



Registry Doc. No.: 212

Date: January 5, 2021

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

Direction to Counsel (from Mr. Justice Gascon, Chairperson)

Re: Concurrent evidence session (“hot-tubbing”) for expert witnesses

This Direction replaces the Direction to Counsel issued on December 3, 2020.

As discussed with the parties at various case management conferences in this matter, the experts scheduled to testify at the hearing of the Application will do so in a concurrent evidence session (also known as “hot-tubbing”), where the experts will give some or all of their evidence concurrently. Rules 75 and 76 of the *Competition Tribunal Rules*, SOR/2008-141 apply to witness panels, including expert witness panels or “hot tubs”. Rule 76 provides that the Tribunal “shall direct the manner in which the panel [of witnesses] shall testify” and that counsel can cross-examine and re-examine the witnesses.

Accordingly, as far as the protocol to be followed for the concurrent testimony of expert witnesses at the hearing, the Tribunal directs as follows:

1. The witnesses identified by the parties as expert witnesses and who have prepared expert reports in this Application on matters not related to efficiencies are Dr. Nathan Miller for the Commissioner of Competition (“**Commissioner**”) and Ms. Margaret Sanderson for Parrish & Heimbecker, Limited (“**P&H**”) (together, the “**Experts**”). The Experts will be testifying at the concurrent evidence session. Since Mr. Heimbecker, who has prepared a reply witness statement on behalf of P&H on matters related to efficiencies (“**Reply Witness Statement**”), is not an expert witness and since, further to the Tribunal’s Direction on P&H Reply on Efficiencies dated December 15, 2020, the Reply Witness Statement is not an expert report, there will not be a concurrent evidence session set up to deal with matters related to efficiencies.
2. As soon as possible before the hearing of the expert evidence, the parties, their counsel and the Experts shall confer and agree on a list of issues to be addressed by the Experts at the concurrent evidence session, and the order and manner in which the questions on those issues will be asked. The list shall be prepared with a view to identifying the areas of agreement and disagreement between the Experts. Communications between the

Experts (and/or their respective support teams) for the purposes of identifying the list of issues for the concurrent evidence session shall be deemed to be “without prejudice” communications, whether or not counsel are present.

3. As soon as possible before the hearing of the expert evidence, the parties and their counsel shall also exchange short statements of each Expert’s proposed expertise and reach agreement when possible.
4. Counsel shall provide to the Tribunal, by Friday, January 15, 2021 at the latest, the agreed list of issues for the concurrent evidence session and short statements of each Expert’s proposed expertise. Counsel shall also provide an estimate of the time allotted to each issue. Each party shall have a full and fair opportunity to present and explain its position on each issue, with the time being shared as equally as possible between the parties, bearing in mind the total time allotted to each party for the evidentiary portion of the hearing further to the Direction on Chess Clock and Sitting Times.
5. Counsel shall indicate to the Tribunal, by Friday, January 15, 2021 at the latest, whether the proposed expertise or qualifications of any Expert will be challenged.
6. Counsel shall provide to the Tribunal, and deliver to counsel for the other party, by Friday, January 15, 2021 at the latest, a copy of any Power Point presentation to be used by an Expert during the examination referred to in paragraph 9 below or at the concurrent evidence session.
7. At the hearing, the Experts will be sworn in immediately after each other.
8. The presiding judicial member will explain the procedure for the concurrent evidence session to the Experts and remind them of the Tribunal’s Code of Conduct.
9. Each Expert, starting with the Applicant’s Expert, will provide a general overview of his or her opinion and explain what are, in his or her view, the principal areas of disagreement with the other side’s Expert(s). The Experts can be guided by their respective counsel for doing so, in a format similar to an examination in chief.
10. Thereafter, the presiding judicial member will use the jointly prepared list of issues setting out the topics upon which the Experts will testify, be cross-examined and re-examined, as the “agenda” for the Experts’ concurrent evidence session. Each issue will be dealt with separately.
11. Each Expert will address the issue in turn, and subsequently can question the other Expert, in the form of a respectful exchange, guided by the presiding judicial member.
12. Counsel for each party can then cross-examine and/or re-examine the Experts on the issue, in a manner and order previously agreed-upon by counsel and approved by the Tribunal.
13. The panel members will then ask questions from the Experts on the issue. Each party shall have the opportunity to ask questions arising from the Tribunal’s questions.
14. For each issue, the Experts will be able to summarize their respective views at the end of the process.

15. Throughout the concurrent evidence session, the presiding judicial member will ensure that the process is balanced and does not turn into an inefficient or unfair exercise for any party or any Expert.
16. The fact that a list of issues has been prepared for consideration does not confine the scope of cross-examination of any Expert. The process of cross-examination remains subject to the overall control of the presiding judicial member.
17. The Commissioner's expert on matters related to efficiencies, Mr. Harington, shall testify after the completion of the concurrent evidence session, in relation to matters related to efficiencies. As required by paragraph 5 above, counsel shall indicate to the Tribunal, by Friday, January 15, 2021 at the latest, whether the proposed expertise or qualifications of Mr. Harington will be challenged.

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