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THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by Parrish & Heimbecker, Limited of certain grain elevators and related assets from Louis Dreyfus Company Canada ULC;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

PARRISH & HEIMBECKER, LIMITED

Respondent

CLOSING ARGUMENT OF THE COMMISSIONER OF COMPETITION

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PART I OVERVIEW

1. Farmers are important contributors to the Canadian economy. Wheat, canola and other grains are produced across the vast Canadian prairies. The crops grown by Canadian farmers are sold and consumed across the globe. Meanwhile, the costs of operating a farm have increased, as has the concentration of buyers of grain in local markets in Canada.
2. Competition between primary grain elevators (“**Elevators**”) is critical to Canadian farmers capturing the value of their grain. The Commissioner’s application against Parrish & Heimbecker (“**P&H**”) for its acquisition of the Elevator in Virden, Manitoba (the “**Virden Elevator**”) is consistent with the purpose clause of the *Competition Act* to maintain and encourage competition in Canada, ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and providing consumers with competitive prices and product choices.
3. Farmers invest significant time and capital to grow wheat and canola. The value of their grain is captured on futures markets. To capture the futures value of their grain, farmers sell their grain to Elevators at a net price. The net price is the futures price of the grain combined with the basis price set by the Elevator. The basis price is an amount subtracted from the futures price in the case of canola (and added to the futures price in the case of wheat to account for exchange rate differences) that covers the grain company’s costs to operate the Elevator while also providing the grain company with a margin. The basis component is a small part of the net price received by farmers for wheat or canola.
4. Elevators have no control over the futures price. They compete with other Elevators to purchase grain through their set basis price. Even though the basis component of the price is small, it is an important part of the supply chain. The evidence the Tribunal has heard demonstrates that competition between Elevators through the basis price is important to farmers.

P&H during discovery and its witnesses during cross-examination, demonstrate the following facts.

A. Primary Elevators perform necessary processing of grain

13. The grain supply chain in Western Canada involves an interconnected network of businesses and infrastructure that moves grain from individual farms to end customers, such as companies that manufacture food or feeds.¹
14. Grain farmers in Canada grow a wide range of crops, including wheat, canola, durum, barley, lentils and soybeans. The crops at issue in this application are Canadian Western Spring Wheat ("**CWRS**", but referred to as wheat²) and canola. Canola does not include specialty products such as Nexera.
15. In theory, farms could produce, clean, store, sell and ship the grain directly to end customers. In practice, farms specialize in farming and rely on companies such as P&H to provide them with an Elevator where they can sell their grain. Once the grain is purchased from the farmer, grain companies have different markets where they can identify end customers and arrange shipments.
16. A farmer's wheat and canola is generally transported by truck from a farm to an Elevator where it is elevated, graded and segregated and may be cleaned, dried, blended or stored ("**Grain Handling Services**").
17. Elevators are capital-intensive, require specialized expertise to operate, and are important to preserving the quality and value of the grain they handle. For example, raw grain with a high moisture content may spoil. Elevators are often equipped to

¹P-A-221, Dr. Miller Public Documents Compendium, Tab 057422 – Dr. Miller Report Footnote: Quorum Corporation, "Grain Supply Chain Study," September 2014, p.341.

² Feed wheat is not included in CWRS. Feed wheat is lower grade of wheat that may not meet CWRS grading requirements and would get a lower price. Feed wheat is typically consumed domestically in feedlots.

dry the grain before storing and/or shipping it.³ Likewise, grain with a lower protein content or a slightly sub-optimal grade may require blending before it can be sold to domestic or international end customers.⁴

18. In addition to Elevators, domestic purchasers of grain include wheat mills and Crushers that transform wheat and canola into a retail product.⁵ Some of the farmers impacted by this Acquisition do sell some of their canola to Crushers, but the majority of wheat and canola grown by farmers affected by the Acquisition is sold to an Elevator.⁶ No farmers affected by the Acquisition sell directly to wheat mills.
19. All else being equal, most farms would prefer to sell to Elevators or Crushers closer to their farm,⁷ and, in fact, most of the farmers affected by the Acquisition currently sell to Elevators less than 100 kilometres away.⁸
20. Bypassing Elevators to ship directly to the nearest port terminal Elevator, over 1000 kilometres away in Thunder Bay,⁹ would considerably increase costs to these farms. They would need to coordinate truck and rail transportation and would forego the

³ P-A-221, Dr. Miller Public Documents Compendium, Tab 057422 - Dr. Miller Report Footnote: Quorum Corporation, "Grain Supply Chain Study," September 2014, p.367.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ All Crushers are over one hour away from Moosomin or Virden. See Confidential Level A, Vol.5, p. 340:15 – 341:4, which indicates that Crushers have different purchasing schedules from Elevators; CA-R-181, Expert Report of Margaret Sanderson ("**Sanderson Report**"), p. 127, Figure 24 shows that 32.4% of canola grown by farmers in the Relevant Markets were sold to Crushers . There are no direct purchasers of wheat in the Relevant Markets.

⁷ PA-A-001, Witness Statement of Alistair Pethick ("**Pethick Statement**"), p. 4-5, paras. 15-16; Confidential Level B Transcript, Vol. 5, p. 153:18-23: Ed Paull said " if I can make deals closer to home, it is an advantage for me and it keeps the business more local I guess. If I can do that, I like to do it and I don't see any reason to be, you know, hauling grain 50 or 100 miles away or whatever for a few cents a bushel."; P-A-033: Witness Statement of Ian Wagstaff ("**Wagstaff Statement**"), p.3, para.12); CB-A-025, Witness Statement of Chris Lincoln ("**Chris Lincoln**"), p.4, para. 15, "Given the time and cost associated with hauling my grain, more distant elevators need to offer a higher price for me to consider selling to them."; CA-R-179, List of Expert's Agreements and Disagreements, p.3.

⁸ CA-A-170, Miller Report, p.16, para. 19; Confidential Level A Transcript, Vol. 9, p.496:11-17, Sanderson: "...basically most elevators for wheat are fairly similar in that most of the farms that are delivering to elevators for wheat are travelling 50 kilometers – less than 50 kilometers, maybe 75 kilometers or so."

⁹ CA-A-170, Miller Report, p.16-17, para. 19 citing Exhibit 7 p.45 and Workpaper 1, CA-A-186.

efficiencies of bulk shipments. They would also need to invest in equipment to prepare their raw grain for the long journey.¹⁰

21. Consequently, Elevators play an important role for farmers directly affected by the Acquisition. Farms rely on the Grain Handling Services provided by Elevators, as farmers could not achieve the same efficiencies in moving grain from the farm to domestic and international end customers.¹¹

B. Pricing among grain Elevators

22. An Elevator posts prices that it is willing to pay for a given grade of wheat or canola. The price a farmer receives for grain is comprised of two components: the futures price and the basis price.¹²

23. The futures price reflects the global commodity market price for the grain, which is set by global supply and demand forces. The futures market price of grain is outside of the control of either the farm or the Elevator.¹³ [REDACTED]

[REDACTED] 14

24. As discussed above, for the majority of farmers, it is not practical to ship their grain to an end customer, so instead they sell their grain to an Elevator. The Elevator performs a number of steps, incurring expenses to complete those steps, to realize the value of the farmers' grain from an end customer.¹⁵ Grain companies that

¹⁰ CA-A-170, Miller Report, p.16-17, para. 19 citing P-A-014, Witness Statement of Harvey Brooks ("**Brooks Statement**"), p. 4, para. 8.

¹¹ CA-A-170, Miller Report, p.17, para. 20.

¹² During examination for discovery, Mr. Heimbecker said he was embarrassed because he could not answer questions about basis (CB-A-134, Read in Brief of the Commissioner, p. 110:12 - 111:3). As demonstrated during Mr. Heimbecker's cross-examination, Mr. Heimbecker has changed his sworn testimony about whether basis is a component of price (CB-A-134, Read in Brief of the Commissioner, p.117). P&H's evidence about the significance of basis should be given little weight.

¹³ Public Transcript, Vol.6, Jan 14, Public, p.522:2-9.

¹⁴ CB-A-134, Read in Brief of the Commissioner, Undertaking to John Heimbecker's Examination for Discovery, July 15, 2020, question 336 at p.102:18 – 103:12, response at p.544, no.21.

¹⁵ Confidential Level B Transcript, Vol.7, p. 380:9 – 382:7; CA-A-224, Agreed Statement of Facts, p.3, paras. 24-34.

operate Elevators recover those expenses (and make a profit) through the basis price component.¹⁶

25. P&H’s mobile application (“**P&H Direct**”) demonstrates the two components of price. The screenshot from P&H Direct attached to Mr. Heimbecker’s statement as Exhibit 10 shows that on October 2, 2020, a farmer can see that the futures price for a bushel of canola for delivery in October 2020 is \$11.7350 – this is the first component of the price. However, if the farmer delivers canola to P&H Moosomin, the farmer will receive \$0.90 per bushel less than the futures value of the farmer’s canola. The \$.90 is the basis that P&H sets to recover the costs and make a profit on handling the farmer’s grain – this is the second component of the price explicitly displayed on P&H Direct.¹⁷ The posted price is called the ‘net’ price, as it is the net of these two components.

C. P&H competes to buy grain at its Elevators through the basis price

26. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁸

27. P&H, through the evidence of Mr. Heimbecker and the report from its expert Ms. Sanderson, attempts to minimize the importance of basis price to the point of denying that P&H even competes at its Elevators through the basis price. According to Mr. Heimbecker, [REDACTED]

¹⁶ P-A-148, P&H email subject Gain From Your Grain dated December 13, 2018 (Public), p.1; Public Transcript, Vol.5, p.490:3 - 14 ; CB-A-134, Read in Brief of the Commissioner, Grain Marketing 101 Presentation, p.941.

¹⁷ CA-R-115, Witness Statement of John Heimbecker, October 13, 2020 (“**Heimbecker Statement**”), p.19, para. 61 and Exhibit 10.

¹⁸ CA-R-115, Heimbecker Statement, p.20-21, para. 65.

basis price, not the futures component. Dr. Miller explained that this dynamic makes it appropriate to analyze the competitive effects of the Acquisition on the basis component of the price.²⁵

31. The following evidence demonstrates that the basis component of the net price is affected by local competition:
- a. Alistair Pethick confirmed that because basis prices are transparent he has been able to play Elevators against each other;²⁶
 - b. Ed Paull testified that he will call multiple Elevators and compare the basis that they are offering when determining where to sell his grain;²⁷
 - c. Kristjan Hebert has given Elevators a target of what basis they want in order to compare prices between Elevators “apples to apples”;²⁸
 - d. Mr. Heimbecker admits that farmers use the basis to compare prices between local Elevators;²⁹
 - e. Mr. Heimbecker admits during discovery that basis is impacted by local supply and demand factors;³⁰
 - f. P&H and its competitors enter into contracts with farmers that allow the farmers to set the basis component of the net price;³¹
 - g. Grain handling companies can pay premiums to farmers to attract their grain, which is reflected through changes to the basis price;³²

²⁵ Public Transcript, Vol. 8, p. 600:6 – 603:16.

²⁶ P-A-001, Pethick Statement, p.5-6, para. 19-20.

²⁷ Public Transcript, Vol.5, p.489:23 – 491:3.

²⁸ Confidential Level B Transcript, Vol.5, p.108:24-109:6.

²⁹ CB-A-134, Commissioner’s Read-in Brief, Clarifications to answers given on the Examination for Discovery of John Heimbecker July 15, 2020, letter dated August 20, 2020, p.627 at item 8, clarifying CA-A-173, p.99:21–23.

³⁰ CB-A-134, Read in Brief of the Commissioner, Examination for Discovery of John Heimbecker July 15, 2020 at p. 96:4-17.

³¹ CA-R-115, Heimbecker Statement at p.30-31 para. 97; An example of a P&H basis contract is at CA-A-084, P&H Contracts and GPOs with HGV (Confidential Level A), p.6, and an LDC basis contract is at CA-A-222, Additional Documents to be relied upon Compendium (Confidential Level A), Tab 043504 – Virden Flat & Basis Example, p.75.

³² Confidential Level A Transcripts, Vol.4, p.284:4 – 12.

- h. Fixed price contracts from P&H and all competitors incorporate the basis price and futures price into the net price paid to the farmer;³³
- i. P&H and LDC both reference basis when sending email blasts to customers;³⁴
- j. P&H and LDC Customer Service Representatives (“**CSR**”) regularly discuss basis internally and with customers;³⁵
- k. One of P&H’s CSRs, since promoted to managing an Elevator, explained the basis in emails sent to hundreds of customers as follows: “This premium or discount to the futures value is commonly referred to as a basis. The basis reflects each grain companies’ own particular handling, transportation and marketing costs, combined with the bid values from their own-end use customers. Some farmers have asked why they can’t book these futures values in their own pocket. The answer is that each grain company has its own cost structures to get your product to the marketplace.”; and ³⁶
- l. P&H responds to basis specials offered by its competitors.³⁷

³³ CA-R-115, Heimbecker Statement, p.30-31, para. 97; a sample contract of each of the grain companies from which the Commissioner collected data is as follows:

- P&H: CA-A-084, P&H Contracts and GPOs with HGV (Confidential Level A), p.2;
- LDC: CA-A-086, HGV Settlement Documents and Receipts (Confidential Level A), p.2;
- Richardson: CA-A-086, HGV Settlement Documents and Receipts (Confidential Level A), p.3;
- Ceres: CA-R-010 Purchase Contracts of Pethick Farms (Confidential Level A), p.7;
- Bunge: CA-A-109, Paull Receipts with third party grain companies (Conf A), p.2;
- G3: CA-A-209, G3 Compendium (Confidential Level A), p.2;
- Cargill: CA-A-211, Cargill Compendium (Confidential Level A), p.5;
- Viterra: CA-A-217, Viterra Compendium (Confidential Level A), p.3; and
- ADM: CA-A-224, ADM Compendium (Confidential Level A), p.2.

³⁴ CA-A-222, Additional Documents to be relied upon Compendium, p.91 – includes a sample of text messages sent by P&H CSRs to farmers on September 11, 2019 which read, for example, ‘sent text to Chelsea with cnl basis levels Dec to Jul.’; CA-A-082, e-mail from Mr. Hebert dated March 21, 2018 which includes a sample of P&H Moosomin’s daily pricing e-mail which includes basis information for wheat and canola; P-A-123; CA-A-222, p.38, mass text message from Andy Klippenstein, GM at Virden: “Subj: wheat targets LDC Virden 204-748-6282 We are triggering +\$35 basis for Oct/Nov delivery on CWRS. Works out to \$6.75/bushel for #1 13.5 pro.”

³⁵ See, for example, the following seven documents where P&H and/or LDC CSRs compete on basis: CB-A-134, Read in Brief of the Commissioner, p. 777, p. 779, p. 791, and p. 827; CA-A-222, Additional Documents to be relied upon Compendium, p.32, p.84 and p.90.

³⁶ CB-A-149, P&H e-mail subject Gain From Your Grain dated February 16, 2017. Mr. Cobb uses his P&H email address to send his gain for your grain emails. The evidence is he did so for at least a year and in fact one P&H internal email exchange starts with one of Mr. Cobb’s Gain From Your Grain emails. Mr. Cobb sent these to hundreds of P&H customers, as well as some of his P&H co-workers, and has subsequently been promoted (CB-A-134, p. 557). P&H’s argument is that these emails were not authorized should be given little weight.

³⁷ CB-A-142, P&H email subject Canola Price comp dated Jan 5, 2018 10am (Confidential Level B).

D. Local price competition between Elevators occurs through a number of price and non-price mechanisms

32. P&H argues that it competes solely through the net (or “bid”) price, which it posts on P&H Direct and through text, email blasts and Elevator monitor screens. According to P&H’s expert Ms. Sanderson, that price is set to appeal to a broad set of geographically dispersed farms.³⁸ P&H attempts to downplay the extent to which farmers are able to negotiate more advantageous pricing with Elevators.³⁹
33. Yet, P&H itself admits that approximately █████ of the transactions that it conducts with farmers occur at prices that are negotiated directly with farmers.⁴⁰ Mr. Heimbecker admitted on cross-examination that this █████ represented only those negotiations where the farmer was successful in obtaining a better price than the posted net price.⁴¹
34. Farmers do not simply consult and compare posted Elevator prices, instead they actively engage with Elevators to negotiate better pricing and grading terms. The evidence from these negotiations is that the farmer’s location and the availability of competitive alternatives can determine whether the farmer is able to obtain a better price:
- a. Scott Beachell, a merchant at P&H, being disappointed that he had to match an Elevator an hour away to make the sale;⁴²

³⁸ CA-R-181, Expert Report of Margaret Sanderson, p.33, para. 73.

³⁹ CA-R-115, Heimbecker Statement, p.27-28, para. 85.

⁴⁰ CA-R-115, Heimbecker Statement, p.27-28, para. 85; CB-A-134, Read in Brief of the Commissioner, Answers to Undertakings from the Examination of John Heimbecker, p. 357:3-15, question 1037, response p.563-564, no.99, follow up response p.607-608, no.99.

⁴¹ Confidential Level B Transcript, Vol.7, p.375:10-19: Mr. Hood: “That is correct, if you provided any information about the number of times a farmer tries to negotiate but isn’t actually able to get a higher price.” Mr. Heimbecker: “No, it doesn’t speak to that.” Mr. Hood: “Right. And nowhere in your witness statement do you speak to that?” Mr. Heimbecker: “That’s right, nowhere, yes.”

⁴² CB-A-134, Read in Brief of the Commissioner, p.795-797.

- b. Randy Swan, a P&H CSR, considering a customer's cost of hauling to different elevators when assessing whether to trigger the customer's Grain Purchase Order (defined in para. 39);⁴³
 - c. Jeremy Krainyk, a Moosomin CSR, emailing Cory Woywada about a farmer having to pay a dime extra to truck from his home to Moosomin as opposed to Fairlight;⁴⁴
 - d. Andy Klippenstein, General Manager at the Virden Elevator, showing a customer quoting another Elevator's price but noting that the customer would prefer to sell to Virden due to distance, and the merchant suggesting coming in at a lower price than the other Elevator;⁴⁵
 - e. Alistair Pethick describing in his witness statement that he relies on competition between Elevators to get the best price he can for his grain;⁴⁶
 - f. Ed Paull negotiating with Andy Klippenstein (while he was a CSR at the Virden Elevator when it was owned by LDC) over the net price of canola;⁴⁷ and
 - g. Kristjan Hebert providing Elevators with the price he is willing to accept for his canola.⁴⁸
35. As the evidence above demonstrates, farmers in the corridor between Moosomin and Virden were well placed to engage in one-on-one negotiations to sell their grain. P&H's Acquisition of the Virden Elevator has deprived them of a competitive option to leverage in these negotiations.
36. In addition to individual negotiations, farmers are also able to obtain better pricing from Elevators through limited-time or limited-tonne specials that an Elevator offers at various times throughout the year. P&H acknowledges the existence of these pricing practices but yet again tries to minimize their importance to local Elevator competition by stating that these specials are driven by P&H's own internal needs –

⁴³ CB-A-134, Read in Brief of the Commissioner, p.833-834.

⁴⁴ CA-A-222, Additional Documents to be relied upon Compendium, Tab, 050960, p.95-96.

⁴⁵ CA-A-222, Additional Documents to be relied upon Compendium, Tab 021617, p.8

⁴⁶ P-A-001, Pethick Statement, p.6, at para. 20.

⁴⁷ CA-A-111, Text exchange between Mr. Paull and Mr. Klippenstein April (Conf A)

⁴⁸ Confidential Level B Transcript, Vol.5, p.100:11-102:6 and p.108:1-15.

for example, to acquire grain to fill a train at an Elevator or to meet a commitment to an end customer.⁴⁹ P&H has not quantified the number of transactions that occur through specials.

37. However, the evidence demonstrates that specials are an important mechanism for P&H to obtain grain and that these specials can occur as a result of competition between local Elevators. For example, on January 5, 2018, Ms. Beutler, a CSR at Moosomin, reported a special from Viterra that caused P&H to offer a special at Moosomin for September delivery of canola. There is no evidence that this special occurred because P&H had a train waiting at Moosomin that needed to be filled (since delivery was for 8 months later), nor is there any evidence that the special occurred because P&H had an end-user commitment that it had to meet. The email chain clearly shows that the special was initiated because of competition from Viterra's Fairlight Elevator.⁵⁰
38. Notwithstanding P&H's policy that special pricing is available the entire day, P&H's own evidence is that Moosomin set a maximum amount of canola that day.⁵¹ The farmers who were able to take advantage of the Moosomin special received collectively \$54,336 more for their canola than if they had sold it to P&H for the posted price available at the beginning of the day.⁵²
39. Grain pricing orders ("**GPOs**") (which are also referred to a grain purchase orders or target contracts) are another mechanism through which P&H can (and does) purchase grain at prices that are more advantageous to growers than what it posts at an Elevator. When a farmer enters into a GPO with an Elevator, the farmer specifies the price at which they agree to sell a certain quantity of grain and the Elevator has the option to purchase the grain at that price during the term of the GPO (unless the farmer chooses to terminate the GPO prior to its expiry). The

⁴⁹ CA-R-115, Witness Statement of John Heimbecker (Conf A), p. 26, para. 80.

⁵⁰ CB-A-144, P&H email subject Canola Price comp dated Jan 5, 2019 12:19pm (Conf B).

⁵¹ P&H Motion Record, CT-2019-005, Proceeding No. 168: p. 10 para. 15; CB-A-146; CB-A-144 P&H email subject Canola Price comp dated Jan 5, 2019 12:19pm (Conf B).

⁵² CB-A-146 shows P&H purchased 4,528 MT at the basis special that it matched Viterra at on January 5, 2018. P&H narrowed its basis by 12 dollars per MT to match Viterra.

evidence demonstrates that P&H and LDC selectively triggered GPOs at higher net prices than their posted price in response to competitive activity in their local market. For example Mike Wytrykusz, Western Regional Marketing Co-ordinator, notes in an email he wrote under the heading canola that “Scott mentioned when there are days when a competitor comes out strong he might react by triggering GPO’s that are in the system as a reward only to the producer who supported P&H with a target contract”.⁵³

40. There are other pricing mechanisms that P&H uses to enhance the local competitive position of its Elevators that are not reflected in its posted net prices. While it may be against P&H policy, there is evidence of P&H offering advantageous terms of sale on crop inputs (at P&H crop input retail locations) or grain drying services (at P&H Elevators) in return for a farmer agreeing to sell his or her grain at a P&H Elevator.⁵⁴ P&H’s own documents also reference this practice being followed by other grain companies.⁵⁵
41. Competition also occurs between Elevators on specifications that impact price. There is evidence of P&H agreeing to purchase grain from farmers at higher prices than those posted at its Elevators for grain of a similar quality (i.e., agreeing to grade a farmer’s grain higher than its actual grade).⁵⁶ This is consistent with Mr. Duncan’s testimony that grain can be borderline between grades. Elevators may choose to grade the grain differently, which “can be a big price difference”.⁵⁷ Farmer testimony during the hearing supports that this happens regularly.⁵⁸

⁵³ CA-A-222, Tab 049205, Additional Documents to be relied upon Compendium – FW: Western Region Weekly Purchases – Feb 27 – Mar 5, 2017, p.92; Confidential Level B Transcript, Vol.6, p. 230:4-231:1.

⁵⁴ CA-A-087, Email from Jeremy Krainyk dated November 29, 2019 (Conf A); CB-A-134, Read in Brief of the Commissioner, p.777-778.

⁵⁵ CA-A-188, [REDACTED]

⁵⁶ CB-A-134, Read in Brief of the Commissioner, p.825; CB-A-134, Read in Brief of the Commissioner, p.719-720.

⁵⁷ Public Transcript, Vol.5, p.471:13- 472:2.

⁵⁸ Public Transcript, Vol.5, p.471:5 – 472:16, and 475:2 – 7.

42. In addition, premiums or discounts can be applied to the price depending on the protein content of wheat. P&H and other grain companies compete with respect to these pricing parameters and track each other's protein spreads.⁵⁹ P&H acknowledges in one of its documents that P&H is taking "[REDACTED]".⁶⁰ This is consistent with the testimony of Mr. Wagstaff, who indicated that the price P&H pays "for lower protein wheat has been lower".⁶¹
43. While P&H tries to minimize the importance of all of these different mechanisms, the evidence in its totality demonstrates that local price competition between Elevators (which is reflected in the basis price) occurs both through posted prices and other pricing mechanisms. As Dr. Miller testifies, the economic analysis should be driven by these facts, which demonstrate that local competition matters and occurs through the basis price.⁶²
44. In response to Tribunal Question 6,⁶³ the evidence above is related to different aspects of competition between Elevators that directly impact the prices that farmers receive for their grain. Evidence also supports the existence of aspects of non-price competition. There is evidence from Mr. Pethick that the ability of an Elevator to accept grain during harvest is important to him.⁶⁴ The ability of an Elevator to quickly and efficiently receive grain, and its capacity to do so, is an aspect of non-price competition that the Tribunal should consider. While these aspects of competition are not necessarily reflected in the Elevator's posted price, they ultimately all are reflected in the price paid to the producer.

⁵⁹ CB-A-153, P&H email subject Competitors protein spreads dated January 5, 2018 (Conf B); CB-A-155, Competitors Protein Spreads.

⁶⁰ CB-A-151, P&H email subject FW: CWRS protein spreads dated August 29, 2017 (Conf B).

⁶¹ P-A-033, Wagstaff Statement, p. 4, para. 14.

⁶² Public Transcript, Vol.8, p.600:6-603:18; Confidential Level A Transcript, Vol.10, p.686: 10-21

⁶³ Tribunal Direction to Counsel, January 26, 2021, re: Final Oral Argument ("**Tribunal Question**")

⁶⁴ P-A-001, Pethick Statement, p.4, para.13.

E. Proximity is an important factor in a farm's choice of Elevator

45. Farms may consider a number of factors when selecting the Elevator at which they will sell their grain (and from which they will purchase Grain Handling Services).⁶⁵ The most important factors determining where a farm chooses to sell its grain are the prices it can obtain at each local Elevator and the transportation costs associated with delivering grain to each such Elevator.⁶⁶ Farmers value the proximity of an Elevator to the farm because it decreases transportation costs and because they have more experience interacting with proximate Elevators.⁶⁷
46. Farms must transport their grain to an Elevator using their own equipment or by paying a commercial trucking company to load, ship and unload their grain.⁶⁸ Whether transportation costs are expressed by the tonne and kilometer and/or in the farmer's own time, these costs add up and are a major consideration for farmers.⁶⁹ Mr. Pethick testifies that one of the factors he considers when determining where to sell his grain is the distance he has to travel to an Elevator. As he writes, "The closer Elevators cost less to haul to so an Elevator further away needs a higher bid to cover the freight costs."⁷⁰ Chris Lincoln testifies that "given the time and cost associated with hauling my grain, more distant Elevators would have to offer a higher price for me to consider selling to them."⁷¹
47. Farms' transportation costs also include the implicit costs of the time and complexity associated with such transportation which may limit competitive options for a farmer. Mr. Wagstaff testified that "when you go north from us it is a pretty bad road. You have to go through the Upper Assiniboine Valley and when it's icy, which conditions

⁶⁵ P-A-001, Pethick Statement, p.3-5, paras. 11-18 ; P-A-033, Wagstaff statement, p.2-4, paras. 6-15; CB-A-025, Lincoln statement, p.2-4, paras. 7-15.

⁶⁶ Public Transcript, Vol.5, p.485:19- 486:2; P-A-001, Pethick Statement, p.3-4, paras. 11-15; Public Transcript, Vol.5, p.452:3-454:10, Public Transcript, Vol.5, p.468:3-11.

⁶⁷ P-A-001, Pethick Statement, p.4-5, para. 15-16; P-A-033, Wagstaff Statement, p.3-4, paras. 8-15; CB-A-025, Lincoln Statement, p. 4, paras. 14-16; Confidential Level B, Vol.5, p.153:11-23.

⁶⁸ P-A-001, Pethick Statement, p.5, para.17; P-A-033, Wagstaff Statement, p.3, para.11.

⁶⁹ *Supra* Note 64.

⁷⁰ P-A-001, Pethick Statement, p.4, para. 15.

⁷¹ CB-A-025, Lincoln Statement, p.4 para. 15.

are a lot of the winter here, it is not a good road and it is a slow road".⁷² Mr. Pethick noted that the one thing against going to Binscarth is the valley with a steep hill where you can get stuck in the winter.⁷³ This demonstrates that certain Elevators that may look close on a map are in fact challenging to get to. Mr. Lincoln said in his witness statement that the Cargill Elevator in Oakner is "not an option because it requires taking secondary roads with a 23-tonne weight limit that is in effect all year... Transportation costs mean that Oakner is not a viable option for me."⁷⁴

48. The evidence from P&H also demonstrates that P&H is aware that transportation costs are a significant input into producer decisions by limiting a producer's ability to take advantage of a better price from a more distant Elevator. For example, in response to an email from Ms. Beutler, a Moosomin CSR, that a customer was cancelling a grain pricing order, Trevor Letkeman, a grain trader at P&H responded "Where is the grower located? We could stretch to \$6.90. Does distance help us?".⁷⁵

F. Through the Acquisition, P&H has obtained the ability to increase the price for Grain Handling Services by 7-8% for wheat and 1-7% for canola

49. Dr. Miller's expert opinion is that the Acquisition allows P&H to charge farmers ■■■ more to handle farmers' wheat and ■■■ more to handle farmers' canola.⁷⁶ Ms. Sanderson agrees that Dr. Miller's simulation model used to find this conclusion is typically used in merger reviews to predict price effects.⁷⁷
50. With the available data, Dr. Miller is able to assess the extent to which farms view the Moosomin and Virden Elevators as each other's next best substitutes by computing their diversion ratios. Furthermore, because of the rich data set he uses, he is also able to assess the extent to which farms view 13 third-party Elevators and

⁷² Public Transcript, Vol.3, p.303:8-304:18.

⁷³ Public Transcript, Vol.1, p. 126:1-18.

⁷⁴ CB-A-025, Lincoln Statement, p.3, para. 11.

⁷⁵ *Supra* Note 42.

⁷⁶ CA-A-170, Expert Report of Dr. Nathan Miller (Conf A), p.10, para. 6.

⁷⁷ Confidential Level A Transcript, Vol.10, Level A, p. 712:8-11.

five third-party canola crush plants as substitutes to Virden and Moosomin with respect to Grain Handling Services for each of wheat and canola. For wheat, he calculates the diversion ratios from Moosomin to Virden and from Virden to Moosomin to be ██████ and ██████ respectively, which indicates that they are relatively close competitors. For canola, the diversion ratios between Moosomin and Virden are smaller, at ██████ and ██████ respectively. However, Fairlight has large diversion ratios with both Elevators, suggesting that there is likely indirect competition between the two, through Fairlight.⁷⁸

51. Dr. Miller then used these diversion ratios to quantify the upward pricing pressure (“**UPP**”) created by the Acquisition.⁷⁹ The UPP is a tool that is often used in merger review to approximate the incentive for the merging parties to unilaterally raise price. Dr. Miller computes several measures of UPP, all of which show that prices would likely rise as a result of the Acquisition.⁸⁰
52. Finally, Dr. Miller conducts a merger simulation to quantify the price impact of the Acquisition on farmers. Merger simulation is a widely accepted econometric method for calculating effects from a merger.⁸¹ The analysis Dr. Miller has conducted reflects the principles established in the economic literature.⁸² The results from Dr. Miller’s simulation show a material increase in the price per metric tonne of Grain Handling Services.
53. Dr. Miller’s results are conservative for a number of reasons:
 - a. his results do not take into account the incentive for Elevators located outside the Relevant Markets to increase their prices in response to the Acquisition;⁸³

⁷⁸ CA-A-170, Expert Report of Dr. Nathan Miller (Conf A), p.65, para. 114.

⁷⁹ CA-A-170, Expert Report of Dr. Nathan Miller (Conf A), p.65, para. 115.

⁸⁰ CA-A-170, Expert Report of Dr. Nathan Miller (Conf A), p.66, para. 116.

⁸¹ CA-A-170, Expert Report of Dr. Nathan Miller (Conf A), p.69-70, para. 127-128 ; Superior Propane (2000 Comp. Trib. 15), at para. 247.

⁸² CA-A-170 , Expert Report of Dr. Nathan Miller (Conf A), p.69, para. 127

⁸³CA-A-170, Miller Report at p. 56-57, para. 94.

- b. his results assume there are no expansion constraints on Elevators or Crushers even though there is evidence that Crushers can be capacity constrained at times during the year;⁸⁴
 - c. his results do not take into account the incremental margin (above the futures price) that P&H earns on the grain that it purchases from farmers when it ultimately sells that grain to its end customers;⁸⁵ and
 - d. his results inflate the magnitude of G3's competitive presence by attributing all of G3's purchases of grain (both canola and wheat) as purchases of wheat (when analyzing the market for wheat handling services) and as purchases of canola (when analyzing the market for canola handling services).⁸⁶
54. Even with Dr. Miller's conservative assumptions, he still predicts that P&H has obtained the ability to increase prices charged to farmers by ██████ for wheat and ██████ more for canola

PART III THE ACQUISITION HAS OR IS LIKELY TO RESULT IN A SUBSTANTIAL LESSENING OF COMPETITION

55. As is set out below, absent an order of the Tribunal, P&H will exercise enhanced market power to the detriment of farmers in certain parts of Saskatchewan and Manitoba. Through the Acquisition, P&H has the ability and incentive to increase the price of Grain Handling Services for wheat and canola, resulting in farmers receiving

⁸⁴Confidential Level A Transcript, Vol. 10, p.756:4-757:1; CB-A-134, p. 772-773, "Harvest space is at premium"; Confidential Level A Transcript, Vol. 5, p.340:15-341:4: Mr. Hood: "Mr. Hebert, you understand that a canola crush plant is able to offer you a significantly better price because a crush plant does not incur the costs to handle your grain that a grain elevator does, correct?" Mr. Hebert: "I'd say that in general terms, I agree with you. But if you were to look at JRI's bid sheet right now, they actually have a no-bid for four months in a row, so they can't even offer me a price. So yes, in general, they can. They're very strong competitors on canola. But they have – they're obviously limited by the output that they can produce every month. So as of right now, for JRI especially and LDC, I couldn't even sell canola into them for the new crop months of September, October, November, and the elevator system is offering a significantly better net cash price." CB-A-134, Read in Brief of the Commissioner, p.869, shows Andy Klippenstein, GM at Virden, reporting that it's very busy at Virden on that day and that P&H Moosomin is full until October.

⁸⁵ CA-A-170, Miller Report at p.41-42, paras. 61-63; CA-A-173, Miller Reply, p.36, para. 74.

⁸⁶ CA-A-170, Miller Report at p. 87, para. 170.

less for their wheat and canola. The merger therefore has or is likely to substantially lessen competition.

A. The Relevant Market

56. The Relevant Markets at issue in this application are the supply of Grain Handling Services for canola and the supply of Grain Handling Services for wheat for those producers who, prior to the Acquisition, benefited from competition between the Virden, Moosomin and Fairlight Elevators.
57. Market definition is not necessarily the initial step, or a required step, but has traditionally been the first step undertaken by the Tribunal.⁸⁷ Market power can be determined by defining the relevant market and assessing the competitive effects of the merger in the relevant market.⁸⁸
58. A relevant market is defined as the smallest group of products and the smallest geographic area in which a sole profit maximizing purchaser could impose and sustain a small but significant and non-transitory increase in price (“**SSNIP**”) above levels that would likely exist in the absence of the merger. This is determined by analyzing evidence of the ability of buyers to switch their purchases to substitute products and locations in response to a price increase.⁸⁹
59. In this case, the Relevant Market is determined by analyzing the extent to which farmers, could, as a result of a SSNIP imposed by a hypothetical monopolist of Elevators, substitute to: (1) alternative options (such as selling their wheat and canola directly to processors such as Crushers) and (2) other more distant Elevators.

⁸⁷ Merger Enforcement Guidelines at para. 3.1; see also Superior Propane (2000 Comp Trib 15) at para. 56, CCS (2012 Comp. Trib 14.) at para. 360-364.

⁸⁸ MEGs at paras. 3.2 and 3.3; see also Superior Propane (2000 Comp Trib 15) at paras. 47 and 48; Canadian Waste Services Holdings Inc. (2001 Comp. Trib.3) at para. 39.

⁸⁹ MEGs at para. 4.3; see also CCS (2012 Comp. Trib. 14) at para. 58-60; Superior Propane (2000 Comp Trib 15) at para. 57.

1. *Relevant product market is properly characterized as the provision of Grain Handling Services*

60. The touchstone for determining the boundaries of the relevant product market is substitutability. A relevant product market consists of at least one product of the merging parties and all substitutes required for a SSNIP to be profitable.⁹⁰
61. The provision of Grain Handling Services is the relevant product market. P&H argues that the relevant product market should be the purchase of grain because Elevators no longer charge the explicitly itemized grain handling fees and tariffs that were a feature of the Canadian Wheat Board era. However, P&H does not dispute that Elevators continue to carry out the grain handling activities that were associated with those tariffs and fees.⁹¹
62. The evidence demonstrates that farmers can sell their grain either to Elevators, or in the case of canola, to Crushers.⁹² In response to a SSNIP imposed by elevators, the response of farmers is not to switch to alternative sales channels. Instead, the response of farmers is geographic – they switch to more distant Elevators and incur greater transportation costs.⁹³
63. The fundamental disagreement between the Parties is about what the farmer obtains when the farmer sells their grain to an Elevator. A relevant product market for Grain Handling Services facilitates an economic analysis that is focused on the competition affected by the Acquisition and on Elevators' contribution to value. As described below, this approach is supported by the jurisprudence from Canada, the United States and the European Commission.

⁹⁰ MEGs at para. 4.10, see also CCS (2000 Comp Trib 15), at para. 58; Superior Propane (2000 Comp Trib 15), para. 67; Director of Investigation and Research v. Hilldown Holdings (Canada) Ltd. (1992), 41 C.P.R. (3d) 289, at para. 27.

⁹¹ Elevators continue to grade, elevate, store, clean, blend, and dry the grain; CA-A-244, Agreed Statement of Facts, p.3, paras. 24-34; Confidential Level B Transcript, Vol. 7, p. 380:1-381:7.

⁹² P-A-001, Pethick Statement, at p.3, paras. 8-10; P-A-033, Wagstaff Statement, at p. 2-3, paras. 7-9.

⁹³ CB-A-025, Lincoln Statement, p.4, para. 15; CA-A-170, Miller Report, p. 56-57, para. 94.

a. The relevant product market should reflect an economic framework that analyzes competition impacted by the Acquisition.

64. As demonstrated in the fact section above, there are two components in the final price that a farmer receives for grain: the futures price and the basis price. The futures price is common across Elevators. It is a global benchmark that Elevators are unable to influence. This means that a change in global supply or demand, such as a demand shock in China, will have the same effect on the net prices of all Elevators via futures prices.⁹⁴
65. The basis is the component of price that is specific to each local Elevator and is influenced by local market competition. It reflects an Elevator's contribution to the value of a farmer's grain. That is why the basis is routinely communicated to farmers when P&H posts its price. The basis is the only component of net price that varies across Elevators.⁹⁵ It is an industry-wide practice for Elevators to post their basis when they post their net price.⁹⁶
66. The facts demonstrate that the actual basis price associated with a given purchase of Grain Handling Services ultimately reflects local market dynamics – including the use of the pricing mechanisms described above, such as posted specials and one-on-one negotiations with farmers.⁹⁷
67. Elevators actively monitor competitors' bases and each grain handling company's merchants exercise discretion over Elevator pricing, including the latitude to deviate from pricing targets in response to local market dynamics.⁹⁸

⁹⁴ CA-A-173, Miller Reply Report, p.18, para.33; CA-A-177, Miller Demonstratives, Slide 7.

⁹⁵ *Supra* Notes 22-23.

⁹⁶ CB-A-134, Read In Brief of the Commissioner, Heimbecker Testimony of July 15, 2020, p. 118:1-6; CB-A-144; *Supra* Notes 31 and 33.

⁹⁷ *Supra* Notes 40-42.

⁹⁸ For references of competing on basis, refer to CB-A-136, P&H E-mail subject Canola basis dated May 5, 2017 (Confidential Level B); CA-A-173, Miller Reply, p.13, para. 19. For reference to 15% of P&H's grain sales being at the posted cash price, see CA-R-115, Heimbecker Statement, p.27-28, para. 85.

68. P&H does not attribute any significance to the basis.⁹⁹ Instead, P&H's approach implies that the competition analysis should depend directly on the value added by other firms and markets in the supply chain. That is, rather than defining a price change in the market as the ratio between the predicted effect of a merger and the prevailing price that existing competition has produced in the market (i.e., the basis), P&H's approach would add a price outside the control of market participants to the denominator (i.e., the futures price). In other words, P&H (mis)attributes the value of the grain that it handles to its Elevators rather than to the farmers who actually produced the grain. The result is an approach to computing price changes that misrepresents the competitive effects of the Acquisition.¹⁰⁰
69. Focusing on the price of grain as opposed to Grain Handling Services allows P&H to obscure the competitive effects of the Acquisition. Farmers benefit from the ability to play Elevators off each other and care about the ability to do so. P&H's approach ignores this important real world competition.¹⁰¹ Being able to access the global supply chain matters to farmers, and this contribution should not be masked simply because the product the farmer is selling has a significant value relative to the contribution of the supply chain.¹⁰²
70. In response to Tribunal Question 4, the evidence referenced in this section and sections B – D of Part II – The Facts demonstrates that the product market is the provision of Grain Handling Services.

b. Insulating an analysis of product market from competition not impacted by the merger has been done by the Tribunal, is recognized in the U.S. Horizontal Merger Guidelines, and has been applied by the European Commission

71. In this part, Tribunal Questions 1-3 are answered. Canadian jurisprudence, the Competition Act, and Merger Enforcement Guidelines (“MEGs”), along with

⁹⁹ *Supra* Note 12.

¹⁰⁰ Public Transcript, Vol.8, p. 607:21-609:3.

¹⁰¹ Confidential Level A Transcript, Vol.10, p. 686:12-21.

¹⁰² Public Transcript, Vol.8, p. 607:21-609:3.

international legal precedent, all support finding the provision of intermediary services, such as Grain Handling Services, as a relevant product market.

72. Focusing the analysis on the part of the final price that is impacted by the merger is consistent with the Competition Tribunal's decision in *Hillsdown* that analyzed the merger of two companies that operated rendering businesses for the by-products from slaughterhouses.¹⁰³ The Tribunal had to decide whether to characterize the market as the supply of 'renderable material' from slaughterhouses to the renderer or as the provision of the services by a Respondent that contribute to the end product's value, namely 'rendering services' by the render to the slaughterhouse, equivalent to choosing between the purchase of grain or the provision of Grain Handling Services.¹⁰⁴ The Tribunal decided to characterize the market as the provision of rendering services.¹⁰⁵
73. Xerox is an example of a non-merger case where the Tribunal found that the relevant product market was the provision of intermediary services, servicing copier parts, that was not constrained by the sale of copiers to end customers.¹⁰⁶
74. The approach taken by the Tribunal for both *Hillsdown* and Xerox demonstrates that the *Competition Act* supports finding that the relevant product market is the provision of Grain Handling Services. Section 92 is concerned with mergers that substantially lessen competition. There is nothing in the wording of section 92 to suggest that section 92 should only be concerned with mergers that substantially lessen competition with respect to the final price to end customers. Indeed, as the Tribunal observed in Xerox, the purpose clause of the Act "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian

¹⁰³ *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289

¹⁰⁴ *Ibid* at para. 26

¹⁰⁵ *Ibid.*

¹⁰⁶ *Canada (Director of Investigation & Research) v. Xerox Canada Inc.*, [1990] C.L.D. 1146, 33 C.P.R. (3d) 83, at paras. 61, 62, and 71.

economy” contemplates, if not requires, action to preserve the competitive situation in an intermediate market.¹⁰⁷

75. The MEGs also support defining Grain Handling Services as a relevant product market. The reference to price in section 4.2 is intended to capture any market that may be anticompetitive.¹⁰⁸ The question is whether a product is an acceptable substitute to a product supplied by the parties to a merger. Like the *Act*, the MEGs are agnostic as to how the price to supply the product is defined. The MEGs are also clear that “in most cases” a 5% increase will be considered significant for the purposes of a SSNIP but that “market characteristics may support using a different price increase”.¹⁰⁹
76. The U.S. Horizontal Merger Guidelines contemplate that the benchmark price used for analyzing product market can be different than the explicit price where the firms’ specific contribution to value can be identified with reasonable clarity.¹¹⁰ The United States District Court, District of Columbia, in *Whole Foods* applied the usual 5% SSNIP but did note that there was agreement from the Whole Foods expert that “smaller SSNIP’s are more appropriate for mergers in low net margin industries like supermarkets”.¹¹¹
77. The U.S. DOJ in *Conagra Foods* used a smaller SSNIP consistent with the U.S. Guidelines to support its Competitive Impact statement filed with the U.S. District Court, District of Columbia.¹¹² The U.S. DOJ challenged a joint venture that would or would likely substantially lessen competition for the provision of hard wheat flour to customers in certain states.¹¹³ Like this application, the price of delivered flour

¹⁰⁷ *Canada (Director of Investigation & Research) v. Xerox Canada Inc.*, [1990] C.L.D. 1146, 33 C.P.R. (3d) 83, at para. 63

¹⁰⁸ MEGS, 4.3 and FN 17.

¹⁰⁹ MEGS, 4.3; CCS (2012 Comp Trib 14), at paras. 59-60

¹¹⁰ Horizontal Merger Guidelines, U.S Department of Justice and the Federal Trade Commission, August 19, 2010, p. 10 (<https://www.justice.gov/atr/file/810276/download>). This approach is also recognized in the ICN Recommended Practices for Merger Analysis, see Comment 3, p. 6.

¹¹¹ *F.T.C. v. Whole Foods Market, Inc.*, 502 F.Supp.2d 1 (2007), p. 9.

¹¹² *United States of America v. Conagra Foods, Inc., et al.*, 14-CV-00823.

¹¹³ *Ibid.*, p. 1-2.

had components, several of which were determined by market forces beyond the control of an individual miller.¹¹⁴ One component was called the block, which amounted to the miller's fee for converting wheat into flour. The block is a relatively small portion of the price of delivered flour, but was the primary term on which they competed.¹¹⁵ The U.S. DOJ based its SSNIP on the block component of the price, stating that this was consistent with the U.S. Horizontal Guidelines statement referenced above.¹¹⁶

78. The approach in the U.S. Guidelines has been approved and followed by the European Commission (“EC”) in two cases.
79. In *Norsk Hydro/Orkla/JV*, the EC analyzed the merger of Hydro, a global supplier of aluminium, with Orkla, which also had operations in the aluminium sector.¹¹⁷ In analyzing the relevant market for soft-alloy extrusions, the EC noted that there was a significant and persistent difference in the “extrusion premia” charged by soft alloy extrusion suppliers in two different geographic markets. The extrusion premium is the price paid by customers for the value added by companies that extrude the aluminum. During the investigation, the EC found “that in aluminium soft-alloy industry, negotiations between customers and suppliers normally only concern the extrusion premium”.¹¹⁸ The aluminium price and billet conversion costs were not subject to negotiations and fixed for all customers. Therefore, the EC concluded that “in the presence of a similar price structure, it seems appropriate to take as a relevant benchmark price the extrusion premia rather than the full price” – citing with approval the U.S. Guidelines discussed above.¹¹⁹
80. In *Inco/Falconbridge*, the EC considered the market for high purity nickel. Super alloy manufacturers purchased nickel at a premium to prices on the London Metal

¹¹⁴ *Ibid.*, p. 6-7.

¹¹⁵ *Ibid.* p. 6-7.

¹¹⁶ *Ibid.* p. 10-11.

¹¹⁷ Case No COMP/M.6756 - NORSK HYDRO/ ORKLA/ JV, May 13, 2013

(https://ec.europa.eu/competition/mergers/cases/decisions/m6756_3081_2.pdf)

¹¹⁸ *Ibid* at para. 67.

¹¹⁹ *Ibid* at para. 67 and FN 19.

Exchange. The EC rejected the merging parties' arguments that an increase in the premiums did not constitute a significant increase in the final price for customers, stating that: "the price increase must be seen in relation to the added value provided by the firms in the relevant market. For example, a price increase of an input good may have only a minor effect on the price of the final product (depending inter alia on the share of total input cost represented by the input good), but nonetheless has to be considered significant from an antitrust perspective. This is the case because the increase in the absolute premiums indicates an increase in market power over the identified market."¹²⁰

81. The relevant product market is properly characterized as the provision of Grain Handling Services. This product market reflects the competition affected by the merger and is consistent with jurisprudence from other jurisdictions including Canada. It ensures that case law aligns with "good economics".¹²¹

2. Relevant Geographic Market is Local

82. The evidence demonstrates that the relevant geographic market is local. Transportation costs matter when farmers are considering where to sell their grain. The qualitative and quantitative evidence demonstrates that if the Virden, Moosomin and Fairlight Elevators were operating as a hypothetical monopolist they would have the ability and incentive to impose a SSNIP.
83. Dr. Miller's report also provides evidence that competition is local. Most farms that Dr. Miller analyzed in his report deliver their grain to Elevators located less than 100 kilometers away.¹²² The size of the service areas from which the Moosomin and Virden Elevators draw at least 90% of the wheat or canola they handle demonstrates that most of these volumes are drawn from farms located near to the Elevators.

¹²⁰ *Inco/Falconbridge*, para. 379.

¹²¹ Confidential Level A Transcript, Vol.10, p.746:3-748:9

¹²² CA-A-170, Miller Report, p. 16, para. 19, citing Exhibit 7.

demonstrates this in action. The data shows that Mr. Paull chose to sell to the nearby Virden Elevator even though he would have made a few pennies more if he sold his canola to the more distant Altona Crusher.¹³⁰

88. As Dr. Miller explains in his reply report, the fact that farms work with more distant Elevators is consistent with his analysis and geographic market definition.¹³¹ However, the evidence is clear that farmers in the towns close to Moosomin, Virden and Fairlight are particularly likely to rely on the three Elevators in Dr. Miller's relevant geographic market.¹³² Dr. Miller has accounted for the fact that farms may consider multiple Elevators for Grain Handling Services and that some farms may have idiosyncratic reasons to seek the services of a distant Elevator.¹³³ Unlike Ms. Sanderson's analysis, Dr. Miller actually analyzes farmers choices using a rich model of demand.¹³⁴ As a result, the hypothetical monopolist test he runs demonstrates that his proposed geographic market meets the SSNIP standard.

B. The Acquisition allows P&H to increase market power in the Relevant Markets resulting in a likely SLC

89. P&H's acquisition of the Virden Elevator is likely to substantially lessen competition in the Relevant Markets. Both the quantitative and qualitative evidence demonstrates that producers in the Relevant Markets will pay materially more for Grain Handling Services over the next two years and lose other impactful aspects

[REDACTED]

¹³⁰ CA-A-111. CA-A-113, Tab "LDC Virden", Row 283, shows Ed Paull delivered 15.27 MT of Canola to Virden on April 4, 2018. Ed Paull did not deliver any Canola to Bunge Altona between March 12, 2018 and July 16, 2018 – see CA-A-113, Tab Bunge Altona.

¹³¹ CA-A-173, Miller Reply Report, p. 20, para. 38, and p. 22-26, paras. 42-52.

¹³² CA-A-173, Miller Reply Report, p. 23-24, para. 46, showing Exhibit 1 and Exhibit 2

¹³³ CA-A-173, Miller Reply Report, p. 25, para. 50.

¹³⁴ CA-A-173, Miller Reply Report, p. 25, para. 50 and p. 34, para. 71.

of competition, including grading and protein spreads – all of which affect the ultimate price received for wheat and canola. In particular, the SLC caused or likely caused by the Acquisition is demonstrated by:

- a. The high margins at the Virden Elevator as direct evidence of market power;
- b. P&H's ability to engage in price discrimination;
- c. P&H's high market shares in the Relevant Markets;
- d. The vigorous and effective competitor to the Moosomin Elevator that the Virden Elevator provided prior to the Acquisition;
- e. The material impact of the Acquisition on the price for Grain Handling Services;
- f. The planned expansion of Moosomin that would have made P&H a more effective competitor to the Virden Elevator in the absence of the Acquisition;
- g. The inability of Viterra's Fairlight Elevator to constrain an increased exercise of market power by P&H; and
- h. High barriers to entry and expansion.

90. When determining whether P&H's acquisition has or is likely to lessen competition substantially, the Commissioner must demonstrate that the Relevant Markets would be substantially more competitive but for the Acquisition.¹³⁵ Specifically, in assessing whether competition has been or is likely to be lessened, the more particular focus of the Commissioner's assessment is on whether the Acquisition has facilitated, is facilitating or is likely to facilitate the exercise of new or increased market power by P&H.¹³⁶

91. "Substantiality" can be demonstrated by the Commissioner through quantitative or qualitative evidence, or both. The Commissioner must, however, always adduce sufficiently clear and convincing evidence to demonstrate, on a balance of probabilities, that competition has been or is likely to be lessened substantially.¹³⁷

¹³⁵ *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, ("**Tervita SCC**"), paras. 51 and 54.

¹³⁶ *Ibid*, paras. 54-55.

¹³⁷ *The Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14, para. 232; *Tervita SCC*, para. 66.

92. What constitutes “materially” greater market power will depend on the facts of the case. In assessing whether the degree or magnitude of lessening of competition is sufficient to be considered “substantial”, the Tribunal will consider the overall economic impact of a merger in the relevant market.¹³⁸
93. With respect to the duration aspect of its assessment, the test applied by the Tribunal is whether the material increase in price or material reduction in non-product dimensions of competition resulting from an impugned practice has lasted or is likely to be maintained for approximately two years.¹³⁹
94. P&H’s acquisition of the Virden Elevator has and is likely to substantially lessen competition in the Relevant Markets. Both the quantitative and qualitative evidence demonstrate that farmers in the Relevant Markets will pay materially more for Grain Handling Services over the next two years.

1. The high margins at the Virden Elevator are direct evidence of market power

95. High margins are direct evidence that a firm has market power.¹⁴⁰ In this case, Dr. Miller has calculated that the Virden Elevator earned a █████% margin on Grain Handling Services for wheat and █████% margin on Grain Handling Services for canola.¹⁴¹ In Dr. Miller’s experience these are relatively high margins and “consistent with localized competition rather than significant competition from many distant competitors. Intuitively, the high margins suggest that the firms have not been forced to lower prices to keep the customers they have from being tempted away to such would-be competitors.”¹⁴²

¹³⁸ *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 at para. 641.

¹³⁹ *Tervita SCC*, para.46; *CCS* (2012 Comp Trib 14), paras. 378-379.

¹⁴⁰ *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.*, [1997] C.C.T.D. No. 8, 73 C.P.R. (3d) 1, (“**Tele-Direct**”), at para. 286.

¹⁴¹ CA-A-170, Miller Report, p. 47, para. 72.

¹⁴² CA-A-170, Miller Report, p. 47, para. 72.

2. *P&H's market shares in the Relevant Markets indicate P&H's ability to exercise market power*

96. Market shares are an indirect indicator that the Acquisition allows P&H to exercise market power in the Relevant Markets.¹⁴³ Analysing the data that has been collected, Dr. Miller's calculation is that post-Acquisition, P&H will have a market share of █████% and █████% for wheat and canola, respectively.¹⁴⁴ These market shares are well in excess of the 35% safe harbour threshold in the *Merger Enforcement Guidelines*. In *VISA*, the Tribunal concluded that MasterCard's 30% market share was evidence of market power.¹⁴⁵

97. Ms. Sanderson includes sales from all Elevators and Crushers that purchase from farmers in the Relevant Market. As Dr. Miller explained, Ms. Sanderson's approach to calculating market shares including Elevators both inside and outside the Relevant Markets is inconsistent with the *MEGs*, which "specifically considers 'market shares for all sellers who have been identified as participants in the relevant market,' not just any arbitrary shares."¹⁴⁶ As Dr. Miller noted, in including Elevators outside the Relevant Markets, Ms. Sanderson is applying "two different standards, one for the product market and a different one for the geographic market."¹⁴⁷

3. *P&H's pricing practices indicate market power that will be amplified by the Acquisition*

98. P&H's own pre-Acquisition pricing practices indicate it has market power. The evidence is clear that P&H knows the location of its customers¹⁴⁸ and can use that information to engage in price discrimination.¹⁴⁹ The ability to engage in price discrimination is evidence of market power.¹⁵⁰

¹⁴³ *Tele-Direct*, para. 226.

¹⁴⁴ CA-A-170, Miller Report, p. 52, Exhibit 10.

¹⁴⁵ *Commissioner of Competition v. Visa Canada Corporation*, 2013 Competition Tribunal 10, ("*Visa*"), para. 267.

¹⁴⁶ CA-A-173, Miller Reply, p.30, para. 63.

¹⁴⁷ Confidential Level A Transcript, Vol.10, p.791:17-792:17.

¹⁴⁸ CB-A-134, Read in Brief of the Commissioner, p.48, lines 4-6: "Q: Do CSRs generally know where their customers are located? A: Yes."

¹⁴⁹ CB-A-134, p. 833-834 and CA-A-111.

¹⁵⁰ *Tele-Direct*, para. 297.

99. Here is an example of P&H engaging in price discrimination from Moosomin customer service representative Mr. Krainyk, reporting on competition from Virden for a farmer in the Maryfield area: “ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In response to this email, P&H grain trader Mr. Letkeman offers what he describes as a “huge deal” on the basis price to neutralize the loss caused by the wider spreads described by Mr. Krainyk.¹⁵¹

100. Dr. Miller’s opinion is that “when approximating overall post-Transaction price changes using UPPs, the price discrimination and posted price models produce remarkably similar predictions”.¹⁵²

*4. Prior to the transaction, the Virden Elevator was a vigorous and effective competitor to the Moosomin Elevator*¹⁵³

101. Removal of a vigorous and effective competitor is evidence that a merger has substantially lessened competition.¹⁵⁴ Dr. Miller’s calculation of diversion ratios between the Virden and Moosomin Elevators described above demonstrate that the two Elevators were close competitors. This analysis is supported by ample documentary evidence from P&H and LDC of the close and vigorous competition between the two Elevators.

102. A Moosomin Business Plan from November 2017 discusses how “ [REDACTED]

[REDACTED]

¹⁵¹ CB-A-134, Read in Brief of the Commissioner, p.827-829.

¹⁵² CA-A-170, Miller Report, p.77-78, paras.140-142.

¹⁵³ This section responds to Tribunal Question 7.

¹⁵⁴ *Competition Act*, R.S.C., 1985, c. C-34, subsection 93(f).

105. The farmers concerns are consistent with the evidence from Figure 21 of Ms. Sanderson's report, which demonstrates that ██████ farmers between the Moosomin and Virden Elevators are selling some or all of their wheat to Virden.¹⁶¹
106. Mr. Heimbecker challenges these assertions in his witness statement. However, Mr. Heimbecker's testimony should be given little weight particularly as it relates to the competitive dynamic among Elevators. Mr. Heimbecker, as CEO of P&H, has little interaction with the day-to-day operations of P&H's Elevators, in fact he admitted that he only visits the Elevators once or twice annually.¹⁶² He did not know that Mr. Cobb had been promoted to manage one of his Elevators,¹⁶³ he was unable to answer basic questions about the "█████"¹⁶⁴ and his testimony as to how basis price specials work was incorrect.¹⁶⁵ P&H certainly could have challenged statements made by the Commissioner's farmer witnesses by filing witness statements from Elevator staff or grain merchants in its employ who could have provided superior testimony in respect to these facts, but they elected to include testimony from only Mr. Heimbecker, who is far removed from the day-to-day interactions that CSRs have with farmers.¹⁶⁶ Therefore, as they failed to put forward this evidence, the Tribunal should draw an adverse inference against P&H.

5. The impact on the price for competition for Grain Handling Services is material

107. As described in the fact section above, Dr. Miller's expert opinion is that the Acquisition allows P&H to charge producers █████% more to handle farmers' wheat and █████% more to handle farmers canola.¹⁶⁷ These predicted price effects are material when considered against the price farmers pay for Grain Handling Services.

¹⁶¹ CA-R-181, Sanderson Report, Figure 21, p. 117-122.

¹⁶² Confidential Level B Transcript, Vol. 7, p. 383:7-12.

¹⁶³ Confidential Level B Transcript, Vol. 7, p. 382:25-383:3.

¹⁶⁴ Confidential Level B Transcript, Vol. 7, p. 443:9-445:11:.

¹⁶⁵ Mr. Heimbecker testified that during a price special discussed in an e-mail (CB-A-142), a P&H merchant was matching a competing Elevator's net price, despite the e-mail stating he would match the basis (Confidential Level B Transcript, Vol. 7, p. 345:15-355:13); however, contracts entered into the day of the special demonstrate that producers received the same basis, not the same net price (Confidential Level B Transcript, Vol. 7, p. 410:5-423:7 and CB-A-159, CB-A-161, CB-A-163, and CB-A-165).

¹⁶⁶ *McIlvenna v. Viebig*, 2012 BCSC 218, at para. 71.

¹⁶⁷ CA-A-170, Miller Report, p. 10, para. 6.

Both experts agree that the absolute value of the predicted price effects does not depend on whether the relevant product market is Grain Handling Services or the purchase of grain.¹⁶⁸ It is the absolute amount of the price effects that are material. As the Tribunal said in *Tele-Direct*, even small increases in price are material in the face of pre-existing market power.¹⁶⁹

108. Dr. Miller has calculated that the decrease in welfare for farmers is around ██████████ per year for wheat and \$████████ per year for canola. This amounts to more than \$0.02 cents a bushel, which was an amount that would have provided P&H with an additional \$████ million in profit if it could increase every transaction by that amount. During discovery, Mr. Heimbecker acknowledged that this amount was “not insignificant” when applied across all of the grain that he purchases.¹⁷⁰
109. Mr. Letkeman, a P&H grain trader, in response to a request for a \$0.15 cent per bushel discount, said, “the damage to our buying program is almost immeasurable”.¹⁷¹ The Acquisition gives P&H the ability to increase the price charged to farmers for Grain Handling Services by more than an extra \$0.02 a bushel . The evidence demonstrates that \$0.02 cents is important to P&H – a company with profits that dwarf a farmer’s.
110. Mr. Hebert, one of P&H’s farmer witnesses, describes how farmers’ margins are getting squeezed in podcasts and at industry events.¹⁷² Mr. Lincoln testifies that “we need every penny to be able to hit the profitability levels that we need to operate our farm”.¹⁷³
111. Harvey Brooks, the general manager of SaskWheat, also confirms that this loss of revenue could harm farmers, testifying that “the impact on the producer’s bottom

¹⁶⁸ Confidential Level A Transcript, Vol.10, p. 667:15-23.

¹⁶⁹ *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.*, [1997] C.C.T.D. No. 8, 73 C.P.R. (3d) 1, at para. 758.

¹⁷⁰ CB-A-134, Read in Brief of the Commissioner, p.178.

¹⁷¹ CB-A-134, Read in Brief of the Commissioner, p.800.

¹⁷² Public Transcript, Vol.5, p. 440:13-441:12 and 443:18-445:8.

¹⁷³ CB-A-025, Lincoln Statement, p. 4, para. 16.

line from the acquisition could be significant if the producer receives a lower price because of lack of competition”.¹⁷⁴

112. After Tervita, the tendency has been to focus on quantified price effects for mergers.¹⁷⁵ While the Commissioner has an obligation to quantify price effects and deadweight loss (“**DWL**”) to respond to P&H’s efficiencies defence, price effects in the context of the SLC analysis are only one type of evidence to be considered. The price effects and non-price effects must be considered in combination with all the evidence demonstrating an SLC.¹⁷⁶
113. The materiality of the price effects is enhanced when all of the other evidence of an SLC is considered, namely P&H’s pre-existing high margins, P&H’s high market shares, P&H’s ability to price discriminate, removal of the Virden Elevator as a vigorous and effective competitor, and the loss of competition between the Virden and Moosomin Elevators as a result of the Moosomin Elevator’s expansion.
114. P&H argues that its increased purchases at the Virden and Moosomin Elevators post-Acquisition demonstrate that the Acquisition has not caused an SLC. The SLC from the Acquisition arises from the increased ability of P&H to raise the price of Grain Handling Services. Even if this ability has not been acted upon while P&H knows it is awaiting a hearing before the Tribunal on the matter, once P&H’s managers are free to pursue profits for their shareholders,¹⁷⁷ the farmers – particularly those farmers located between Moosomin and Virden – are likely to be harmed.
115. In any event, the retrospective analysis carried out by Ms. Sanderson is flawed for the reasons articulated by Dr. Miller in his reply report and testimony from the

¹⁷⁴ P-A-014, Brooks Statement, p. 11, para. 32.

¹⁷⁵ *Tervita SCC*, at para. 125.

¹⁷⁶ *Superior Propane* (2003 FCA 53), at paras. 35-38.

¹⁷⁷ Public Transcript, Vol.6, p. 510:17-511:20. The evidence referenced throughout demonstrates that P&H cares about the price it purchases grain at. In response the basis sales referenced in CA-A-142, P&H email subject Canola Price comp dated Jan 5, 2018 10am (Confidential Level B), a P&H merchant observed that “Looks like they will have a train covered within an hour. Given how easy this has been to buy seems like we are over paying as it is.” Confidential Level A Transcript, Vol.10, p.703:1-5.

concurrent session. Temporally, Ms. Sanderson does not have enough data post merger to do a robust analysis nor does she have a sufficient control set against which to reliably interpret her results.¹⁷⁸ In addition, Ms. Sanderson is using data from a period that was unstable due to world events.¹⁷⁹

6. But for the acquisition, P&H would have expanded Moosomin, making it a more effective competitor

116. The magnitude of the substantial lessening of competition is increased because absent the Acquisition, P&H would have expanded Moosomin. Prior to the Acquisition, P&H had planned to expand railcar access at Moosomin allowing it to [REDACTED]¹⁸⁰ This expansion would have also allowed Moosomin access to cheaper bulk rates on its freight.¹⁸¹

117. Dr. Miller's opinion is that "prior to the Transaction, this investment would enhance Moosomin's ability to win business from numerous sources including the opportunity to steal business from the Virden Elevator. Merged Elevators have no incentive to steal business from one another as the merged entity profits from sales of Grain Handling Services at both locations."¹⁸²

118. Dr. Miller's opinion is also consistent with the testimony from Harvey Brooks, who testifies that "if Moosomin's capacity had been expanded absent the transaction, producers would have benefited from the increased competition that this capacity expansion would bring". SaskWheat has observed that there can be capacity constraints in the grain Elevator handling and transportation system. When an Elevator is capacity constrained the Elevator tends to increase the basis price they charge the producer. Therefore, the "increase in Moosomin's capacity would have increased competition from Moosomin to the benefit of producers".¹⁸³

¹⁷⁸ Confidential Level A Transcript, Vol.10, p.767:9 – 24.

¹⁷⁹ CA-A-173, Miller Reply, p. 43-44, paras. 88-90.

¹⁸⁰ CA-R-115, Heimbecker Statement, p. 42, para. 131.

¹⁸¹ CB-A-134, Read in Brief of the Commissioner, p. 402:16-403:25.

¹⁸² CA-A-170, Miller Report, p. 80, para. 146.

¹⁸³ P-A-014, Brooks Statement, p. 10, paras. 27-30.

7. Fairlight will not constrain an increased ability to exercise market power by P&H

119. The Elevator owned by Viterra at Fairlight competes for business from farmers in the Relevant Markets. However, after the Acquisition, Fairlight will not constrain an increased ability to exercise market power by P&H.
120. In calculating the price effects, Dr. Miller's merger simulation relied on transaction level data provided by Viterra.¹⁸⁴ Fairlight's, as well as 12 other Elevators and 5 Crushers, ability to constrain an exercise of market power is therefore considered in this model. Fairlight, as the lone Elevator not owned by P&H remaining in the relevant geographic market, does not constitute effective remaining competition.
121. In addition to Dr. Miller's quantitative analysis, the qualitative evidence demonstrates that Fairlight is not an effective competitor. The Virden and Moosomin Elevators are both located along the TransCanada Highway 1, while Fairlight is approximately 35 km south on a secondary road. The secondary road leading to Fairlight is subject to weight restrictions in the spring, contributing to its inability to constrain an exercise of market power by P&H.¹⁸⁵ Mr. Wagstaff testified that "the number 1 highway it's good going, you can drive at the average speed, but the Elevators that are far, like up 41 highway or down number 8, they are more difficult and the roads aren't as good and it takes you a considerable while longer."¹⁸⁶

8. Barriers to entry and expansion are high¹⁸⁷

122. Farmers are going to experience the anticompetitive effects caused by the likely SLC from the Acquisition for more than two years, because barriers to entry and expansion are high.

¹⁸⁴ CA-A-170, Miller Report, p. 81, para.149.

¹⁸⁵ P-A-033, Wagstaff Statement, p. 3, para. 12.

¹⁸⁶ Public Transcripts, Vol. 3, p 303:24-304:4.

¹⁸⁷ This section answers Tribunal Question 8.

123. Potential competitors who wish to open a new Elevator in the Relevant Markets face high barriers to entry. As a result, entry is unlikely to replace the competition lost when P&H acquired the Virden Elevator. Entry is only effective in constraining the exercise of market power when it is viable. Viable entry occurs when a potential competitor's entry is likely, timely, and sufficient in scope.¹⁸⁸ The costs, difficulty finding a suitable site, and regulatory approvals make it unlikely that *de novo* entry will soon replace the competition lost from the Acquisition.
124. The evidence that barriers to *de novo* entry are high is consistent, coming from both G3 and P&H. G3 is a grain handling company founded in 2015 through the purchase of grain handling assets of the former Canadian Wheat Board and Bunge Grains Canada. Since 2015, G3 has completed the construction of ten new Elevators in Western Canada.¹⁸⁹ The witness statement from G3's executive, Brett Malkoske, details the time and costs associated with building new Elevators. In summary, G3's experience is that the total costs to build a new grain Elevator are \$██████████ ██████████, and that it typically takes between ██████████ months from deciding to construct an Elevator to commencing operations.¹⁹⁰
125. G3's evidence on barriers is consistent with the evidence from P&H. P&H decided to replace its Transcona Elevator with a new build in Dugald, Manitoba. P&H began to consider sites for this new Elevator in June 2018.¹⁹¹ P&H estimates that the cost to build Dugald is between \$██████ million to \$██████ million.¹⁹² P&H expects that Dugald will open early winter of 2021 – three years after it made the decision to build a new Elevator.¹⁹³

¹⁸⁸ CCS (2012 Comp Trib 14), at para.s 216-217; Merger Enforcement Guidelines, part 7, para. 7.2 (October 6, 2011); *Tervita Corp. v. Canada* (Commissioner of Competition), 2015 SCC 3, at para. 64-83.

¹⁸⁹ CB-A-048, Malkoske Statement, p. 3, para. 6.

¹⁹⁰ CB-A-048, Malkoske Statement, p. 3, para. 8.

¹⁹¹ CB-A-134, Read in Brief of the Commissioner, P&H Response to Undertakings, p.540, Question 1.

¹⁹² CB-A-134, Read in Brief of the Commissioner, P&H Response to Undertakings, p.540, Question 2.

¹⁹³ CB-A-134, Read in Brief of the Commissioner, p. 13:15 – 16:18.

126. Barriers to expansion are also high. The evidence from P&H is that it has been working to expand Moosomin since before January 2017 and it still has not yet begun construction for the expansion.¹⁹⁴ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]¹⁹⁵

127. Finally, Dr. Miller's price effects do not depend on capacity constraints. Dr. Miller has assumed that Elevators are able to absorb any increase in volume. Of course, if Elevators realistically would hit a capacity constraint and would have to make sizable investments to win additional customers, this would tend to soften the competitive constraint that rivals could place on P&H. As a result, Dr. Miller's model is conservative in this regard.¹⁹⁶

C. The Commissioner has acted fairly in this application

128. Both experts have agreed that the quality of the transaction level data is reliable and fulsome, supporting the evidentiary record, which demonstrates on a balance of probabilities that the Acquisition has caused or is likely to cause a substantial lessening of competition. During the hearing, P&H's counsel argued that the Commissioner owed a duty of fairness that required, among other things: (1) an obligation to collect additional evidence from market participants both in the form of records and data; (2) have a complete case before filing an application; and (3) to adduce unhelpful evidence.¹⁹⁷ These assertions are without merit and the Commissioner, who is presumed to and has acted in the public interest, has complied with his duty of fairness.

1. The data underlying Dr. Miller's analysis is rich and robust

¹⁹⁴ CB-A-134, Read in Brief of the Commissioner, p.399:7-18. "Q: ... Do you know when did P&H first consider expanding Moosomin, the rail track at Moosomin? A: I can't give you a specific date, but the concept of expanding it has been around for a long time, certainly before 2017."

¹⁹⁵ CA-A-037, Witness Statement of Viterra, p. 3, para. 10.

¹⁹⁶ CA-A-173, Miller Reply Report, p. 41 – 42, para. 83 – 85.

¹⁹⁷ Public Transcripts, Vol.1, p. 93:12-95:14; Public Transcripts, Vol. 2, p. 251:11-253:10.

129. Dr. Miller’s model incorporates data from 18 Elevators and 5 Crushers. Both experts were able to interpret the data provided by the Elevators to conduct their analysis.¹⁹⁸ Despite agreement from both experts about the quality of the data, P&H argues that (1) the Commissioner should have collected more data and (2) the evidence and information from the farmer witnesses calls into question the quality of the data collected.
130. During evidence, P&H’s counsel focused on the fact that the Commissioner did not collect data from two Paterson grain Elevators located at Carnduff and Binscarth nor from Cargill’s Nesbitt Elevator. All six farmers who testified do not sell to any of these three Elevators, nor have they produced any receipts showing sales to these Elevators. There is no reference to the Paterson Elevators or Cargill’s Nesbitt Elevator as competitors in any of the Moosomin business plan documents,¹⁹⁹ nor are there any examples in the documents of farmers using these three Elevators to negotiate a better price.²⁰⁰ Paterson Carnduff is a small Elevator with only 16 rail car spots and did not record any throughput to the Canadian Grain Commission in the 2018/2019 crop year.²⁰¹ Cargill’s Nesbitt Elevator is further east than four Elevators for which data were collected: Richardson, Minnedosa; Viterra, Brandon; Richardson, Brandon; and Viterra, Souris.²⁰²
131. The qualitative evidence demonstrating that these three Elevators are not important, along with both experts’ agreement that the Commissioner has collected a rich data set, supports the robustness of the data Dr. Miller uses for his model. Ms. Sanderson, P&H’s own expert, refused to agree with the proposition put to her by

¹⁹⁸ Confidential Level A Transcripts, Vol. 10, p.706:7-11: Dr. Miller: “I agree with Ms. Sanderson that the transaction data are useful for understanding the choices that farmers make. I think I agree with Ms. Sanderson that the diversion ratios that come out of my demand model are reasonable for the purposes of our merger review.”

¹⁹⁹ CA-A-188 and CA-A-190.

²⁰⁰ CA-R-181, Sanderson Report, p. 138-139, Figures 35 a – b.

²⁰¹ CA-A-222, Tab 056499 – cp-canada-grain-directory, p. 51. For context, every Elevator the Commissioner collected data from has at least 50 rail car spots. See Appendix B for Paterson Carnduff and Paterson Binscarth’s 2018/19 throughput figures and an explanation of how this was determined.

²⁰² P-R-249, Map - Elevator, Crusher, and witness locations with rail.

P&H's counsel that more data was needed for Dr. Miller's analysis.²⁰³ The Tribunal recognized in TREB that the Commissioner has to be prudent and make difficult decisions regarding the allocation of limited public funds available for administering and enforcing the Act. Indeed, in *Pearson*, the Federal Court cautioned that section 11 requests by the Commissioner would be reviewed to ensure that the request was not excessive, disproportionate, or unnecessarily burdensome.²⁰⁴ The Tribunal refused to draw an adverse inference against the Commissioner for not conducting any quantitative analysis.²⁰⁵ No adverse inference should be drawn against the Commissioner because he did not collect data from more Elevators.²⁰⁶

132. The Commissioner called farmer witnesses to describe their businesses and provide evidence about the factors that impact their decisions to sell grain. It is the transaction data, as Ms. Sanderson noted, that is more powerful for quantitatively modeling farmer choices and that saves the Tribunal from having to hear from "a lot of farmer witnesses".²⁰⁷ P&H, despite having the farmer witnesses statements since September 2020, attempted to subpoena the farmer witnesses two weeks before the hearing to bring every document related to grain purchases over the last four years. All three farmers (along with P&H's farmers)²⁰⁸, have produced numerous receipts, settlement tickets, and contracts in their possession.

²⁰³ Confidential Level A Transcript, Vol. 10, p. 808:23-809:13. In this exchange, Mr. Russell implies that Dr. Miller suggests that the Commissioner should have collected more data. Dr. Miller never made such an admission (Confidential A Transcript, Vol.10, p.786:7-18).

²⁰⁴ *The Commissioner of Competition v. Pearson Canada Inc.*, 2014 FC 376, at para. 59.

²⁰⁵ *Commissioner of Competition v. Toronto Real Estate Board*, 2016 Comp Trib 7 ("**TREB**"), at para. 656.

²⁰⁶ There are additional Elevators around the periphery that data was not collected from. Of course, this needs to be balanced against the fact that we did not collect data from other Elevators owned by P&H, such as P&H's Glossop and Kegworth Elevators which are similar distances from the Moosomin and Virden Elevators to some of the peripheral Elevators suggested by P&H as competitors to Moosomin and Virden.

²⁰⁷ Confidential Level A Transcript, Vol.10, p.711:13-20: Ms. Sanderson: "...that is why the transaction data is so valuable in many ways, because it gives us information over a lot of – it is the alternative of having a lot of farmer witnesses, without the detail of course of specifically what they are doing, but that is probably why it is I think more – I think Dr. Miller and I would agree it's more powerful than potentially the anecdotes that may come from individual witnesses."

²⁰⁸ All three of P&H's farmers confirmed during cross-examination that they were not asked to produce any documents prior to signing their witness statements. See Public Transcript, Vol. 5, p. 464:20-23 (Mr. Duncan) and p.483:12-15 (Mr. Paull), and Confidential Level A Transcript, Vol. 5, p. 319:15-24 (Mr. Hebert).

133. The additional information provided by the farmers confirms the robustness of the data collected by the Commissioner. Every receipt produced by the farmers for the sale of 1CWRS and Canola was from Elevators for which data was collected. The transactions all appear in the data if the receipt is for a sale during a period for which data was collected.²⁰⁹ The subsequent information provided by the Commissioner's farmers also demonstrates why the approximate production numbers in the farmers' witness statements may be greater than sales to Elevators. Mr. Duncan, a P&H farmer witness, confirmed that his numbers were approximate given that he provided this information while out in the field.²¹⁰ Imperfect data is the norm in merger review and should not grant antitrust immunity.²¹¹

2. *The Commissioner can continue to collect evidence after filing an application*

134. The jurisprudence is clear that the Commissioner can file a notice of application upon concluding that there are sufficient facts to support the application and can continue to collect evidence thereafter.²¹² Further, the Commissioner is not required to collect every piece of evidence.²¹³ As required by the *Tribunal Rules*,²¹⁴ the data collected after the application was filed was produced to P&H. Both experts had ample time with the data collected before filing their expert reports.

3. *The Commissioner's discretion regarding which witnesses to call*

135. The Tribunal's Rules and procedures allow for a fair hearing. It is proper for the Commissioner to exercise discretion regarding which witnesses to call and what evidence to provide to the Tribunal. The Tribunal's Rules provide for third party discovery rights of which P&H could have availed itself.

²⁰⁹ Appendix C shows receipts collected from farmers and where the transaction is found in the data.

²¹⁰ Public Transcript, Vol. 5, p.470:8-12: Mr. Duncan: "... A lot of the times these statements are given over the phone. I get a phone call, I am possibly out in the field busy or working around the yard, so it is easy to just pull numbers out of my head and say, like I did for this, where it is more of a goal."

²¹¹ CA-A-173, Reply Miller Report, p. 33, para. 68.

²¹² *Warner Music Group Inc., Re*, 138 F.T.R. 140, 78 C.P.R. (3d) 335, paras. 8 – 9; *Canadian Pacific Ltd. v. Canada (Director of Investigation & Research)* (1997), 74 C.P.R. (3d) 65 at para. 7.

²¹³ *Warner Music Group Inc., Re*, 138 F.T.R. 140, 78 C.P.R. (3d) 335, at paras. 7-8; *Canadian Pacific Ltd. v. Canada (Director of Investigation & Research)*, 70 A.C.W.S. (3d) 452, 74 C.P.R. (3d) 65, at para 7; *The Commissioner of Competition v. Pearson Canada Inc.*, 2014 FC 376, at para. 48.

²¹⁴ *Tribunal Rules*, SOR/2008-141, Rule 60.

136. The Tribunal commented on the Commissioner's duty of fairness in *Canada Pipe*²¹⁵ in the context of a challenge by Canada Pipe to Tribunal Rules, which was frequently cited throughout the hearing by counsel to P&H. The Rules to which that decision applies are no longer in force and when they were, did not apply to merger cases.²¹⁶ Furthermore, the two Supreme Court of Canada decisions referenced by the Tribunal in *Canada Pipe* relate to the Crown's disclosure obligations in a criminal proceeding. Even under the most stringent standards, once the Crown makes disclosure, the Crown is entitled to exercise its discretion in respect of which witnesses it will call and is under no obligation to call a particular witness.²¹⁷
137. The Tribunal in *Canada Pipe* declined to decide whether a Crown's obligations should be directly imported into Tribunal cases²¹⁸ and the Tribunal in the present Application does not need to opine on the matter either. In no way has the Commissioner breached his duty of fairness, and the current Tribunal Rules and procedures provided P&H with adequate measures to ensure a fair process.

PART IV APPROPRIATE REMEDY

138. The evidence assembled by the Commissioner demonstrates that P&H has, and is likely to, substantially lessen competition with its acquisition of the Virden Elevator. As described above, this evidence, which comes from a wide variety of quantitative and qualitative sources – farmers, trade association, P&H's own documents, and independent expert economic evidence – all shows the harm to farmers in the Relevant Markets caused by the Acquisition. This harm is substantial and will last more than two years, because barriers to entry and expansion are high. P&H should be ordered to remedy this harm by divesting either the Virden or Moosomin Elevator.

²¹⁵ *Commissioner of Competition v. Canada Pipe Company*, 2004 Comp. Trib. 2.

²¹⁶ *Commissioner of Competition v. Canada Pipe Company*, 2004 Comp. Trib. 2, para. 1; *Commissioner of Competition v. Canada Pipe Company*, 2003 Comp Trib 15, at paras. 1, 13, 15, 17.

²¹⁷ *R. v. Cook*, [1997] 1 SCR 1113 at para. 36; *R. v. JMW*, 2020 ABCA 294, at para. 44; *R. v. Lo*, 2020 ONCA 622, at para. 155.

²¹⁸ *Commissioner of Competition v. Canada Pipe Company*, 2004 Comp. Trib. 2, at para. 64.

PART V EFFICIENCIES DEFENCE

139. P&H has not demonstrated that any of the claimed efficiencies generated by the Acquisition are likely to be cognizable. Therefore the efficiencies in this matter are not outweighed by the deadweight loss found by Dr. Miller of \$██████ for wheat and \$██████ for canola.²¹⁹
140. P&H, in its Response, claimed the Acquisition will generate four categories of efficiencies, only two of which it has tried to quantify.²²⁰ P&H has not filed an expert report in support of its efficiencies claims. When an applicant raises an efficiencies defence to a merger, challenging it creates a significant burden on the Commissioner to quantify the deadweight loss where possible. While Dr. Miller's model quantifies price effects, which are evidence of an SLC, that quantification is not required to prove an SLC.
141. The Commissioner has met his burden of proving anticompetitive effects from the Acquisition. Therefore, the burden shifts to P&H to prove any efficiency gains that are brought about by the Acquisition. is the onus is also on P&H to prove that the efficiency gains from the merger will be greater than and offset the effects of any prevention or lessening of competition resulting from the merger.²²¹
142. The balancing test under section 96 requires two steps: First, any quantitative efficiencies should be compared against any quantitative anticompetitive effects. Where the quantitative anticompetitive effects outweigh the quantitative efficiencies, this step will be dispositive in most cases. Second, qualitative efficiencies should be balanced against qualitative anticompetitive effects. A final determination must be made as to whether the total efficiencies offset the total anticompetitive effects.²²²

²¹⁹ CA-A-170, Expert Report of Dr. Miller, p. 77, para. 138 and Exhibit 15.

²²⁰ Response of P&H, CT-2019-005, Proceeding No. 22, at para. 37.

²²¹ *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, at paras. 122. See also para. 89; *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 15, at para. 403

²²² *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para. 147; see also paras. 91-99.

143. In order to qualify as an cognizable efficiency, the claim must involve a productive, dynamic or allocative efficiency, and it must accrue to the Canadian economy.²²³ The Tribunal should only consider efficiency gains that are brought about by the Acquisition and would not likely be attained in the event of an Order.²²⁴ This involves comparing the world where the merger proceeds with the but-for world where an Order prevents or amends the merger.²²⁵
144. In response to Tribunal Question 9, as described below, P&H has not provided the evidence to support finding cognizable efficiencies.
145. In response to Tribunal Question 10, any firm-wide efficiencies would need to pass the fifth Tervita screen to be cognizable.²²⁶ None pass this screen. P&H will retain efficiencies generated from adding 9 new Elevators to its network. The alleged incremental efficiencies (even assuming they passed the other four screens which they do not) lost from having to divest one Elevator, as explained in more detail below, are likely to be obtained by a likely purchaser such as G3. There is no evidence of qualitative/non-quantified efficiencies that pass all five Tervita screens.

A. P&H's claimed efficiencies are not cognizable under the Act.

146. P&H has failed to quantify any potential benefits that may arise from any efficiencies other than those arising from increased volumes through the Virden Elevator or the crop inputs expansion.

²²³ *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para. 102; *The Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14, at para. 262. These are requirements under the first and fourth Tervita screens, respectively.

²²⁴ *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para. 113; *The Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14, at para. 262. These are requirements under the second and fifth Tervita screens, respectively.

²²⁵ *The Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14, at para. 396.

²²⁶ *The Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14, at para. 264. The fifth Tervita screen filters out claimed efficiencies that (1) would likely be attained through alternative means or (b) would likely be attained even if a divestiture order were made.

147. Any quantifiable efficiencies must be quantified. Quantifiable efficiencies that have not been quantified cannot be considered qualitatively.²²⁷ P&H failed to quantify potential efficiencies related to network benefits or increased throughput at Vancouver terminals.²²⁸ Therefore, these alleged efficiencies should not be considered in the analysis.
148. P&H has also failed to demonstrate that any efficiencies would be lost in the event of an Order to divest either the Moosomin or Virden Elevators.²²⁹
149. The increase in volumes at the Virden Elevator would likely have come about irrespective of the Acquisition given the overall upward trend in grain production (specifically, deliveries) for the same period.²³⁰ For example, the canola deliveries for the period of January to October 2020 as compared to January to October 2019 went up by 18%.²³¹
150. P&H increased buying in 2020 in order to compensate for low inventory levels left by LDC at the time of Acquisition, which could also explain increases in volume.²³²
151. P&H has failed to demonstrate that increases in volumes at the Virden Elevator are not a “redistribution of income between two or more persons”.²³³ Any volumes not attributable to overall increases in grain production will have an offsetting reduction in volumes for other elevators, which equates to a wealth transfer from one

²²⁷ *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para. 147. The SCC’s analysis regarding effects is also illustrative of how efficiencies should be treated. The SCC held that effects that can be quantified must be quantified, even as estimates (at paras. 100 and 124).

²²⁸ CA-A-196, Harington Report, p.12-13, para. 17(a) and 17(b), and p.62-63, paras. 142-148.

²²⁹ CA-A-196, Harington Report, p.11, para. 13.

²³⁰ CA-A-196, Harington Report, p.53-54, paras. 116-117.

²³¹ Confidential Level B Transcript, Vol.7, 330:6-331:10; P-A-141.

²³² Confidential Level B Transcript, Vol.11, p. 470:7-472:18; Confidential Level B Transcript, Vol. 7, p.409:4-21; CA-R-115, Heimbecker Statement, p.15-16, para. 51.

²³³ *The Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14, at para. 262. The third Tervita screen filters out any efficiencies brought about by reason only of a redistribution of income; section 96(3) of the *Competition Act*, R.S.C., 1985, c. C-34.

organization to another, and is not a cognizable efficiency under section 96 of the Act.²³⁴

152. A redistribution could result in an efficiency to the Canadian economy if the entity from which throughput is taken operates at a higher per unit variable operating cost than P&H.²³⁵ P&H claims its operating costs at the Virden Elevator for the ten-month period ending October 31, 2020 were lower than LDC. However, P&H does not claim lower variable costs.²³⁶

153. Furthermore, P&H has not demonstrated that any increase in volumes at the Virden Elevator could not have been achieved by an alternative purchaser.²³⁷ The Tribunal should not consider any claimed efficiencies achievable by a likely alternative purchaser, absent exceptional circumstances.²³⁸

154. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²³⁹

155. P&H states it will add crop input retail operations to the Virden Elevator, which it claims will provide P&H with increased margins.²⁴⁰ However, the addition of crop input retail operations is unlikely to generate any cognizable efficiencies because any earnings from such operations are likely to be a pecuniary redistribution of income and offset by the costs and timing of implementing this component to the

²³⁴ Confidential Level B Transcript, Vol.11, p. 475:7-476:6; CA-A-196, Harington Report, p.58, para. 129-130.

²³⁵ CA-A-196, Harington Report, p.58, para. 130.

²³⁶ CA-R-121, Heimbecker Reply Statement, p. 8-9, at para. 18-20.

²³⁷ CA-A-196, Harington Report, p.12, at para. 15(d), p. 58-61, at para. 131-139.

²³⁸ *The Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14, at paras. 264-267

²³⁹ CB-A-134, Read in Brief of the Commissioner, Mr. Heimbecker discovery on July 17, 2020, p.448 questions 1337 and 1338, and p.452, question 1363

²⁴⁰ CA-R-115, Heimbecker Statement, p.17-18, paras. 55-59. Note that P&H has not entered any documents into evidence to substantiate these claims.

elevators.²⁴¹ Any costs that the merging parties incur to achieve the claimed efficiencies are deducted when calculating cognizable efficiencies.²⁴²

B. Cognizable efficiencies, if any, are outweighed by the DWL

156. Dr. Miller has quantified that the DWL caused by the Acquisition is \$██████ for wheat and \$██████ for canola.²⁴³ Ms. Sanderson does not dispute Dr. Miller's calculation of consumer surplus losses. Rather, Ms. Sanderson takes issue with Dr. Miller's producer surplus calculation, arguing that Dr. Miller's DWL calculation should include profits captured by elevators outside the Relevant Markets.

157. Dr. Miller testified that it is appropriate to consider DWL only in the relevant geographic market. If the Tribunal were to accept Ms. Sanderson's calculations, then the Tribunal should also consider the incentives of the elevators outside the relevant market to raise prices as well as subsequent anti-competitive effects. As Dr. Miller explained, P&H's anticompetitive Acquisition will have ripple effects throughout the Canadian economy, which would be impossible to quantify. As a result, the right approach is to consider the DWL caused in the Relevant Market.²⁴⁴

158. Regardless, this issue does not need to be resolved, P&H has not quantified any efficiencies that pass the five Tervita screens. The DWL, however it is defined, necessarily is greater than zero. P&H's efficiency defence should fail.

PART VI RELIEF REQUESTED

159. The Commissioner repeats his request for relief contained in the Commissioner's Notice of Application.

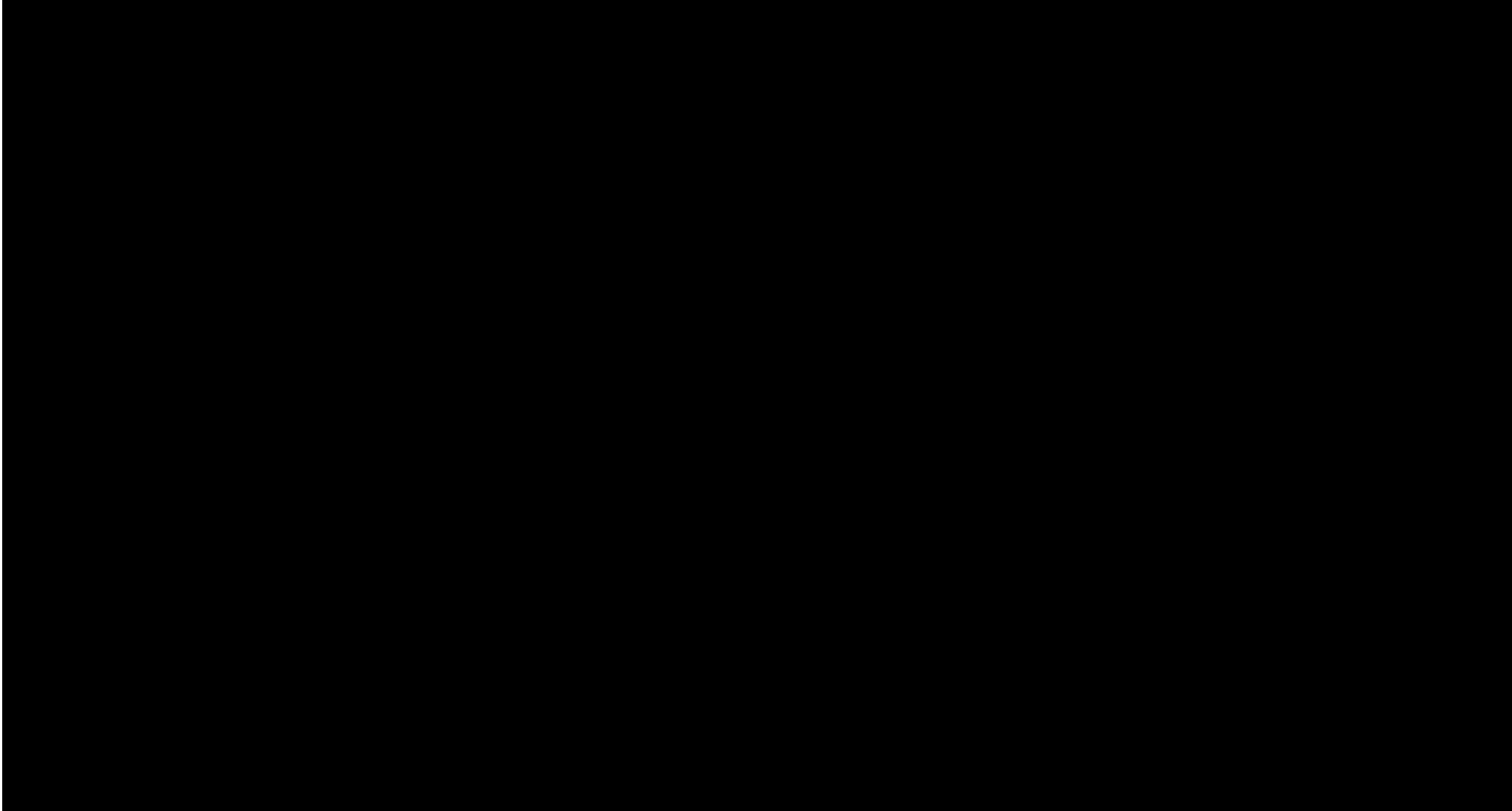
²⁴¹ CA-A-196, Harington Report, p.13-14, para. 17(c), p.64-65, at para. 151-154; Confidential Level B Transcript, Vol.11, p. 462:12-20.

²⁴² *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 15, at para. 340.

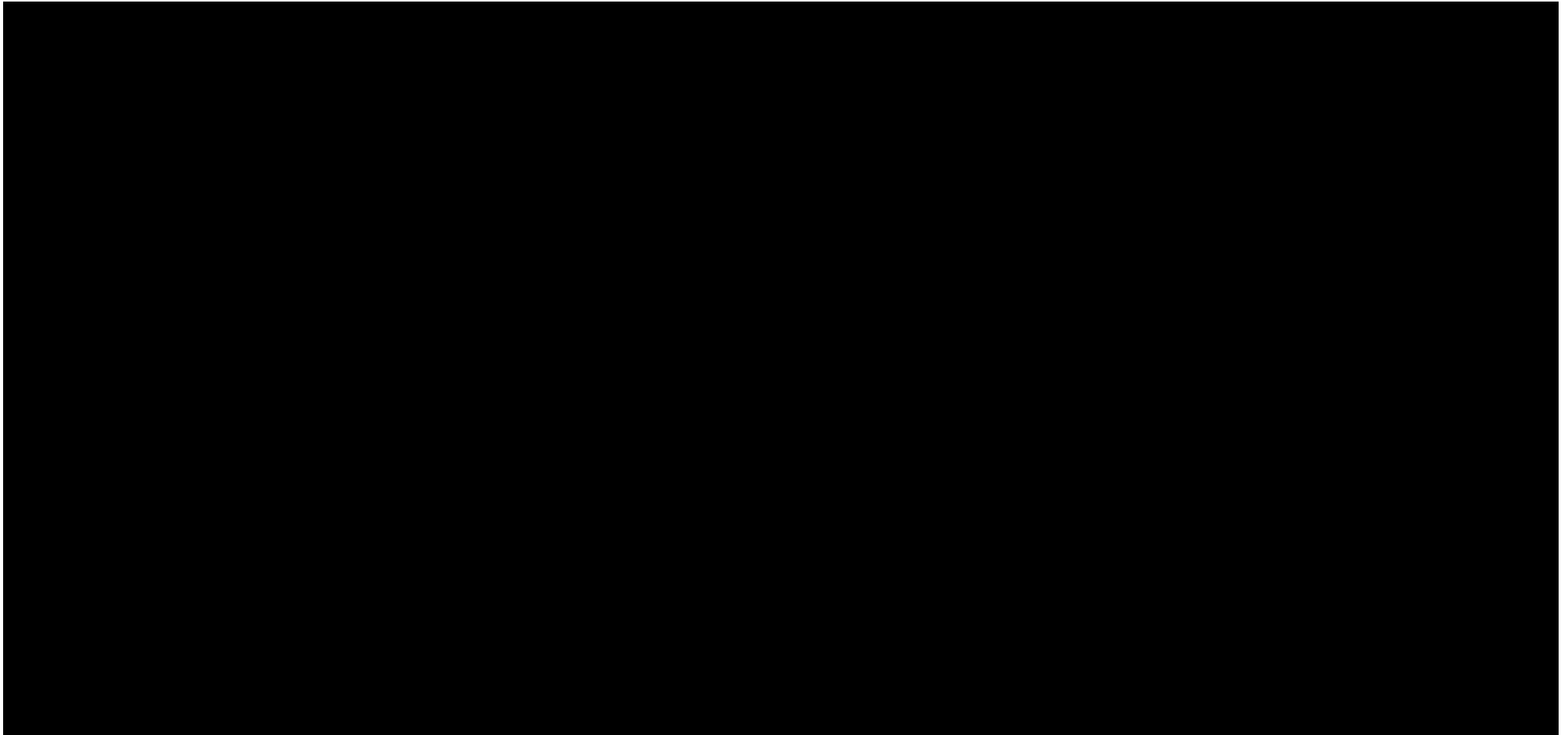
²⁴³ CA-A-170, Miller Report, p. 77, para. 138 and Exhibit 15.

²⁴⁴ CA-A-173, Reply Miller Report, p. 50, para. 108; Confidential Level A Transcript, Vol.10, p.780:12-23.

Appendix A: Revised Figure 19 to the Expert Report of Margaret Sanderson



Appendix B: Using CGC data to estimate throughput of Paterson Elevators in Binscarth and Carnduff



Appendix C : Farmer witnesses' receipts in the Transaction Level Data

