020, <https://www.patersongrain.com/about/>.
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  - iv. Paterson Grain, “Locations,” accessed October 21, 2020, <https://www.patersongrain.com/contact/locations/>.
  - v. Paterson Grain, “Logistics,” accessed October 21, 2020, <https://www.patersongrain.com/domestic-and-international-customers/logistics/>.

- vi. Paterson Grain, “Your Profit Plan,” accessed October 21, 2020, <https://www.patersongrain.com/for-farmers/crop-inputs/profit-plan/>.
  - vii. Paterson GlobalFoods Inc., “Paterson Grain,” accessed October 21, 2020, <https://www.patersonglobalfoods.com/companies/paterson-grain/>.
- f. Ceres Global Ag Corp
- i. Ceres Global Ag Corp, “2019 Annual Meeting Presentation”, accessed October 21, 2020, <https://ceresglobalagcorp.com/app/uploads/2019/11/Ceres-Nov-2019-AGM-V3.pdf>.
  - ii. Ceres Global Ag Corp, Ceres Global Annual Information Form for the year ended June 30, 2019, September 17, 2019.
  - iii. Ceres Global Ag Corp, “Ceres Global Ag Corp. Completes Acquisition of Nicklen Siding, SK Elevator from Cargill Limited,” accessed October 21, 2020, <https://ceresglobalagcorp.com/ceres-completes-purchase-of-nicklen-siding-elevator-from-cargill-ltd/>.
  - iv. Ceres Global Ag Corp, “Ceres Global Ag Corp. Signs Agreement to Purchase Nicklen Siding, SK Elevator from Cargill Limited,” accessed October 21, 2020.
  - v. Ceres Global Ag Corp, “Duluth Storage,” accessed October 21, 2020, <https://ceresglobalagcorp.com/location/duluth-storage/>.
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  - vii. Ceres Global Ag Corp, “Unaudited Interim Condensed Consolidated Financial Statements of Ceres Global For the three-month and six-month periods ended December 31, 2019 and 2018,” accessed October 21, 2020, <https://ceresglobalagcorp.com/app/uploads/2020/02/Ceres-Global-Financial-Statements-Q2-FY2020.pdf>.

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  - ii. Nutrien Ag Solutions, “Locations,” accessed October 21, 2020, <https://www.nutrienagsolutions.ca/find-a-location>.
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## The Commissioner of Competition v. Parrish &amp; Heimbecker, Limited

## Summary of Selected Information from Statistics Canada Annual Grain Production Figures

For the Crop Years Ended July 2016 to July 2020

To be read with The Brattle Group report dated October 23, 2020

(Thousands of Tonnes)

Row	2015 - 16	2016 - 17	2017 - 18	2018 - 19	2019 - 20	% Change Crop Year 2018-19 to 2019-20	2020 - 21 (F)	% Change Crop Year 2019-20 to 2020-21	
	[A]	[B]	[C]	[D]	[E]	[F]	[G]	[H]	
<b>Canada</b>									
CWRS	[1]	16,868	16,778	19,584	20,030	22,167	10.7%	21,000	-5.3%
Canola	[2]	18,377	19,599	21,328	20,594	19,477	-5.4%	19,393	-0.4%
All Wheat	[3]	27,647	32,140	30,377	32,188	32,348	0.5%	34,145	5.6%
All Grain	[4]	79,165	85,498	86,187	86,785	86,864	0.1%	89,742	3.3%
<b>Saskatchewan</b>									
CWRS	[5]	7,321	6,994	8,225	8,893	9,815	10.4%		
Canola	[6]	9,537	10,682	11,181	11,178	10,959	-2.0%		
All Wheat	[7]	13,045	14,549	13,185	14,726	15,120	2.7%		
All Grain	[8]	28,393	31,098	30,534	31,766	33,333	4.9%		
<b>Manitoba</b>									
CWRS	[9]	3,715	3,544	4,090	4,272	4,493	5.2%		
Canola	[10]	2,858	2,608	3,148	3,318	3,056	-7.9%		
All Wheat	[11]	4,218	4,218	4,476	4,778	4,969	4.0%		
All Grain	[12]	10,604	11,127	12,578	12,346	11,840	-4.1%		

## Sources and Notes:

Statistics Canada (STC) and Agriculture and Agri-Food Canada (AAFC). Calculations compiled by Agriculture and Agri-Food Canada, Crops and Horticulture Division/Market Analysis Group.

[A] - [E], [G]: Crop years run twelve months starting August through July.

[F]: [E] / [D] - 1.

[G]: Statistics Canada (STC) and Agriculture and Agri-Food Canada (AAFC), "Canada: Outlook for Principal Field Crops," September 24, 2020.

[H] [G] / [E] - 1.

[1], [5], [9]: CWRS stands for Red Winter Spring Wheat.



## The Commissioner of Competition v. Parrish &amp; Heimbecker, Limited

## Summary of Selected Information from Statistics Canada Monthly Grain Production Figures

For the Months January to July in Each of the Crop Years Ended July 2019 and July 2020

To be read with The Brattle Group report dated October 23, 2020

(Thousands of Tonnes)

	Row	Canada		Saskatchewan		Manitoba	
		All Wheat	All Grain	All Wheat	All Grain	All Wheat	All Grain
		[A]	[B]	[C]	[D]	[E]	[F]
<b>2019</b>							
January	[1]	2,586,523	5,113,449	1,423,467	2,947,099	261,221	536,723
February	[2]	1,991,051	3,855,199	1,063,755	2,157,058	249,739	481,793
March	[3]	2,333,110	4,062,184	1,176,531	2,206,737	320,215	540,981
April	[4]	2,254,795	4,110,998	1,130,725	2,199,864	324,161	604,252
May	[5]	2,420,160	4,502,591	1,013,167	2,166,057	520,956	859,075
June	[6]	2,129,916	3,999,961	1,063,512	2,016,105	450,535	761,045
July	[7]	1,990,891	3,974,745	1,080,196	2,120,610	329,377	624,452
January to July	[8]	<b>15,706,446</b>	<b>29,619,127</b>	<b>7,951,353</b>	<b>15,813,530</b>	<b>2,456,204</b>	<b>4,408,321</b>
<b>2020</b>							
January	[9]	2,061,800	4,251,710	1,115,935	2,497,323	297,954	569,913
February	[10]	2,021,322	4,033,386	1,131,208	2,360,253	242,522	450,829
March	[11]	2,444,525	4,658,001	1,370,887	2,672,622	317,144	599,073
April	[12]	3,071,349	5,851,412	1,573,035	3,188,879	537,467	887,806
May	[13]	1,849,942	3,545,189	920,510	1,842,696	281,473	514,955
June	[14]	2,787,176	5,196,249	1,448,748	2,838,182	479,008	835,273
July	[15]	3,315,872	5,957,175	1,643,883	3,241,030	467,036	860,884
January to July	[16]	<b>17,551,986</b>	<b>33,493,122</b>	<b>9,204,206</b>	<b>18,640,985</b>	<b>2,622,604</b>	<b>4,718,733</b>
Unit increase (decrease)	[17]	1,845,540	3,873,995	1,252,853	2,827,455	166,400	310,412
Percentage increase (decrease)	[18]	11.8%	13.1%	15.8%	17.9%	6.8%	7.0%

## Sources and Notes:

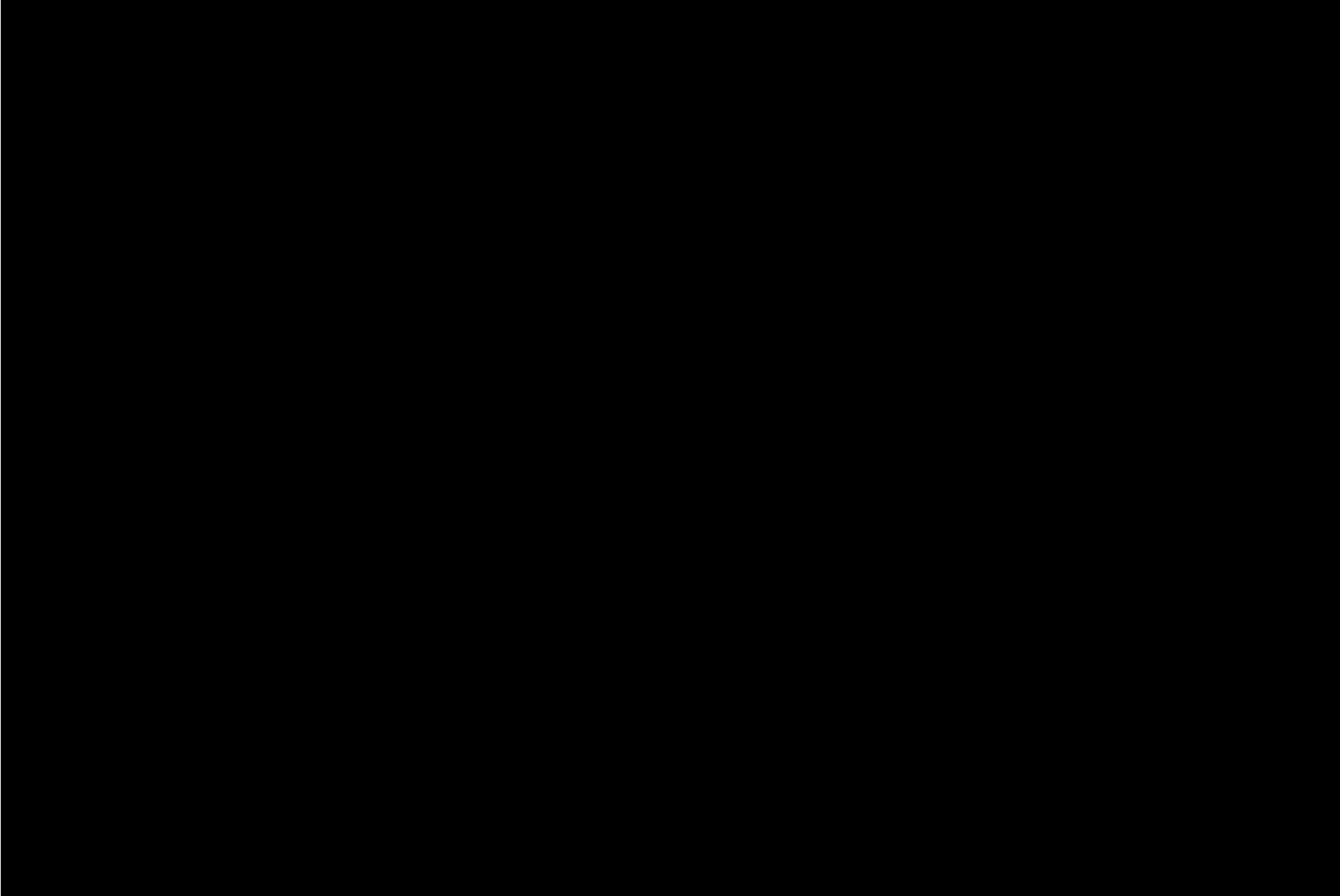
Statistics Canada (STC) and Agriculture and Agri-Food Canada (AAFC). Calculations compiled by Agriculture and Agri-Food Canada, Crops and Horticulture Division/Market Analysis Group.

[8]: Sum of [1] to [7].

[16]: Sum of [9] to [15].

[17]: [16] - [8].

[18]: [17] / [8].





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Exhibit B to the Affidavit of  
**Andrew C. Harington**  
Affirmed on October 23, 2020



**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**

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**ACKNOWLEDGEMENT OF EXPERT WITNESS  
ANDREW C. HARINGTON**

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I, **Andrew C. Harington**, acknowledge that I will comply with the Competition Tribunal's code of conduct for expert witnesses which is described below:

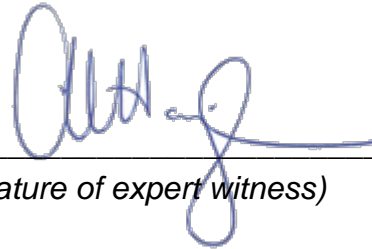
1. An expert witness who provides a report for use as evidence has a duty to assist the Tribunal impartially on matters relevant to his or her area of expertise.

2. This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.

October 23, 2020

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*(Date)*

A handwritten signature in blue ink, appearing to be 'Ally', written over a horizontal line.

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*(Signature of expert witness)*

**THE COMPETITION TRIBUNAL**

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**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**

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**ACKNOWLEDGEMENT OF EXPERT WITNESS  
ANDREW C. HARINGTON**

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