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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 SUBMISSIONS OF PARRISH & HEIMBECKER, LIMITED

I. Introduction

1. The facts of this case invoke a consideration of exports in the merger analysis. The purpose clause in section 1.1 includes four separate but equal objectives under the *Competition Act*. Parliament made it clear that while competition within the Canadian economy was important, equally important was “to expand opportunities for Canadian participation in world markets”. This Parliamentary intent is made clear in the comments of Pierre Blais, the Parliamentary Secretary to the Minister of Agriculture regarding Bill C-91 in 1986:

[the *Competition Act*] operates on two levels, namely on the Canadian market and on the international market ... The preamble sets down, for the benefit of those who will be called upon to interpret the Act in the future, the intent of Parliament in enacting the new provisions. I will simply quote a few words. "The purpose of this Act is to maintain and encourage competition in Canada in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada". This is quite clear ... I would like to bring to the attention of the House four major aspects of the amendments, concerning specifically international trade. The first aspect deals with mergers. ... Provisions concerning mergers must be drafted in such a way as to encourage competition between Canadian businesses at home in Canada, without putting them at a disadvantage when carrying out business dealings in international markets. The Act as it now stands unfortunately does not meet that requirement.¹

2. It is important to note that contrary to section 1.1 and section 96(2) of the *Act*, the Commissioner’s case ignores the dimension of export markets this case brings before the Tribunal. The Commissioner’s characterization of the case would have the Tribunal ignore its statutory mandate.

3. The Tribunal is also being asked by the Commissioner to decide this case in a way that would effectively and dramatically change the application of the *Competition Act* (the “*Act*”) by significantly altering the assessment of mergers under the *Act*. Attempting to introduce a ‘value-add’ approach has been described by economists and courts as a “backdoor” approach to significantly altering the approach to and significantly lowering the threshold for intervention in a merger.

4. The Commissioner’s case is also entirely based on an artificially derived product market and geographic market which ignores the evidence of how grain companies see their business, operate their business and invest in their business.

¹ Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof”, 2nd reading, *House of Commons Debates*, 33-1, No 8 (7 April 1986) at 11961-

5. The Commissioner parses the way in which grain companies and farmers conduct their transactions, ignoring the evidence to the contrary. There is absolutely no evidence that farmers and grain companies transact business on the basis of the sale and purchase of ‘grain handling services’. Grain companies purchase grain for their own account to deliver grain to its customers, who are primarily export customers.

6. This ‘directional distortion’ in essence is an attempt to turn the facts upside down and essentially asks the Tribunal to ignore the reality of the way in which the grain industry now operates in the post CWB era.

7. Ms. Sanderson observes that there is no discernible value-add related to ‘grain handling services’ being provided to the seller of the goods. She notes that all of the ‘value-add’ by grain companies is post-transaction - after the buyer has purchased the grain from the seller. She opines that the manner in which Dr. Miller parses the business is incorrect, even within Dr. Miller’s limiting perspective. This obvious point is uncontroverted in the actual evidence before the Tribunal and the reality of the industry. However, this disconnect with reality creates the need for the Commissioner to rely on the artificial construct that the ‘buyer is adding value to the seller’, by referring to the grain companies as adding value by getting ‘the farmers’ grain’ to export markets. \There is no support for this reverse direction value-add approach in the case law, the economic literature or the facts of this case.

8. The farmer has no interest, pecuniary or otherwise in the grain once they deliver it to the grain companies. This ‘value-add’ by the grain companies to get the grain to export markets is important. But it is not a ‘value-add’ that is sold to farmers. It is a value-add to the export customer and a value-add to the export capability of the Canadian grain industry and the Canadian economy.

9. Adopting the Commissioner’s approach would also require the Tribunal to accept an imputed price for a fraction of the full value-added provided by grain companies to export Canadian grain to international markets. As noted, it directionally distorts the actual transaction that takes place between the sellers (farmers) and the purchasers (grain companies). The paradigm Dr. Miller suggested as the lens for the value-add – that the grain companies are simply selling value add to farmers – is a clear distortion of the facts.

11963 (Hon Pierre Blais), (“**Bill C-91 Debates**”) at P&HC, Tab 1. See also Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (1985) p. 5, P&HC, Tab 2.

10. However, not only does this directional distortion impact the way in which value-add is viewed, it directly impacts the way in which the ‘price’ applicable to the purchase and sale of grain from the farmer to the grain company is viewed. Again, it is a directional distortion of the way that the sale and purchase transaction is priced. It does not accurately reflect how grain companies such as P&H set their prices for the purchase of grain. [REDACTED]

[REDACTED]. The farmers sell their grain to the grain companies at the cash price. That is the transaction price. Grain companies are not sellers in any respect in that transaction.

11. Grain companies do not sell ‘grain handling services’ to farmers and do not set prices for grain handling services. In fact, there is no internal accounting that even breaks out the cost of these processes. Those grain handling services are in fact internal processes that the grain companies may apply to the grain only after title to that grain has passed to the grain companies. Therefore, all processing of the grain (which the Commissioner calls grain handling ‘services’) are merely costs to the grain companies not to the farmers, in getting the grain to export markets, to the grain companies export customers.

12. These facts are highlighted by the admissions made by the Commissioner in the course of this hearing where Mr. Hood stated:

“P&H relies on the fact that it does not set the price at each elevator with reference to the specific expenses incurred by that elevator. And P&H relies on the fact that farmers care about the cash in their pocket from the transaction and doesn’t talk about obtaining grain handling services. **These facts are true** [...]”² [emphasis added]

13. Dr. Miller creates a product market and an imputed price for ‘grain handling services’ rather than the actual prices that are transacted between the buyer and the sell. This artificial imputed price is the foundation of all of his economic analysis³. Dr. Miller argues that his approach is reflected in the US Horizontal Merger Guidelines (“**HMGs**”) as a “specific contribution to value”. However, even if the Tribunal were to accept the HMGs as proper guidance, which the Respondent submits it should not, the Commissioner and Dr. Miller do not comply with that guidance.

14. Again, this is highlighted by the admissions made by the Commissioner in the course of

² Commissioner’s Opening Statement, P Transcript, Vol. 1, January 6, pp. 32:22 to 33:3, P&HC, Tab 3.

³ The impute value is applied to Dr. Miller’s HMT, UPP, GUPPI and his Merger Simulation.

the hearing where Mr. Hood stated: “to analyze the value added by elevators, what Dr. Miller has done is to take the cash price received by farmers recorded in the transaction data and he **imputes a basis**. He imputes the basis because while the basis is often explicitly communicated, as I’ve just discussed, it’s actually not recorded in the transaction data used by Dr. Miller. Now, as Ms. Sanderson, P&H’s economic expert, points out, this **can result in the imputed price for grain handling services not corresponding to what the basis component of the cash price actually was**. Dr. Miller acknowledges this.”⁴ [emphasis added] Dr. Miller’s imputed value is not the basis.

15. This an important admission that the imputed basis does not correspond to the value of the basis as used in the industry. However, it is even more important to note that the ‘basis’ as used in grain industry is not a ‘price’ or even a currency value (in the case of CWRS), but rather merely the ‘spread’ between the futures price and the cash or transaction price. Like in any commodity and raw material markets, a basis is the spread that informs trends in demand conditions in international markets. This was Dr. Brooks evidence when he testified about the export basis and how it can inform farmers about changing demand conditions.⁵

16. Referring to Dr. Miller’s imputed price as the basis is a mischaracterization and is misleading in terms of understanding Dr. Miller’s analysis. Suggesting it represents the basis, which the Commissioner admits it is not, is clearly an attempt to provide Dr. Miller’s imputed price with a cloak of ‘observability’ in an effort to qualify it under the HMGs as a price “that can be identified with reasonable clarity”. On discovery, however, the Commissioner admitted that Dr. Miller’s “price of grain handling services” is not transparent to farmers.⁶

I. Overview

17. This case presents three important issues of first instance for the Tribunal:
- The application of the ‘value-add’ approach to merger analysis;
 - The importance of the overall consideration of ‘exports’ in both the application of section 92 and section 93, reflecting the objectives stated in section 1.1 of the *Act*; and

⁴ Commissioner’s Opening Statement, P Transcript, Vol. 1, January 6, pp. 38:13 to 39:4, P&HC, Tab 4.

⁵ **P-A-014**, Witness Statement of Dr. Harvey Brooks (“**Brooks Statement**”), para 9, P&HC, Tab 5; Brooks Evidence, P Transcript, Vol. 2, January 7, pp. 236:21-238:17, P&HC, Tab 6.

⁶ **CA-R-242**, Compilation of Additional Documents Added to the Agreed Book, P&H Read-In Brief (056866), pp. 21-24, P&HC, Tab 7.

- The application of section 96(2) of the *Act*.⁷

18. Not only is the analysis put forward by the Commissioner unconventional, unprecedented and inconsistent with the evidence, it is also inconsistent with prior decisions of this Tribunal and in other jurisdictions. This includes cases involving the grain industry which looked at sale and purchase of grain in a conventional and directionally correct manner.⁸

19. Even if the Tribunal were inclined to consider the Commissioner's artificial product market, his intended evidence of the alleged substantial lessening of competition ("SLC") is not clear,

⁷ *Competition Act*, sections 1.1, 93 and 96, P&HC, Tab 8.

⁸ Courts and authorities in Canada (including the Commissioner), the US and the EU have consistently held that the price to be used for market definition is the price used in the ordinary course of business and that the relevant product market for a commodity (including grain, logs, fed cattle and unprocessed scrap metal) is the purchase of the commodity itself: see, e.g., **grain cases:** *Commissioner of Competition v Saskatchewan Wheat Pool, et al* (24 February 2006), CT-2005-009 (Statement of Grounds and Material Facts), paras 2-3, 11, 15(c), 16-17, 21 and 24, P&HC, Tab 9; *Commissioner of Competition v Saskatchewan Wheat Pool, et al* (10 February 2006), CT-2005-009 (Response of James Richardson International Limited), paras 29, 78-87, 101 and 117, P&HC, Tab 10; *Commissioner of Competition v Saskatchewan Wheat Pool* (28 March 2007), CT-2007-005 (Consent Agreement), p. 1, Agreed Statement of Facts at paras 7(d), 13, 16, 20 and 22, P&HC, Tab 11; *Commissioner of Competition v James Richardson International Limited* (4 July 2007), CT-2007-008 (Consent Agreement), p. 2, P&HC, Tab 12; *Commissioner of Competition v United Grain Growers Limited* (17 December 2001), CT-2001-007 (Statement of Grounds and Material Facts) ("**UGG SGMF**"), paras 1, 13-14, 16-18, 20-22, 28-29, 39-40, 53-54, 57, 68, 71, 86-87, P&HC, Tab 13; *Commissioner of Competition v United Grain Growers Limited* (17 December 2001), CT-2001-007 (Affidavit of Halldor Palsson) ("**UGG Palsson Affidavit**"), paras 33-37, 76 and 81, P&HC, Tab 14; *Commissioner of Competition v United Grain Growers Limited* (17 December 2001), CT-2001-007 (Draft Consent Order) ("**UGG Draft Consent Order**"), paras 4, 8 and 43, P&HC, Tab 15; European Commission, Decision in *Cargill/Continental Grain* (IV/M.6166), 3 February 1999, paras 6-16, 21, P&HC, Tab 16. **Log cases:** *Commissioner of Competition v West Fraser Timber Co Ltd and West Fraser Mills*, CT-2004-013 (Consent Agreement), p. 2, P&HC, Tab 17; Competition Bureau Canada, "Competition Bureau reaches Agreement to Preserve Competition in Two B.C. Forestry Markets" (December 7, 2004), P&HC, Tab 18; *Burns Lake Native Development Corporation et al v Commissioner of Competition and West Fraser Timber Co Ltd et al*, 2006 Comp Trib 16 (Consent Agreement), para 18, P&HC, Tab 19; *The Commissioner of Competition v Canfor Corporation*, CT-2004-002 (Consent Agreement), p. 1, P&HC, Tab 20. **Beef cases:** Technical Backgrounder, *Acquisition of Better Beef by Cargill Limited*, Competition Bureau Canada (Aug 2005) ("**Better Beef/Cargill Backgrounder**"), pp. 2-3, P&HC, Tab 21; *US and Plaintiff States v JBS SA and National Beef Packing Company, LLC*, Civil No. 08-CV-5992 (US Dist Ct Ill ND), Complaint at para 29, P&HC, Tab 22; Department of Justice, "Statement on the Abandonment of the JBS/National Beef Transaction" (February 20, 2009), P&HC, Tab 23; *United States v Cargill, Incorporated and Continental Grain Company*, Civil No. 98-CV-1875, 1999 (Complaint), paras 2, 12, 17-19, 24, 27, 34, P&HC, Tab 24; *United States v Cargill, Incorporated and Continental Grain Company*, Civil No. 98-CV-1875 (GK), Competitive Impact Statement ("**US Cargill/Continental Competitive Impact Statement**"), pp. 1-2, P&HC, Tab 25; *United States v Cargill, Incorporated and Continental Grain Company*, Civil No. 98-CV-1875 (GK), Final Judgment, pp. 1-2, P&HC, Tab 26; OECD Competition Committee Working Paper DAF/COMP(2005)44, "Competition & Regulation in Agriculture, Monopsony Buying and Joint Selling", pp. 183-184, P&HC, Tab 27. **Unprocessed scrap metal case:** *Commissioner of Competition v American Iron & Metal Company*, CT-2008-001 (Memorandum of Argument of the Commissioner of Competition), paras 9, 21-25, 53, P&HC, Tab 28; see also *Canada (Director of Investigation & Research) v Hillsdown Holdings (Canada) Ltd* (1992), 41 CPR (3d) 289 (Comp Trib) [**Hillsdown**], para 26, P&HC, Tab 29. The case law and the MEGs caution that the ultimate inquiry is not about market definition (which is merely an analytical tool) but whether the merger being assessed prevents or lessens, or is likely to prevent or lessen, competition substantially: *Canada (Commissioner of Competition) v Superior Propane Inc*, 2000 Comp Trib 15 (reversed in part, 2001 FCA 104, leave to appeal to SCC ref'd, 2001 CarswellNat 1905) [**Superior Propane 2000**] at para 56, P&HC, Tab 30; *Commissioner of Competition v CCS*, 2012 Comp Trib 14, affirmed, 2013 FCA 28, reversed, 2015 SCC 3 [**CCS**] at paras 361-363, P&HC, Tab

convincing or reliable as required by the relevant jurisprudence. The Miller Report is based on a flawed construction of price and margin which is measured with substantial error, relies on a selective approach to the evidence and generates an uninformative result.

20. However, even if Dr. Miller's product market and geographic market were considered, the transactions data makes it clear that P&H's post-acquisition share is well below the 35% safe harbour threshold contained in the Merger Enforcement Guidelines ("MEGs"). P&H has neither the incentive nor the ability to materially reduce prices for canola and wheat at the Virden and Moosomin Elevators when farms in the area can switch their grain sales to numerous alternative buyers who are clearly documented in the transactions data. It is nonsensical to ignore the competition that is so clearly documented when defining the geographic market, as Dr. Miller and the Commissioner urge the Tribunal to do. When all of the competitors purchasing wheat and canola in the geographic market are included, there is clearly no SLC.

II. Proper Approach to the Evidence

21. The first thing that should always be asked in a merger case is what are the objectives of the transaction in issue. This is clearly supported by the statutory provisions of the *Competition Act* and the *Notifiable Transactions Regulations*.

22. The documentary disclosure that is required to be made to the Commissioner pursuant to sections 16(1)(a) and 16(1)(d) of the *Regulations* focuses on the objectives of the transaction. Specifically, section 16(1)(a) requires the notifying party to describe the "business objectives intended to be achieved as a result of [the proposed transaction]", while section 16(1)(d) requires the disclosure of all studies, surveys, analyses and reports that were prepared or received by an officer or director of the corporation for the purpose of evaluating or analyzing the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into new products or geographic regions.⁹

23. The information requested by the Commissioner in the Supplemental Information Request issued to P&H in this matter also focused on the objectives of the transaction.¹⁰

31; Competition Bureau, Merger Enforcement Guidelines (2011) ("MEGs") at paras 3.1-3.3 and 4.28, P&HC, Tab 32.

⁹ *Notifiable Transactions Regulations*, section 16, P&HC, Tab 33.

¹⁰ CA-R-240, Compilation of Miscellaneous Documents, SIR – P&H (056987), p. 793, specifications 1 and 2, P&HC, Tab

24. Those objectives should then guide the analysis.

25. In this case, the appropriate starting point is to ask what made this acquisition profitable for P&H to pursue - is it profitable because it provides P&H with monopsony power in local input markets or because it increases P&H's competitiveness in domestic and international export markets? The answer to that question then delineates both the proper examination of the evidence and the appropriate economic analysis.

26. In the present matter, the evidence clearly supports the conclusion that P&H is trying to maximize the profitability of its export business. It maximizes the profitability of its export business by maximizing its integrated business, its network. The focus on the return on its investment in its newly constructed Fraser Grain Terminal ("FGT") makes this clear. P&H's business records clearly indicate that [REDACTED]

[REDACTED]. Mr. Heimbecker's evidence in this regard is uncontroverted.

27. The manner in which P&H conducts its business also fully supports that it is not trying to exercise monopsony power in local input markets. Indeed, P&H's goal of [REDACTED], cannot be achieved if P&H were to attempt to exercise monopsony power at the local Elevator level. Exercising monopsony power requires [REDACTED], which is the exact opposite of P&H's rationale for acquiring the LDC elevators, including Virden.

28. The evidence of the Commissioner's witnesses, Dr. Brooks and Mr. Harington, further supports the focus on export markets and not local input markets.¹¹

29. This evidence should drive the Tribunal to the conclusion that the profitability of the transaction is driven by pro-competitive, output-enhancing goals, and is not due to the possible exercise of monopsony power. But even if the Tribunal were to reject this evidence, Dr. Miller's predicted profit increase for P&H is trivial. It is illogical that P&H would pursue the transaction to achieve the immaterial profit improvements predicted by Dr. Miller. The profitability of the transaction is driven by

34.

CA-R-240, Compilation of Miscellaneous Documents, SIR – P&H (056987), p. 793, specifications 1 and 2, P&HC, Tab 35.

¹¹ Brooks Evidence, P Transcript, Vol 2, January 7, pp. 211:19-213:14, 214:24-215:8, 238:18-241:4, P&HC, Tab 36; Harington Evidence, CA Transcript, Vol 11, January 25, pp. 940:14-942:5, P&HC, Tab 37; Harington Evidence, CB Transcript, Vol 11, January 25, pp. 482:3-483:5, P&HC, Tab 38.

increasing grain purchases in order to increase export sales.

III. THE GRAIN INDUSTRY AND P&H

THE CANADIAN GRAIN INDUSTRY IS EXPORT-FOCUSED

30. Canada is the world leader in canola exports, exporting more than 90% of its canola as seed, oil or meal to 50 markets around the world.¹² Canada is also the third largest wheat exporter, producing about 14.1% of the world’s wheat exports by dollar value.¹³ 70% of Canadian wheat production is exported annually.¹⁴

31. Consistent with the foregoing, [REDACTED]
[REDACTED].¹⁵ [REDACTED]
[REDACTED]
[REDACTED]¹⁶

32. An examination of the evidence clearly shows that purchase prices paid by P&H to farmers start with [REDACTED]
[REDACTED]. Increased demand to meet export customer contracts improves purchase prices for grain at the local level.¹⁷ As Mr. Heimbecker testified, the Workback Algorithm used by P&H to set the cash prices at its Elevators across Western Canada [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹² P-A-221, Industry Overview (057277), p. 123, P&HC, Tab 39; ; CA-R-242, Key Issues – Grain Growers of Canada (100226), p. 445, P&HC, Tab 40; CA-R-242, Medium-term prospects for major agricultural commodities 2017-2026 – Canada (100247), p. 806, P&HC, Tab 41.
¹³ CA-R-242, Wheat Exports by Country 2019 (100231), p. 478, P&HC, Tab 42; Statistics Canada – Canadian International Merchandise Trade Database – top countries – wheat (100241), p. 755, P&HC, Tab 43.
¹⁴ CA-R-242, Key Issues – Grain Growers of Canada (100226), p. 445, P&HC, Tab 44.
¹⁵ CA-R-121, Reply Witness Statement of Mr. John Heimbecker (“CA Reply Heimbecker Statement”), para 30, P&HC, Tab 45.
¹⁶ CA-R-115, Witness Statement of Mr. John Heimbecker (“CA Heimbecker Statement”), para 7, P&HC, Tab 46.
¹⁷ Brooks Evidence, P Transcript, Vol 2, January 7, pp. 214:24-215:8, P&HC, Tab 47.
¹⁸ Heimbecker Evidence, CB Transcript, Vol. 6, January 14, p. 224:19-25 and 251:17-252:13, P&HC, Tab 48.

33. Export markets determine the cash prices paid for grain that will be sold domestically. There is no separate Workback Algorithm and no separate price for purchases from farms that are directed at domestic consumption as opposed to export sales. The crushers are also purchasing primarily for export sales rather than domestic consumption.²⁰

34. The fact that grain companies and farmers pay attention to futures markets pricing in respect of wheat and canola also reflects that the focus of local input market pricing is tied to the pricing in export markets.

P&H'S GRAIN BUSINESS

35. The facts with respect to the manner in which P&H organizes and operates its grain business are undisputed or uncontroverted.

36. P&H operates in the grain business by buying grain from farms (for its own account²¹) throughout the crop year (i.e., from August 1st to July 31st of the following year) and selling grain to its customers.²² In Western Canada, P&H buys wheat and canola from farms through its network of 29 Elevators, including the Moosomin Elevator and the ten former LDC Elevators.²³

37. Wheat and canola sold by P&H to its overseas customers move by rail from its Elevators in Western Canada to its export facilities located on the West Coast and in Thunder Bay for export.²⁴ The vast majority of grain (including wheat and canola) exported by P&H moves through its export

¹⁹ **CA-R-115**, CA Heimbecker Statement, paras 66-67, P&HC, Tab 49; Heimbecker Evidence, CA Transcript, January 14, pp. 274:6-275:14, P&HC, Tab 50.

²⁰ **P-A-221**, Industry Overview (057277), p. 123, P&HC, Tab 51; **CA-R-242**, Key Issues – Grain Growers of Canada (100226), p. 445, P&HC, Tab 52; **CA-R-240**, Compilation of Miscellaneous Documents, LDC Global Oilseeds meeting – Yorkton Presentation (015363), pp. 9814 and 9817, P&HC, Tab 53.

²¹ Brooks Evidence, Public Transcript, Vol. 2, January 7, pp. 218:3-219:1, P&HC, Tab 54.

²² **CA-A-244**, Agreed Statement of Facts, para 2, P&HC, Tab 55; **P-R-116**, Witness Statement of Mr. John Heimbecker (“**Heimbecker Statement**”), para 6, P&HC, Tab 56.

²³ **P-R-116**, Heimbecker Statement, para 6, P&HC, Tab 57.

²⁴ **P-R-116**, Heimbecker Statement, para 17, P&HC, Tab 58.

terminals.²⁵

38. The export terminals are used to receive grain from rail; to grade, segregate and store grains by type and quality attribute; to clean grain when required; and to blend and load grain onto vessels.²⁶ The cleaning of wheat and canola (and of other grains purchased by P&H) occurs principally at P&H's export terminals (and not at its Elevators) because there are greater economies of scale available at the export terminals.²⁷ Similarly, blending of grain commonly occurs at the export terminals.²⁸

39. P&H has interests in and operates four export terminals: AGT, Fraser Surrey Docks, Superior Terminal, and FGT. P&H has invested [REDACTED] in the construction of FGT compete more effectively with the leading grain companies in Canada. As Mr. Heimbecker testified, prior to the construction of FGT, P&H's share of grain capacity on the West coast [REDACTED]

[REDACTED]²⁹

P&H's [REDACTED]

40. [REDACTED]

[REDACTED]³⁰

41. [REDACTED]

²⁵ CA-A-244, Agreed Statement of Facts, para 37, P&HC, Tab 59; P-R-116; Heimbecker Statement, para 17, P&HC, Tab 60.

²⁶ CA-A-244, Agreed Statement of Facts, para 40, P&HC, Tab 61; P-R-116; Heimbecker Statement, para 18, P&HC, Tab 62.

²⁷ P-R-116, Heimbecker Statement, para 20, P&HC, Tab 63.

²⁸ CA-A-244, Agreed Statement of Facts, paras 38-40, P&HC, Tab 64; P-R-116, Heimbecker Statement, paras 19-20, P&HC, Tab 65.

²⁹ CA-R-115, CA Heimbecker Statement, paras 21-23, 24, 28-29 and Exhibits 2-4, P&HC, Tab 66; CA-R-240, Compilation of Miscellaneous Documents, P&H West Coast Shipping Summary (056878), pp. 781-82, P&HC, Tab 67; CA-R-242, Compilation of Additional Documents Added to the Agreed Book, "Cargill Terminal Rail Improvement" and "Fibreco Export Terminal Enhancement" (100264 and 100265), pp. 1584 and 1595, P&HC, Tab 68; CB-A-134, Read-in Brief of the Commissioner of Competition, Letter dated November 24, 2020, Tab J, p. 637, #7, P&HC, Tab 69; CA-A-244, Agreed Statement of Facts, paras 61-62, P&HC, Tab 70; CA-R-115, CA Heimbecker Statement, para 25, P&HC, Tab 71; CA-R-242, Compilation of Additional Documents Added to Agreed Book, JVSA – P&H and GrainsConnect and FGT (100238), p. 559, P&HC, Tab 72 and CA-R-240, Compilation of Miscellaneous Documents, P&H GrainsConnect Canada – Memorandum of Understanding (051471), p. 229, P&HC, Tab 73.

³⁰ CA-R-115, CA Heimbecker Statement, para 30, P&HC, Tab 74.

S [REDACTED]
 [REDACTED]
 [REDACTED].³¹ In practical terms, P&H aims to “turn” (i.e., fill and empty) the storage capacity of its Western Canadian Elevators as many times as possible each year. Doing so allows P&H to maximize revenues to cover its fixed costs of operation.³²

42. [REDACTED]

[REDACTED]³³

RATIONALES FOR AND OBJECTIVES OF THE TRANSACTION (INCLUDING THE ACQUISITION)

43. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

44. [REDACTED]
 [REDACTED]
 [REDACTED]

³¹ CA-R-115, CA Heimbecker Statement, para 31, P&HC, Tab 75.

³² CA-A-244, Agreed Statement of Facts, para 30, P&HC, Tab 76; P-R-116, Heimbecker Statement, para 15, P&HC, Tab 77.

³³ CA-R-115, CA Heimbecker Statement, paras 33-34, P&HC, Tab 78.

³⁴ CA-R-115, CA Heimbecker Statement, para 27, P&HC, Tab 79.

[REDACTED] CA-A-244, Agreed Statement of Facts, paras 76-78, P&HC, Tab 80; CA-R-115, CA Heimbecker Statement, paras 39-40 and 55-59, P&HC, Tab 81. See also CB-A-134, Read-in Brief of the Commissioner of Competition, Memo dated July 8, 2019, “Re: Case to Acquire LDC”, Tab 8, p. 641, P&HC, Tab 82; CA-R-240, Compilation of Miscellaneous Documents, P&H email re West Coast Shipping Summary dated August 8, 2019 (044335), p. 9831, P&HC, Tab 83.

³⁵ CA-R-115, CA Heimbecker Statement, paras 18-19, 38, 41-42 and 181, P&HC, Tab 84; CA-R-121, CA Reply Heimbecker Statement, para 30, P&HC, Tab 85; CB-A-134, Read-in Brief of the Commissioner of Competition, P&H Response to SIR dated November 8, 2019 (Tab 85), pp. 855-57, P&HC, Tab 86.

³⁶ CA-R-240, Compilation of Miscellaneous Documents, LDC email re Canada call with LDCH board dated August 29, 2019 (056527), p. 248, P&HC, Tab 87; CA-R-240, Compilation of Miscellaneous Documents, P&H – Notification re Asset Purchase from LDC – Schedule C-4 (044457), Note dated July 29, 2019, p. 227, P&HC, Tab 88; CB-A-134, Read-in Brief of the Commissioner of Competition, [REDACTED] Tab 8, p. 641, P&HC, Tab 89; CA-R-240, Compilation of Miscellaneous Documents, [REDACTED] (044335), p. 9831, P&HC, Tab 90; CA-R-240, Compilation of Miscellaneous Documents, [REDACTED]

[REDACTED]

45. As Mr. Heimbecker testified, the tonnage [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

46. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED].⁴¹

47. As Mr. Heimbecker testified, the addition of the Virden Elevator to the P&H network will also allow P&H to increase the overall efficiency of that network. More particularly, with the addition of the Virden and Rathwell Elevators as part of the Transaction, both of which are closer, and will ship grain to the east, to Thunder Bay, [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] (044422), p. 9832 (“[REDACTED]”), P&HC, Tab 91.

³⁷ CA-R-240, Compilation of Miscellaneous Documents, [REDACTED] (056527), p. 248, P&HC, Tab 92.

³⁸ CA-R-115, CA Heimbecker Statement, Exhibit 33, [REDACTED], p. 2608, P&HC, Tab 93.

³⁹ CA-R-115, CA Heimbecker Statement, para 42, P&HC, Tab 94.

⁴⁰ CA-R-115, CA Heimbecker Statement, paras 50-51, P&HC, Tab 95; CB-R-167, [REDACTED], P&HC, Tab 96.

⁴¹ CA-R-115, CA Heimbecker Statement, para 42, P&HC, Tab 97.

prevailing price in the relevant market.⁴⁵ In general, the base price used to postulate a price increase is whatever is ordinarily considered to be the price of the product in the sector of the industry being examined.⁴⁶

53. The MEGs serve as an important tool for the public and the business community to understand the application of the *Competition Act*. While not legally binding, they serve as an important element of delineating legal and economic principles that are not fully reflected in the *Competition Act* itself.⁴⁷

54. The MEGs also serve as an important element of the Commissioner's statutory responsibility as a regulatory authority to act fairly and transparently. It is for that reason that amendments to these regulatory guidelines are made only after a consultative process with the legal, economic and business community.⁴⁸

The US Horizontal Merger Guidelines

55. The absence of any reference in MEGs to the value-added approach is noteworthy in comparison to the equivalent guidance in the US Horizontal *Merger Guidelines* (“**HMGs**”). The HMGs expressly contemplate the potential use of a value-added approach in defining markets: “Where explicit or implicit prices for the firms’ specific contribution to value **can be identified with reasonable clarity**, the Agencies may base the SSNIP on those prices”.⁴⁹ [emphasis added]

56. The inclusion of this approach was first raised in a draft version of the HMGs (“**Draft HMGs**”)⁵⁰ that kicked off a detailed consultation process with the antitrust community, including leading lawyers and economists.

57. In response to the Draft HMGs, leading antitrust economists Elizabeth M. Bailey, Gregory K. Leonard and Lawrence Wu identified a fundamental flaw in the value-added approach to product market definition proposed in the HMGs. They noted that:

⁴⁵ MEGs at para 4.6, P&HC, Tab 101.

⁴⁶ MEGs at para 4.7, P&HC, Tab 102.

⁴⁷ Remarks by Melanie L. Aitken, Commissioner of Competition, Canadian Bar Association Competition Law Section 2012 Competition Law Spring Forum Best Practices in a Time of Active Enforcement, May 2, 2012, P&HC, Tab 103.

⁴⁸ *Eli Lilly and Co v Apotex Inc*, 2005 FCA 361 at para 33, P&HC, Tab 104.

⁴⁹ HMGs at 4.1.2, P&HC, Tab 105.

⁵⁰ US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines, For Public Comment: Released On April 20, 2010* at p. 10-11 (“**Draft HMGs**”), P&HC, Tab 106.

[T]his approach assumes that the product at issue is the value-added service provided by the merging parties, rather than the end product ...In many cases, however, the value-added service is not actually purchased by customers on a standalone basis ...**customers are not able to substitute to sellers of just the value-added service** [...]. Instead, customers make their choices from among the end products.⁵¹

58. In this case, the Commissioner’s proposed market for the supply of Grain Handling Services to farmers suffers from the flaw identified by Bailey et al, namely that farmers are not able to substitute to other sellers of just Grain Handling Services. This renders the product market based on value-add wholly inappropriate. The same flaw was identified by Justice Emmett of the Federal Court of Australia in *Metcash* in rejecting a value-added approach sought to be used by the Australian Competition and Consumer Commission (“ACCC”) in a merger of wholesale grocery suppliers, where he noted that “the associated services provided by [the wholesaler] are not available in the absence of the acquisition by a retailer of packaged groceries from [the wholesaler].”⁵²

59. Bailey et al also identified three key practical flaws in the value-added approach, each of which would render merger analysis using this approach more difficult and less accurate. In particular, they noted that “customers will have more knowledge about the end product and the price that they pay for that, as the end product is the product that is actually being purchased.”⁵³ This flaw is directly illuminated in this case, in which farmers do not have knowledge – or interest – in the imputed price for Grain Handling Services, but rather, their interest and knowledge relate to the cash price they receive for their grain.

60. A 2020 arbitration decision in a merger by American arbitrator Kevin Arquit, a former General Counsel and Director of the Bureau of Competition at the US Federal Trade Commission, expressly rejected the HMGs approach. Mr. Arquit was appointed by the US District Court for the Northern District of Ohio to determine whether “aluminum automotive body sheet” constitutes a relevant product market for purposes of the Court’s consideration of FTC’s challenge of the merger of Novelis Inc. and Aleris Corporation.

61. The FTC argued for a value-added approach to product market definition in which it would apply a SSNIP on an imputed “aluminum conversion premium” price which reflected the work

⁵¹ E.M. Bailey, G.K. Leonard and L. Wu, “Comments on the 2010 Proposed Horizontal Merger Guidelines”, *HMG Revision Project – Comment, Project No. P092900*, June 3, 2010 (“**Comments on Proposed HMGs**”) at 5, P&HC, Tab 107.

⁵² *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCA 967 at para 196 [*Metcash*], P&HC, Tab 108.

⁵³ Comments on Proposed HMGs at 6, P&HC, Tab 109.

aluminum automotive body suppliers did transform raw material into the finished goods for sale to automakers. However, Mr. Arquit decided that the “common sense” approach was to use the final price of the finished goods, despite the HMGs’ contemplation of using an imputed price.⁵⁴

62. In the *Metcash* case, the ACCC similarly sought to use an imputed price purporting to represent the value-added by grocery wholesalers at their stage in the supply chain as the basis for considering the impact of a SSNIP in defining markets,⁵⁵ and it was roundly rejected by the Federal Court of Australia (and affirmed on appeal).⁵⁶ The Court found that the purported value add services for which the ACCC sought to use an imputed price was not the extent of what the wholesaler provided, and that therefore an imputed price just for these services could not be used as the basis for defining the market.⁵⁷ This is precisely the error made by the Commissioner here – seeking to utilize an imputed price for only a subset of the product in issue, and he must similarly fail.

63. Even if one were to consider that the HMG approach was a desirable change to Canadian merger reviews (which the Respondent denies) the HMGs expressly require that in order to base a SSNIP on an implicit price, the merging “firms’ specific contribution to value can be identified with reasonable clarity”.⁵⁸ In contrast, the imputed price utilized by Dr. Miller cannot be identified by industry participants, let alone with “reasonable” clarity. As the Commissioner has admitted, it cannot be observed explicitly by the grain companies or the farmers, nor is it implicitly observable by industry participants.

64. By using the value-added approach, the Commissioner is attempting to impose stricter merger analysis criteria than that identified in the MEGs. Given that this would be a precedent setting case, it is vitally important to understand the import of what may appear to be a minor change in the approach to merger review. The conventional approach when using the hypothetical monopolist test (“HMT”) when defining markets in merger analysis is to consider whether a hypothetical monopolist would find it profitable to impose a SSNIP.⁵⁹

⁵⁴ *In re: Arbitration of United States v. Novelis Inc., et al.*, referred from United States District Court for the Northern District of Ohio, Civil Action No.: 1:19-cv-02033-CAB, *United States of America v. Novelis Inc. and Aleris Corporation*, Redacted Public Version, Arbitration Decision, March 9, 2020 at 4-5, P&HC, Tab 110.

⁵⁵ *Metcash* at para 196, P&HC, Tab 108.

⁵⁶ *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151, P&HC, Tab 108.

⁵⁷ *Metcash* at paras 198-203, P&HC, Tab 108.

⁵⁸ HMGs at p. 10, P&HC, Tab 114.

⁵⁹ MEGs at para 4.6, P&HC, Tab 115.

65. The value of ‘significant’ in the SSNIP test most often used by courts and regulators, including the Commissioner as expressed in the MEGs is 5%.⁶⁰ There is no decision where a price increase of less than 5% has been utilized in the SSNIP test.⁶¹⁶²

66. As noted by antitrust economists Peter Davis and Urs Haegler, “one implication of applying the [HMT] using a value-added approach is that it will tend to produce more narrowly defined markets whenever the threshold used for the value added test is not sufficiently increased to account for the ratio of value added to prices.”⁶³ [emphasis added] They note that “where value added accounts for 10% of the final price, applying a 50% [SSNIP] to the value added is equivalent to applying a 5% [SSNIP] to the final price”.⁶⁴ The corollary of this is that if a 5% SSNIP applied to an imputed value-added price that was 10% of the final price, that would represent a mere 0.5% SSNIP to the final price. This can be seen by using the illustration by Davis and Haegler and applying it to the imputed price utilized by Dr. Miller⁶⁵ in this case:

	% SSNIP applied to transaction price	Equivalent % SSNIP on Value-add only to equal 5% SSNIP on transaction price	Value-add % of Cash or Transaction Price based on Value-add \$ /Cash \$
Davis and Haegler example	5%	█	█
Dr. Miller’s Value-add Wheat (Virden)	5%	█	█
Dr. Miller’s Value-add	5%	█	█

⁶⁰ MEGs at para 4.3, P&HC, Tab 116.

⁶¹ According to a footnote in the US District Court for the District of Columbia’s ruling in *F.T.C. v. Whole Foods Market, Inc.*, (2007) 502 F.Supp.2d 1, regarding Whole Foods’ proposed merger with Wild Oats, expert economists for the FTC argued “that in some cases a hypothetical price increase as low as 1% may be appropriate” in conducting a SSNIP test: *F.T.C. v. Whole Foods Market, Inc.*, (2007) 502 F.Supp.2d 1 at footnote 9, P&HC, Tab 117. The US Court of Appeals for the DC Circuit reversed the District Court on the basis that it committed an error of law in finding that “the antitrust laws are addressed only to marginal consumers”: *F.T.C. v. Whole Foods Market, Inc.*, (2008) 548 F.3d 1028 at 1041, P&HC, Tab 118. However, neither Court ruled on either the validity of using a price increase of less than 5% in the SSNIP test or the use of imputed prices in defining markets.

⁶² Although the potential of a smaller SSNIP was raised by one of the experts in the *F.T.C. v. Whole Foods* decision, neither the District Court nor the District Court of Appeal ruled on the applicable SSNIP. There was no value-add approach considered and ultimately, the FTC’s narrow relevant market was rejected by the District Court and, ultimately, the FTC’s narrow relevant market was rejected by the District Court.

⁶³ P Davis and U Haegler, “Should competition agencies focus on ‘value added’ instead of final prices?”, March 1, 2016 <http://ssrn.com/abstract=2740706> (“**Davis and Haegler**”) at 16, P&HC, Tab 119

⁶⁴ Davis and Haegler at 4, P&HC, Tab 120.

⁶⁵ Dr. Miller’s Value-add equals the median value of his imputed price for grain handling services at Virden or Moosomin in Wheat or Canola

Wheat (Moosomin)			
Dr. Miller's Value-add Canola (Virden)	5%	████	████████████████
Dr. Miller's Value-add Canola (Moosomin)	5%	████	████████████████

	Equivalent % SSNIP on transaction price to equal 5% SSNIP on Value-add only	% SSNIP applied to Value-add only	Value-add % of Cash or Transaction Price based on Value-add \$ /Cash \$
Davis and Haegler example	████	5%	████████████████
Dr. Miller's Value-add Wheat (Virden)	████	5%	████████████████
Dr. Miller's Value-add Wheat (Moosomin)	████	5%	████████████████
Dr. Miller's Value-add Canola (Virden)	████	5%	████████████████
Dr. Miller's Value-add Canola (Moosomin)	████	5%	████████████████

67. The ACCC's lack of adjustment to the quantum of the SSNIP from the accepted 5-10% when applying it to an imputed price in *Metcash* provides a stark example of the issue identified by Davis and Haegler, and was one reason why the Federal Court of Australia did not accept its attempted use of the value-added approach. Justice Emmett noted that on the facts of that case, applying a 5% SSNIP to the imputed value-added price (wholesaler profit margin in that case) would reflect just a ~0.26% final retail price increase. Justice Emmett did not accept that such a small increase could be used to define a product market.⁶⁶

68. Davis and Haegler refer to applications of a 5% SSNIP on the value added as an attempt "through the back door" by antitrust authorities to impose atypically low intervention thresholds.⁶⁷ These comments apply to the case at hand, and the Commissioner should not be permitted to impose what is undoubtedly an atypically low intervention threshold that is contrary to the guidance in the MEGs and the practice under which the Act has long been enforced.

⁶⁶ *Metcash* at para 195, P&HC, Tab 121.

⁶⁷ Davis and Haegler at 5, P&HC, Tab 122.

Value-added Cases in Europe

69. While the Commissioner may point to three EC cases (which may be collectively referred to as the extruded metals cases) as allegedly supporting his value-added approach, they are each clearly distinguishable from the matter at hand.⁶⁸

70. In considering the proposed merger of Inco and Falconbridge in 2006, the EC noted that the pricing for nickel products sold to downstream distributors of the extruded product by the parties was comprised of a quoted price for nickel from the London Metal Exchange (“LME”) plus a premium applied by the parties.⁶⁹ The EC relied on the fact that the premiums (which was the markup for the extruded product) it was using were directly negotiated with customers.⁷⁰ While the terminology of value-add was used to describe the extruded product it was in fact a separate product from the raw material product and it had a separate price which was negotiated. It is also worthy of note that the US Department of Justice, in seeking remedies in respect of the Inco/Falconbridge proposed transaction, considered the impact of the transaction on final prices, not premiums, in defining the same relevant product markets.⁷¹

71. In 2012, the EC also considered a premium added to the LME quoted price for another metal – in this case zinc. Like Inco/Falconbridge, the premium applicable to the extruded metal and the premium that differentiated the extruded product from the raw metal price was the main element of the price negotiated between buyers and sellers.⁷²

72. The third extruded metals case was the EC’s decision regarding a joint venture between Norsk Hydro and Orkla is very similar to Glencore/Xstrata in its use of a premium for the extruded product in defining geographic markets. As in Glencore/Xstrata, the EC found that negotiations between customers and suppliers normally only concerned the premium for the extruded product. Notably, no HMT test was

⁶⁸ It is possible that the Commissioner may also seek to rely on the EC’s decision on the merger of NYSE Euronext and Deutsche Börse as an example of the use of an imputed price rather than the final price in defining markets. The EC considered the merger from the perspective of the total trading costs as a whole including explicit fees (such as membership and transaction fees for trading and clearing) directly controlled by the exchange, as well as the implicit fees, consisting of the bid-ask spread, market impact and opportunity costs linked to the provision of collateral). Davis and Haegler note that this is not a case in which the EC applied a value-added approach. European Commission, Decision in Deutsche Börse/NYSE Euronext (COMP/M.6166), 1 February 2012, P&HC, Tab 478.

⁶⁹ *Inco/Falconbridge* at para 65, P&HC, Tab 123.

⁷⁰ *Inco/Falconbridge* at para 113, P&HC, Tab 124.

⁷¹ *US v Inco Ltd and Falconbridge Ltd*, Complaint, Dist. Ct. D.C. Case No. 1:06CV01151, June 23, 2006 at paras 17-24, P&HC, Tab 125.

⁷² *Glencore/Xstrata* at para 138, P&HC, Tab 126.

undertaken and no consideration of the impact on the SSNIP.⁷³

73. The extruded metals cases are not applicable to the present case for a number of reasons. Although referred to as a value-add, the extruded metal was an entirely different product from the raw metal. The negotiation between the parties was for the extruded product and the price negotiation was with respect to what was defined as the premium. The premium or premia was a clearly identifiable cash amount. This entirely different from this case, in which the imputed price is not negotiated between buyers and sellers and is not known or visible in the negotiations. The concept of value-add was directionally from the seller to the buyer. It was not an attempt to apply a value-add in a monopsony case.

Expert Evidence in this Case

74. The experts agreed that the appropriate issue to address regarding the local input market analysis is whether P&H is likely to pay farmers materially less for their canola and wheat at Moosomin and Virden because of the acquisition.

75. Ms. Sanderson observed that P&H's incentive and ability to pay materially less depends on:

- Farmers' ability to sell to rival elevators and crushers in large enough quantities; and
- Rivals' ability to expand their purchases from farmers who sold to Moosomin and Virden pre-Acquisition.

76. Ms. Sanderson concludes that P&H is unlikely to pay farmers materially less for their grain.⁷⁴ She concludes that Moosomin and Virden are small buyers in an unconcentrated market on the basis that:

- (a) Moosomin and Virden purchase a [REDACTED] share of canola and wheat deliveries from farms in Dr. Miller's Farmer Region⁷⁵
- (b) There are many other elevators and crushers currently buying canola and wheat from farms in the area:
 - [REDACTED] rival elevators and crushers buying more canola than Moosomin⁷⁶
 - [REDACTED] rival elevators each with at least 5% share of wheat purchases⁷⁷

⁷³ European Commission, Decision in *Norsk Hydro/Orkla* (COMP/M.6756), 13 May 2013 at paras 66-67, P&HC, Tab 127. The premium must represent at least 50% of the final price because the regional difference in prices is reported as “[10-20] %” and the regional difference in premiums is even higher at “[10-20] %”. At minimum, this means that a 10% difference in price equals a 20% difference in premium. This means that the premium is, at minimum, 50% of the final price.

⁷⁴ P-R-182 Slides of Ms. Margaret Sanderson, p.100, P&HC, Tab 128.

⁷⁵ CA-R-181, Sanderson Report, Figures 24 to 25, P&HC, Tab 129.

⁷⁶ CA-R-181, Sanderson Report, Figures 24 to 25, P&HC, Tab 130.

- Neither Virden nor Moosomin is the [REDACTED] buyer in canola or wheat⁷⁸
- (c) Farmers have numerous alternatives to which they sell now, and to which they can sell more, if P&H were to attempt to reduce purchase prices⁷⁹

77. Following the MEGs, Ms. Sanderson notes that “when the merging parties represent only a small percentage of the total purchases of the relevant product, ... suppliers (i.e., farmers) are well-placed to forego sales to the merging parties in favour of other buyers when faced with an attempt to lower prices”.⁸⁰

78. Ms. Sanderson notes that static merger simulation models always predict price increases when efficiencies are not modelled;⁸¹ therefore, we need to consider whether:

- a) The predicted price increases are meaningful or material;⁸²
- b) We are confident in the inputs and model assumptions;⁸³ and
- c) The predictions are consistent with the rest of the evidence.⁸⁴

79. When these questions are considered in turn, using the evidence on the record, it is clear that Dr. Miller’s simulation and resulting predicted price effects are unreliable.

- a) The core inputs to Dr. Miller’s economic analyses are subject to measurement error and potential bias;⁸⁵
- b) Dr. Miller’s simulation results are completely contrary to the evidence that P&H has increased purchases and not reduced its cash prices post-acquisition.⁸⁶ Dr. Miller ignores this evidence based on his conjecture that P&H is waiting out the outcome of these proceedings.⁸⁷
- c) Dr. Miller fails to acknowledge the extensive and uncontroverted evidence that the objectives of P&H are to increase throughput to its export facilities which would mean that

⁷⁷ CA-R-181, Sanderson Report, Figures 24 to 25, P&HC, Tab 131.

⁷⁸ CA-R-181, Sanderson Report, Figures 24 to 25, P&HC, Tab 132.

⁷⁹ CA-R-181, Sanderson Report, at paras. 12-13, P&HC, Tab 133.

⁸⁰ CA-R-181, Sanderson Report, para 12, P&HC, Tab 134; MEGs at para 9.3, P&HC, Tab 135.

⁸¹ CA-R-181, Sanderson Report, para 102, P&HC, Tab 136.

⁸² CA-R-181, Sanderson Report, para 101, p. 45, P&HC, Tab 137; P-R-182 Slides of Ms. Margaret Sanderson, p.4, P&HC, Tab 138.

⁸³ P-R-182 Slides of Ms. Margaret Sanderson, p. 4, P&HC, Tab 139.

⁸⁴ P-R-182 Slides of Ms. Margaret Sanderson, p. 4, P&HC, Tab 140.

⁸⁵ P-R-182, Slides of Ms. Margaret Sanderson, p. 4, P&HC, Tab 141.

⁸⁶ P-R-182, Slides of Ms. Margaret Sanderson, p. 4, P&HC, Tab 142.

it has an incentive to increase purchases negating a fundamental assumption of his opinion and negating a fundamental assumption in his economic modeling; and

- d) Even if the Tribunal were to accept Dr. Miller's simulation, he improperly calculates the deadweight loss because he fails to consider producer surplus transfers to competitors that compete to buy wheat and canola from the farms within the area, treating profit transfers to any elevator other than Fairlight as "lost to the economy" when this is not the case.⁸⁸

80. Even if the Tribunal were to accept Dr. Miller's economic modelling, his predicted price increases are neither material nor likely.⁸⁹ This is because his average predicted price increases represent at most only [REDACTED] of his imputed price for canola grain handling services which is [REDACTED] of canola cash purchase prices, and at most only [REDACTED] of his imputed price for wheat grain handling services which is [REDACTED] of wheat cash purchase prices.⁹⁰ Moreover, Dr. Miller's predicted profit improvement for P&H is a trivial [REDACTED] annually in canola and a trivial [REDACTED] annually in wheat.⁹¹

81. The simulation price and P&H profit changes are so small precisely because P&H is a small buyer in an unconcentrated market, where it faces a lot of competition from rival elevators and crushers. As a result, there is little diversion between Moosomin and Virden, compared to the diversion to rivals.⁹²

82. Even assuming the Tribunal were to entertain a value-add approach to the economic analysis in this case, Dr. Miller's predictions are unlikely because the simulation inputs are built around an imputed price for 'grain handling services' which is not representative of the value-add for the grain services at the Virden elevator. This is because:

- a) There is measurement error in the imputed prices for grain handling services. These errors are significant and are not appropriately accounted for simply by using the median value;⁹³ and
- b) Dr. Miller's mark-ups and margins are overstated due to excluding freight costs. Taking account of freight cost differentials related to the location-specific futures prices he uses would materially reduce his estimated mark-ups and margins.⁹⁴

⁸⁷ CA-A-173, Reply Expert Report of Dr. Nathan Miller, para 87, P&HC, Tab 143.

⁸⁸ CA-R-183, Slides of Ms. Margaret Sanderson, p.96, P&HC, Tab 144.

⁸⁹ P-R-182, Slides of Ms. Margaret Sanderson, p. 100, P&HC, Tab 145.

⁹⁰ P-R-182, Slides of Ms. Margaret Sanderson, p.5, P&HC, Tab 146; CA-R-181, CA Sanderson Report, paras 101-106, P&HC, Tab 147.

⁹¹ P-R-182, Slides of Ms. Margaret Sanderson, p.5, P&HC, Tab 148; CA-R-181, CA Sanderson Report, paras 185-86, P&HC, Tab 149.

⁹² P-R-182, Slides of Ms. Margaret Sanderson, p.5, P&HC, Tab 150.

⁹³ P-R-182, Slides of Ms. Margaret Sanderson, p.6, P&HC, Tab 151.

83. It is also important to note that static merger simulation models depend on **assumptions** that do hold in all cases and more specifically do not hold in the case before the Tribunal.

- a) The merger simulation treats Moosomin/Virden as divorced from P&H's network without regard to network effects if purchased volumes at Moosomin/Virden decline.⁹⁵ In order to make this prediction Dr. Miller would have had to compute any additional costs to P&H of acquiring grain through its other elevators in order to replace these reduced volumes; and
- b) Dr. Miller's economic modelling and opinion predicts [REDACTED] in Moosomin and Virden purchase volumes to achieve a very small improvement in profit for P&H. This assumption is not only inconsistent P&H's objectives to [REDACTED] [REDACTED] which is evidenced in the documents and by the evidence of Mr. Heimbecker, [REDACTED] Mr. Heimbecker testified that [REDACTED] [REDACTED] P&H's management is far more likely to continue as it is currently rather than reversing course as predicted in Dr. Miller's simulation⁹⁶

Ms. Sanderson's Economic Analysis

84. Ms. Sanderson's economic analysis is an evidenced based approach consistent with the MEGs, specifically addressing section 9.3 which addresses whether P&H's share of total purchases is sufficiently small that it is unlikely to exercise monopsony power post-acquisition. She opines that in this case, P&H's share of purchases is evident by studying the transactions data collected by the Commissioner. This is a more relevant and accurate approach as it is grounded in observed farm deliveries to individual Elevators and crushers, and is supported by internal business documents that demonstrate the extensive competition faced by the Moosomin and Virden Elevators when purchasing wheat and canola from farms.

85. Ms. Sanderson's analysis is grounded in the industry facts and common sense. That evidence based empirical approach was made possible by the transactional data available in this case. Because the transactional data was robust for most of the competitors in the local area defined by Dr. Miller and the

⁹⁴ P-R-182, Slides of Ms. Margaret Sanderson, p. 6, P&HC, Tab 152.

⁹⁵ CA-R-183, Slides of Ms. Margaret Sanderson, p. 92, P&HC, Tab 153.

⁹⁶ CA-R-183, Slides of Ms. Margaret Sanderson, p.90, P&HC, Tab 154.

Commissioner, Ms. Sanderson was able undertake the analysis she believes was appropriate.⁹⁷ Surprisingly, Dr. Miller accepts that P&H has a small share of grain purchases within the area, but nevertheless excludes P&H's many rivals when identifying the market participants that he claims operated within his defined geographic market. As Ms. Sanderson has noted, Dr. Miller's and the Commissioner's "market shares" for P&H are overstated due to erroneously excluding any rival purchaser of canola or wheat other than Fairlight.⁹⁸

86. The documents of P&H and LDC support Ms. Sanderson's conclusions, and show that P&H competes with many rivals when setting its purchase prices.⁹⁹ Ms. Sanderson also used the evidence to study the extent to which individual negotiations between farmers and either the Moosomin or Virden Elevator occur and when those negotiations occur, whether farms used Moosomin and Virden against each other prior to the merger to obtain better prices.¹⁰⁰

87. Ms. Sanderson also studied the evidence related to industry pricing to understand the typical fluctuations in purchase prices in order to determine what would be "significant" or "material" relative to typical price fluctuations in the industry.¹⁰¹

88. Ms. Sanderson studied the evidence in the transaction data¹⁰² and witness testimony¹⁰³ to determine how many alternative Elevators farms sell to, how much switching occurs by farmers in respect of who they sell their wheat and canola to and how far farmers are prepared to travel to sell their grain to different competitors. In terms of geographic scope Ms. Sanderson studied both the region identified by Dr. Miller¹⁰⁴ and the area of concern identified by Commissioner in pre-merger discussions, which focused on farms located directly between Moosomin and Virden along Hwy 1.¹⁰⁵

89. In order to study this geographic area, Ms. Sanderson relied on maps obtained from the relevant Rural Municipalities to identify 'section' owners that were then aggregated into "farms" by family

⁹⁷ Sanderson Evidence, CA Transcript, Vol. 9, January 20, pp. 510:24-513:10, P&HC, Tab 155.

⁹⁸ Sanderson Evidence, CA Transcript, Vol. 10, January 21, pp. 802:2-803:5, 807:11-809:14, P&HC, Tab 156.

⁹⁹ CA-R-183, Slides of Ms. Margaret Sanderson, p. 90, P&HC, Tab 157.

¹⁰⁰ CA-R-181, Sanderson Report, at paras. 114-117, P&HC, Tab 158; CA-R-181, Sanderson Report, Figures 35a to 35b, P&HC, Tab 159.

¹⁰¹ CA-R-181, Sanderson Report, at paras. 101-106, P&HC, Tab 160.

¹⁰² CA-R-181, Sanderson Report, Figures 10 to 14, P&HC, Tab 161; CA-R-181, Sanderson Report, Figures 18 to 29, P&HC, Tab 162.

¹⁰³ CA-R-181, Sanderson Report, para. 20, P&HC, Tab 163.

¹⁰⁴ CA-R-181, Sanderson Report, Figures 24 to 25, P&HC, Tab 164.

¹⁰⁵ CA-R-181, Sanderson Report, at paras.15-18, P&HC, Tab 165.

name.¹⁰⁶ These farms were then matched to names and addresses in the transactions data. The more detailed analysis undertaken by Ms. Sanderson with respect to the [REDACTED] farms located in the narrowly defined corridor between the Moosomin and Virden elevators provides the Tribunal with observed deliveries for far more “most affected” farms than the witnesses alone.¹⁰⁷

90. Ms. Sanderson used the transactions data collected by the Commissioner to define “draw areas” for each elevator and crusher by identifying the farm locations delivering canola or wheat to each buyer.¹⁰⁸ She then undertook an overlap analysis that was demonstrated by the maps derived from this process to determine the extent of overlap between the draw areas for Moosomin and Virden with rival Elevators and crushers.¹⁰⁹ This provided a complete picture of the extent to which different rival Elevators and crushers purchased canola and wheat from the same farm locations as the Moosomin and Virden Elevators.

91. The empirical study of the overlap in draw areas permitted the calculation of P&H’s share of pre-acquisition and post-acquisition purchases from farms within Dr. Miller’s Farmer Region to understand whether the farms located within this geography have sufficient alternatives to thwart a purchase price reduction, the exercise of monopsony market power.¹¹⁰

92. Dr. Miller and Mr. Harington opine based on conjecture and mere speculation that the [REDACTED] [REDACTED] is artificial suggesting that P&H was merely biding its time until this proceeding was complete.¹¹¹ Such opinion is not based on fact or industry knowledge (neither of the Commissioner’s expert witnesses were qualified as industry experts) and is therefore not proper expert opinion. In contrast, Ms. Sanderson undertook an empirical and evidence-based analysis to assess whether P&H has lowered its purchase prices post-acquisition. She reviewed the evidence of the objectives of P&H that were documented pre-acquisition and post-acquisition.¹¹² She empirically studied P&H’s conduct post-closing by undertaking a difference-in-differences regression utilizing posted cash price data.¹¹³ Ms. Sanderson used a competitive benchmark elevator unaffected by the LDC acquisition as a comparator and controlled for futures prices to test whether P&H’s posted cash prices at

¹⁰⁶ CA-R-181, Sanderson Report, para. 85, P&HC, Tab 166.

¹⁰⁷ CA-R-181, Sanderson Report, para 85, P&HC, Tab 167.

¹⁰⁸ CA-R-181, Sanderson Report, para 13, P&HC, Tab 168.

¹⁰⁹ CA-R-181, Sanderson Report, Figures 10 to 14, P&HC, Tab 169.

¹¹⁰ CA-R-181, Sanderson Report, Figures 24 to 25, P&HC, Tab 170.

¹¹¹ CA-A-173, Reply Expert Report of Dr. Nathan Miller, para 87, P&HC, Tab 171.

¹¹² CA-R-181, Sanderson Report, at paras.33-34, P&HC, Tab 172.

Moosomin or Virden have declined post-acquisition. She additionally did a comparison of purchase volumes under P&H ownership compared to LDC ownership and found that they have increased.¹¹⁴

Ms. Sanderson’s disagreement with Dr. Miller’s economic analysis and opinion

93. Ms. Sanderson disagrees with Dr. Miller on a number of his fundamental assumptions, observations of fact and opinions:

- a) Relevant product is not “grain handling services” (“**GHS**”)¹¹⁵
- b) The ordinary price transacted between farms and Elevators/crushers is the cash price, which is set by P&H based on export prices and costs to reach export customers¹¹⁶
- c) The existence of a futures price has not been a reason to redefine products or prices away from the price ordinarily used in the industry
 - i. Better Beef/Cargill: purchase of fed cattle¹¹⁷
 - ii. Agricore/UGG: purchase of canola seed¹¹⁸
 - iii. US case of Cargill/Continental: purchase of corn, soybeans and wheat¹¹⁹

94. Ms. Sanderson disagrees with Dr. Miller’s price both in approach and with respect to his imputation. Dr. Miller imputes a price that contains large measurement error, which he recognizes.¹²⁰

95. More generally, the sensitivity of Dr. Miller’s simulation results depend entirely on how he divides the cash price into components and how he divides P&H’s costs to buy from producers and sell grain to export customers.¹²¹ His division is entirely arbitrary. Dr. Miller’s mark-up at the Virden Elevator, which is a critical input to his competitive effects analysis does not include any freight costs, which is a meaningful omission.^{122, 123} Some freight costs need to be accounted for in either adjusting

¹¹³ **CA-R-181**, Sanderson Report, paras 107-113, P&HC, Tab 173

¹¹⁴ **CA-R-181**, Sanderson Report, Figures 36-37, P&HC, Tab 174

¹¹⁵ **CA-R-181**, Sanderson Report, para.10, P&HC, Tab 175; **P-R-182**, Slides of Ms. Margaret Sanderson, p.10, P&HC, Tab 176.

¹¹⁶ **P-R-182**, Slides of Ms. Margaret Sanderson, p.10, P&HC, Tab 177.

¹¹⁷ Better Beef/Cargill Backgrounder, P&HC, Tab 178; **P-R-182**, Slides of Ms. Margaret Sanderson, p.10, P&HC, Tab 179.

¹¹⁸ UGG SGMF, paras 1, 13-14, 16-18, 20-22, 28-29, 39-40, 53-54, 57, 68, 71, 86-87, P&HC, Tab 180; UGG Palsson Affidavit, paras 33-37, P&HC, Tab 181; UGG Draft Consent Order, para 4, P&HC, Tab 182; **P-R-182**, Slides of Ms. Margaret Sanderson, p.10, P&HC, Tab 183.

¹¹⁹ US Cargill/Continental Competitive Impact Statement, pp. 1-2, P&HC, Tab 184; **P-R-182**, Slides of Ms. Margaret Sanderson, p.10, P&HC, Tab 185.

¹²⁰ **P-R-182**, Slides of Ms. Margaret Sanderson, p. 10, P&HC, Tab 186.

¹²¹ **P-R-182**, Slides of Ms. Margaret Sanderson, p. 11, P&HC, Tab 187.

¹²² **P-R-182**, Slides of Ms. Margaret Sanderson, p. 11, P&HC, Tab 188; **CA-R-181**, Sanderson Report, para 125, P&HC, Tab 189.

the selected futures price or when calculating the mark-up.¹²⁴ In either case, the mark-up used in Dr. Miller's analyses would be lower generating lower UPP, GUPPI and price effects even adopting a product market of GHS.¹²⁵

96. The inferences that Dr. Miller draws from his analysis is in stark contrast to what is observed from the transactions data, testimony and other evidence.¹²⁶ There is a large set of competitors who buy as much and often much larger volumes than Moosomin or Virden purchase from farms within Dr. Miller's Farmer Region.¹²⁷ The transaction data clearly demonstrates that this geographic region has many participants and that P&H has a small share of purchases.¹²⁸ Dr. Miller fails to explain the difference between his economic modeling and the evidence that contradicts his opinion based on his modeling.

97. One of the fundamental reasons for this disparity is that Dr. Miller's imputed price of GHS in the HMT and the merger simulation is only a small fraction of the actual transaction price, yet he makes no adjustment for the SSNIP value he utilizes. Ms. Sanderson considered cash price in the HMT test utilizing the conventional 5% SSNIP and found starkly different results with respect to the relevant geographic market.¹²⁹ When the cash price is used in the HMT, the relevant geographic market clearly contains many more Elevators and crushers than only Moosomin, Virden and Fairlight.

- a) In the case of wheat, the geographic market includes *at least* Moosomin, Virden, Fairlight, [REDACTED],¹³⁰ and
- b) In the case of canola, the geographic market includes *at least* Moosomin, Virden, Fairlight, [REDACTED]
[REDACTED]

98. Based on the larger geographic market utilizing the cash price with a 5% SSNIP the combined shares of [REDACTED] (recognizing that the

¹²³ CA-A-170, Miller Report, para 205, P&HC, Tab 190.

¹²⁴ P-R-182, Slides of Ms. Margaret Sanderson, p.11, P&HC, Tab 191.

¹²⁵ P-R-182, Slides of Ms. Margaret Sanderson, p.11, P&HC, Tab 192.

¹²⁶ P-R-182, Slides of Ms. Margaret Sanderson, p.12, P&HC, Tab 193.

¹²⁷ P-R-182, Slides of Ms. Margaret Sanderson, p.12, P&HC, Tab 194.

¹²⁸ P-R-182, Slides of Ms. Margaret Sanderson, p.12, P&HC, Tab 195.

¹²⁹ CA-R-183, Slides of Ms. Margaret Sanderson, p.72, P&HC, Tab 196.

¹³⁰ CA-R-183, Slides of Ms. Margaret Sanderson, p.74, P&HC, Tab 197.

shares are overstated because the shares of Ceres and Paterson are missing due to the lack of data).¹³¹ However the geographic market is defined, what matters for competitive effects is P&H's post-merger *share of purchases* because this determines the competitive alternatives available to farms if P&H were to seek to reduce its purchase prices post-acquisition. Dr. Miller and Ms. Sanderson agree on P&H's share of purchases. Post-acquisition, the Moosomin and Virden elevators account for only [REDACTED]

99. Ms. Sanderson also considered Dr. Miller's deadweight loss calculations based on his simulation modeling. She found that Dr. Miller had incorrectly calculated his deadweight loss even accepting the simulation model's underlying inputs.

100. As Ms. Sanderson described, producer surplus transferred to rival Elevators and crushers like Whitewood, Oakner, Harrowby etc. is not "lost" to the economy even if Dr. Miller does not include these purchasers in his geographic market.¹³² Profits transferred to Oakner, for example, are no different from profits transferred to Fairlight, assuming Dr. Miller's simulation predictions hold. Making this correction to Dr. Miller's deadweight loss calculations greatly reduces the deadweight losses from Dr. Miller's simulation because profits earned by non-Fairlight Elevators and crushers are no longer treated as deadweight loss.¹³³ Taking these producer surplus transfers into account reduces Dr. Miller's deadweight loss for wheat from roughly [REDACTED] and [REDACTED] his deadweight loss in respect of canola.¹³⁴

RELEVANT PRODUCT MARKETS ARE THE PURCHASE OF WHEAT AND CANOLA

P&H Does Not Supply "Grain Handling Services" and There Is No Price For "Grain Handling Services"

101. When the Canadian Wheat Board ("CWB") was operating the 'single desk' model this meant that the CWB was both the exclusive purchaser and exporter of wheat.¹³⁵ In that context, grain

¹³¹ CA-R-183, Slides of Ms. Margaret Sanderson, pp.74-75, P&HC, Tab 198.

¹³² CA-R-183, Slides of Ms. Margaret Sanderson, pp. 96-99, P&HC, Tab 199; CA-R-181, Sanderson Report, at paras 168-181, P&HC, Tab 200.

¹³³ CA-R-183, Slides of Ms. Margaret Sanderson, pp. 96-99, P&HC, Tab 201; CA-R-181, Sanderson Report, at paras 168-181, P&HC, Tab 202.

¹³⁴ CA-R-183, Slides of Ms. Margaret Sanderson, pp. 96-99, P&HC, Tab 203; CA-R-181, Sanderson Report, at paras 168-181, P&HC, Tab 204.

¹³⁵ Barley was also a CWB grain. Other grains, including canola, were purchased by grain companies from farms in the same way as they are today: see P-R-116, Heimbecker Statement, para 113, P&HC, Tab 205.

companies purchased grain as agents of the CWB on a “toll basis”.¹³⁶ Grain companies like P&H were service providers to the CWB. The grain companies’ role was to “handle” wheat for and on behalf of the CWB, and they were paid CGC-approved tariffs (or fees) for performing elevating, cleaning and/or storing services for the CWB in respect of the CWB’s wheat. At no time did the grain companies “own” the wheat. It was the property of the CWB and the grain companies were its agent.¹³⁷

102. With the end of the CWB on July 31, 2012, the historical tariffs and fees for service ended. In the post-CWB world, P&H (like other grain companies and crushers) buys CWRs and canola from farms, taking title to the grain at the time the farm delivers it to the Elevator. At that time, the farm receives the contracted cash price for its grain and ownership of the grain passes to P&H. From that point, the farm has no right or interest in the grain and bears no risk in relation to the purchase transaction. Instead, P&H is fully responsible for the costs, risks, and rewards of aggregating, transporting and selling the grain to a grain customer.¹³⁸

103. Today (and since mid-2012), as noted above, Elevators contract with farmers for “cash prices”¹³⁹ which are posted within the Elevators and disseminated to farmers via email, text and mobile app. The cash price is a single price. It does not include or incorporate the historical CWB tariffs or fees for service.¹⁴⁰

104. Mr. Heimbecker’s testimony in this regard was unchallenged on cross-examination. So was his evidence that P&H does not supply “grain handling services”, as the Commissioner defines this, and that there is no price for grain handling services”. To the contrary, the documents (including the grain purchase contracts produced by all of the grain companies which testified) and *viva voce* evidence before the Tribunal shows that “grain handling services” is not an actual service transacted, contracted, or discussed, in any dealings between farms and P&H or other grain companies.¹⁴¹

¹³⁶ **P-R-116**, Heimbecker Statement, paras 113-14, P&HC, Tab 206.

¹³⁷ **P-R-116**, Heimbecker Statement, para 114, P&HC, Tab 207.

¹³⁸ **P-R-116**, Heimbecker Statement, para 116, P&HC, Tab 208; Brooks Evidence, Public Transcript, Vol. 2, January 7, pp. 218:3-219:1, P&HC Tab 209; McQueen Evidence, Public Transcript, Vol. 3, January 11, pp. 333:12-335:6, P&HC Tab 210.

¹³⁹ The “cash price” that P&H and other grain companies and canola crushers pay farms for their grain is a “flat” or “net” or “bid” price: **P-R-116**, Heimbecker Statement, para 60, P&HC, Tab 211.

¹⁴⁰ **CA-R-115**, CA Heimbecker Statement, paras 70-72, 98-112 and 115, P&HC, Tab 212.

¹⁴¹ **CA-A-209**, G3 Compendium, G3 Purchase Confirmations, pp. 2-9, P&HC, Tab 213; **CA-A-086**, Settlement Receipts of HGV with Other Grain Elevators, Richardson Purchase Contracts, pp. 3 and 42, P&HC, Tab 214; **CA-A-211**, Cargill Compendium, Cargill Purchase Confirmations, pp. 3-5, P&HC, Tab 215; **CA-A-217**, Viterra Compendium, Viterra Grain Purchase Agreement, pp. 3-6, P&HC, Tab 216; **CA-R-029**, Ceres contract, p. 22, P&HC, Tab 217; **CA-A-222**, Additional Documents to Be Relied upon Compendium, LDC Deferred Delivery Contracts, pp. 74-76, P&HC, Tab 218; **CA-R-115**, CA

105. While the Miller Report (see paras 21 and 109) claims that it is “the prices charged for grain handling services” that drive farmers’ decisions where to sell, the farmer witness statements cited by him and the testimony of both the Commissioner’s farmer witnesses and the farmer witnesses called by P&H make it clear that farmers decide whom to sell based on the posted cash price and that grain companies compete on cash price, and not with respect to “prices charged for grain handling services”.¹⁴² Indeed, not one of the farmer witnesses referred in his witness statement or in his testimony before the Tribunal to “prices for grain handling services”, let alone testified that such purported prices have any bearing on his choice of grain purchaser.¹⁴³

106. Further, although, farmers and other industry participants sometimes refer to the basis, the evidence is clear that the cash price is the amount that the farmer receives for his grain and that this is the amount that matters to him and drives his decision to sell his grain to a given Elevator or crusher.¹⁴⁴

107. As Mr. Heimbecker testified, in some cases (including on the monitors in its Elevators, emails sent daily to farms and on P&H Direct), when it communicates cash prices, P&H also posts what is referred to as the “basis”.¹⁴⁵ Mr. Heimbecker, Dr. Brooks and other witnesses confirmed that, “in-country” at the Elevators, basis is simply the difference or spread between the cash price offered by P&H to the farm and the futures price in the delivery period specified in the sales contract between P&H and its Grain Customer (i.e., basis = cash price *minus* futures price).¹⁴⁶

Heimbecker Statement, P&H Purchase Confirmations, Exhibits 12 and 14, P&HC, Tab 219; **CA-R-240**, Compilation of Miscellaneous Documents, Cargill Read-In (100235), pp. 538 and 540, P&HC, Tab 220; **P-R-095**, Witness Statement of Mr. Tim Duncan (“**Duncan Statement**”), para 8, P&HC, Tab 221; **P-R-104**, Witness Statement of Mr. Edward Paull (“**Paull Statement**”), para 8, P&HC, Tab 222; **P-R-077**, Witness Statement of Mr. Kristjan Hebert (“**Hebert Statement**”), para 9, P&HC, Tab 223; Hebert Evidence, CA Transcript, Vol. 5, January 13, p 349:6-350:15, P&HC, Tab 224; McQueen Evidence, CB Transcript, Vol. 3, January 11, p. 29:5-16 and Exhibit CB-R-039, P&HC Tab 225; Wildeman Evidence, CA Transcript, Vol. 4, January 12, pp. 279:12-280:4, P&HC Tab 226.

¹⁴² **P-A-026**, Witness Statement of Mr. Chris Lincoln (“**Lincoln Statement**”), para 15, P&HC, Tab 227; **P-A-033**, Witness Statement of Mr. Ian Wagstaff (“**Wagstaff Statement**”), para 13, P&HC, Tab 228; **P-A-001**, Witness Statement of Alistair Pethick (“**Pethick Statement**”), paras 11-12, P&HC, Tab 229; **P-R-095**, Duncan Statement, paras 7, 9-10, P&HC, Tab 230; **P-R-104**, Paull Statement, paras 7 and 10, P&HC, Tab 231; **P-R-077**, Hebert Statement, paras 8, 10-11, P&HC, Tab 232.

¹⁴³ **CA-R-242**, Compilation of Additional Documents Added to the Agreed Book, P&H Read-In Brief (056866), pp. 23-24, P&HC, Tab 233.

¹⁴⁴ See, e.g., *ibid.*

¹⁴⁵ **P-R-116**, Heimbecker Statement, para 74, P&HC, Tab 234.

¹⁴⁶ **P-R-116**, Heimbecker Statement, para 74, P&HC, Tab 235; Brooks Evidence, P Transcript, Vol. 2, January 7, pp. 204:17-2016:17 and **P-R-022**, P&HC, Tab 236; Duncan Evidence, CB Transcript, Vol. 5, January 13, pp. 116:20-117:8 and **CB-A-098**, P&HC, Tab 237; Heimbecker Evidence, CB Transcript, Vol. 6, January 14, pp. 192:7-17, 205:23-206:7, 218:24-219:2, 219:22-220:2, 224:19-25, 251:17-252:13 and **CB-A-124** and **CB-A-126**, P&HC, Tab 238; Heimbecker Evidence, CB Transcript, Vol 7, January 15, pp. 424:15-428:11, P&HC, Tab 239; **CB-A-134**, Read-in Brief of the Commissioner of Competition, Answers to Undertakings (Tab D), p. 545 (UT#22) and **P-R-116**, Heimbecker Statement, para 74, P&HC, Tab 240; Heimbecker Evidence, CB Transcript, Vol 7, January 15, pp. 433:24-435:20 and **P-A-148**, P&HC, Tab 241.

108. The evidence also shows that the term “basis” is commonly used in the grain industry and that it merely refers to the difference between two values. For example, Harvey Brooks testified that “basis” (or, more particularly, “export basis”) can refer to the difference between the cash price the export customer pays P&H at its port terminal and the cash price P&H pays farmers for their grain at an in-country Elevator.¹⁴⁷ As Dr. Brooks’ testimony confirmed, export basis is not equal to the price of “grain handling services” as it is defined by the Commissioner’s expert Dr. Miller.¹⁴⁸ In particular, Dr. Brooks includes more costs for grain companies’ purchases from farms than does Dr. Miller, including “rail transportation to port, terminal elevation and vessel loading”, plus what Dr. Brooks refers to as “an undefined risk premium and any profits captured by the grain elevator company” and the railway companies.¹⁴⁹

109. The evidence before the Tribunal also establishes the following facts regarding the basis:

- When P&H contracts to acquire grain from farms, this basis appears on the contract as the “basis price”. Although the default contract template puts a “\$” before this amount, it is neither a “price” nor is it necessarily denoted in a currency;¹⁵⁰
- Farmers may have regard to the basis because it is relatively more stable than the futures price (and hence the cash price), and therefore provides a relatively stable way for farmers to compare offers across Elevators in *very short windows* when futures (and hence cash) prices are moving rapidly.¹⁵¹ As noted above, however, ultimately it’s the cash price – which is the total amount the farmer receives in his pocket for his grain – that drives when and to whom to sell. Farmers may enter into basis contracts – which lock in a posted basis while leaving the futures price to be set later – when they anticipate a possible futures price rally that may enable them to obtain a high

¹⁴⁷ Brooks Evidence, P Transcript, Vol. 2, January 7, pp. 204:17-2016:17 and **P-R-022**, P&HC, Tab 242.

¹⁴⁸ Brooks Evidence, P Transcript, Vol. 2, January 7, pp. 204:17-2016:17, 215:9-15 and **P-R-022**, P&HC, Tab 243.

¹⁴⁹ **P-A-014**, Witness Statement of Mr. Harvey Brooks, para 9 and p. 19, P&HC, Tab 244; Brooks Evidence, P Transcript, Vol. 2, January 7, pp. 215:16-218:2 and **P-A-014** (para 9), 219:2-221:25, P&HC, Tab 245; Heimbecker Evidence, CA Transcript, January 15, pp. 435:21-436:18, P&HC, Tab 246; **CB-A-151**, P&H Email Subject: CWRS Protein Spreads, dated August 29, 2017 and **CB-A-155**, Competitor Protein Spreads, P&HC, Tab 247.

¹⁵⁰ Heimbecker Evidence, CB Transcript, Vol. 7, January 15, p. 426:4-25; **CB-A-134**, Read-in Brief of the Commissioner of Competition, Answers to Undertakings (Tab D), p. 545 (UT#22), P&HC, Tab 248.

¹⁵¹ Heimbecker Evidence, CB Transcript, Vol 6, January 14, p. 238:2-24, P&HC, Tab 249; **CB-A-134**, Read-in Brief of the Commissioner of Competition, Letter dated August 20, 2020 (Tab H), p. 626, #8, P&HC, Tab 250.

cash price if the market peaks;¹⁵²

- Industry participants commonly refer to the basis as a means of describing the cash price;¹⁵³
- Consistent with the evidence that it is the cash price that drives their decision of when and whom to sell, the vast majority of pricing-related communications by P&H to farmers (and by farmers with P&H and LDC) refer only to the cash price and make no mention of basis;¹⁵⁴ and
- Over 40% of commodities (i.e., types of grain) grown in Western Canada, including amber durum, barley, flax and peas, have no futures price and therefore no basis. As Mr. Heimbecker confirmed, despite the fact that these commodities have no basis, P&H uses the very same Workback Algorithm that it uses to set its cash prices for wheat and canola to set the cash prices for these non-basis commodities.¹⁵⁵

RELEVANT GEOGRAPHIC MARKET IS BROADER THAN ONLY THE MOOSOMIN, VIRDEN AND FAIRLIGHT ELEVATORS

Farmers Sell their Grain to More Elevators than Only Moosomin, Virden and Fairlight

110. The Commissioner argues that the relevant geographic market includes only three Elevators: Moosomin, Virden and Viterra's Fairlight Elevator. The Commissioner's expert refers to a geographic area defined as the "union of the 90% service areas" around these three Elevators. However, the transactions data collected by the Commissioner, the contemporaneous business documents, the testimony of the farmers witnesses and the Miller Report itself all clearly show that farmers within the area surrounding the Moosomin, Virden and Fairlight Elevators can and do regularly sell their grain to more Elevators and crushers than those three Elevators alone.

111. P&H would only have market power in the purchase of wheat and canola from farmers in the

¹⁵² **P-R-116**, Heimbecker Statement, para 97, P&HC, Tab 251; **P-R-077**, Hebert Statement, para 16, P&HC, Tab 252. Mr. Heimbecker testified that basis contracts are rare: Heimbecker Evidence, CB Transcript, Vol 7, January 15, p. 355:22-25, P&HC, Tab 252A.

¹⁵³ P&H and LDC documents also that staff consistently refer to the cash price or refer to the basis as a means of describing the cash price: see, e.g., **CB-A-134**, Read-in Brief of the Commissioner of Competition, Tabs 34, 44, 49, 63, 65, 67, 77 and 78, pp. 725-26, 781-82, 791-92, 824, 827-28, 831, 836-37 and 838, P&HC Tab 253. See also Heimbecker Evidence, CB Transcript, Vol 7, January 15, p. 346:10-17, P&HC, Tab 254.

¹⁵⁴ Heimbecker Evidence, CB Transcript, Vol 7, January 15, pp. 428:12-430:11 and **P-R-116**, Heimbecker Statement, para 61, P&HC, Tab 255. As the emails put to Mr. Heimbecker on discovery by Commissioner's counsel make clear, when farmers communicate with P&H regarding price they do so overwhelmingly with reference to the cash price (and almost never the basis): see **CB-A-134**, Read-in Brief of the Commissioner of Competition, Tabs 19, 22, 40, 53, 55, 56, 69, 71, 83 and 89, pp. 710, 712-14, 777, 795-97, 799, 800, 832, 833-34, 845 and 869, P&HC, Tab 256.

¹⁵⁵ Heimbecker Evidence, CB Transcript, Vol 7, January 15, 2021, pp. 430:15-431:16, P&HC, Tab 257.

area surrounding the Moosomin, Virden and Fairlight Elevators if the farmers in this area have few effective alternative buyers for their grain. That is not the case. There are many rival Elevators and crushers to which farmers within the area sell their grain. Exhibit P-R-249 maps the many Elevators and canola crushers surrounding the Moosomin, Virden and Fairlight Elevators.¹⁵⁶ In this regard, as detailed below, both the Commissioner and the Miller Report cherry-pick emails to support the Commissioner's relevant geographic market, while ignoring that the documentary evidence in this case confirms that the Moosomin and Virden Elevators refer to pricing at many rival Elevators beyond one another..¹⁵⁷

112. The record is also clear that farmers are not beholden to their closest Elevator such that the nearest Elevator can exploit its location advantage to that farmer by paying less to a nearby farmer for his grain than the Elevator pays to more distant farmers.¹⁵⁸

113. The Commissioner called three farmers as witnesses who are claimed to be representative. These witnesses accounted for about 0.7% of Moosomin and Virden's combined canola purchases and about 1.1% of their combined CWRS purchases in the last three crop years.¹⁵⁹ As detailed below, the Commissioner's farmer witnesses testified to making wheat and canola sales to numerous Elevators and crushers beyond Moosomin, Virden and Fairlight. So too did the farmer witnesses called by P&H¹⁶⁰ -

¹⁵⁶ **P-R-249**, Map with Farmer Witnesses, Elevators and Crushers and Canadian Rail Lines, P&HC, Tab 258.

¹⁵⁷ **CA-R-181**, Sanderson Report, para 81, P&HC, Tab 259.

¹⁵⁸ As shown in Figures 7-14 to the Sanderson Report, the number of Elevators and crushers to which farmers can sell their grain is similar throughout Western Canada: **CA-R-181**, CA Sanderson Report, Figures 26 to 29, P&HC, Tab 260.

¹⁵⁹ These percentages were calculated using the total sales of wheat and canola by Messrs. Pethick (and his brother Darren), Wagstaff and Lincoln to Virden and Moosomin in the last three crops years (as reflected in **CA-R-006**, Excel Table Summarizing Purchases of Grain from Pethick Farms, Summary, **CA-R-027**, Chris Lincoln Deliveries 2016-2019, Summary, **CA-R-034**, Ian Wagstaff Deliveries 2016-2019, Summary, P&HC, Tab 261) divided by total purchases by Virden and Moosomin over the same period (as reflected in the Virden and Moosomin transactions data provided to the Commissioner: see **CA-R-187**, USB Key Containing Back-up Documents to the Expert Report of Ms Margaret Sanderson). Following his testimony, Mr. Lincoln revised his annual crop production, as stated in his witness statement, from 155,000 bu (3,515 MT) of canola and 301,000 bu (8,192 MT) of CWRS to between 4,648 and 8,695 MT of canola and between 2,898 and 3,642 MT of CWRS: **CB-A-025**, Witness Statement of Mr. Chris Lincoln ("**Lincoln Statement**"), para 16, P&HC, Tab 262; **CA-A-203**, Chris Lincoln Compendium, Chris Lincoln Fwd TPA- 4237486 – Canola – Fairlight – Lincoln Farms Ltd – signed (057160) and Chris Lincoln FW PH – Hearing (057161), P&HC, Tab 263; **CA-R-027**, Chris Lincoln Deliveries 2016-2019, P&HC, Tab 264. Similarly, Mr. Wagstaff revised his estimates, as set out in his witness statement, from 70,000 bu (1,905 MT) of CWRS and 30,000 bu (680 MT) of canola to 932 MT of CWRS and 364 MT of canola: **P-A-033**, Witness Statement of Mr. Ian Wagstaff ("**Wagstaff Statement**"), paras 6 and 15, P&HC, Tab 265; Wagstaff Evidence, CA Transcript, Vol. 3, January 11, p. 142:19-23, P&HC, Tab 266; **CA-A-201**, Ian Wagstaff Compendium, Wagstaff Response to Tribunal Questions Jan 11 (057177), Response 1, P&HC, Tab 267.

¹⁶⁰ **P-R-104**, Paull Statement, paras 22 and 23, P&HC, Tab 268. See also Paull Evidence, CB Transcript, Vol. 5, January 13, pp. 127:6-129:13, P&HC, Tab 269. Paull Evidence, CB Transcript, Vol. 5, January 14, pp. 492:22-494:20, P&HC, Tab 270, Paull Evidence, CB Transcript, Vol. 5, January 13, pp. 140:13-153:23, P&HC, Tab 271, and **CB-A-111**, P&HC, Tab 272 (discussing cash price and transportation cost comparisons between Altona and Virden); **CA-R-242**, Compilation of Additional Documents Added to Agreed Book, Ed Paull Email Read In (100236), pp. 545-49, P&HC, Tab 273; **P-R-077**, Hebert Statement, paras 19, 21, 22 and 25, P&HC, Tab 274; Hebert Evidence, P Transcript, Vol. 5, January 13, pp. 432:9-

each of whom is in the “corridor” identified by the Commissioner as allegedly comprising the most affected farmers.¹⁶¹

114. More particularly, with respect to the Commissioner’s farmer witnesses, the evidence established the following:

- Chris Lincoln has sold his wheat and canola to Fairlight,¹⁶² Virden, the LDC crush plant in Yorkton,¹⁶³ Richardson crush plant in Yorkton¹⁶⁴ the Bunge Harrowby crush plant,¹⁶⁵ Ceres Northgate¹⁶⁶ – to which he sold more than [REDACTED] of his canola crop this year¹⁶⁷ – and ADM Velva.¹⁶⁸ He has also delivered to Viterra Grenfell and Viterra Souris,¹⁶⁹
- Mr. Lincoln also confirmed that, with the exception of Fairlight, there are six Elevators that are a similar distance from or closer to his farms than many of the Elevators and crushers he has sold to; namely, Paterson Carnduff,¹⁷⁰ Richardson Whitewood, Viterra Carnduff,¹⁷¹ Cargill Elva,¹⁷² Viterra Souris East,¹⁷³ and Cargill Oakner;¹⁷⁴
- Ian Wagstaff has sold his wheat and canola to Richardson Kemnay,¹⁷⁵ Virden,¹⁷⁶ G3 Bloom¹⁷⁷

433:7, P&HC, Tab 275; Hebert Evidence, CA Transcript, Vol. 5, January 13, p. 338:14-341:4, P&HC, Tab 276; Hebert Evidence, CA Transcript, Vol. 5, January 13, p. 346:13-350:15, P&HC, Tab 277; Hebert Evidence, CA Transcript, Vol. 5, January 13, pp. 346:4-347:25, P&HC, Tab 278; Hebert Evidence, P Transcript, Vol 5, January 13, p. 453:16-25, P&HC, Tab 279; **P-R-095**, Duncan Statement, paras 17-20, P&HC, Tab 280.

¹⁶¹ **CA-R-242**, Compilation of Additional Documents Added to the Agreed Book, P&H Read-In Brief (056866), pp. 72 (#2), 73 (#4), 83 and 85, P&HC, Tab 281.

¹⁶² Lincoln Evidence, P Transcript, Vol. 2, January 7, p. 268:16-22, P&HC, Tab 282.

¹⁶³ Lincoln Evidence, P Transcript, Vol. 2, January 7, pp. 268:23-269:14, P&HC, Tab 283.

¹⁶⁴ Lincoln Evidence, P Transcript, Vol. 2, January 7, p. 269:15-23, P&HC, Tab 284.

¹⁶⁵ Lincoln Evidence, P Transcript, Vol. 2, January 7, p. 271:13-22, P&HC, Tab 285.

¹⁶⁶ Lincoln Evidence, P Transcript, Vol. 2, January 7, pp. 271:25-272:7, P&HC, Tab 286.

¹⁶⁷ Lincoln Evidence, CA Transcript, Vol. 2, January 7, pp. 82:10-84:9, P&HC, Tab 287.

¹⁶⁸ Lincoln Evidence, P Transcript, Vol. 2, January 7, pp. 273:7-274:4, P&HC, Tab 288; **CB-A-025**, CB Lincoln Witness Statement at paras 8, 10 and 12; Lincoln Evidence, CA Transcript, Vol. 2, January 7, pp. 82:4-83:23, 86:21-87:14 and **CA-R-029**, P&HC, Tab 289; and **CA-R-027**, P&HC, Tab 290; Lincoln Evidence, CA Transcript, Vol. 2, January 7, pp. 71:10-72:4 and **CA-R-029** (pp. 17 and 21), P&HC, Tab 291. Mr. Lincoln also testified that he has sold canola to the Moosomin Elevator (46 km from his Maryfield farm and 67 km from his Wawota farm): Lincoln Evidence, CA Transcript, Vol. 2, January 7, pp. 85:24-86:20, Lincoln Evidence, P Transcript, Vol. 2, January 7, pp. 275:17-276:3 and **CA-R-029** (p. 18), P&HC, Tab 292.

¹⁶⁹ Pethick Evidence, CA Transcript, Vol. 1, January 6, 2021, pp. 19-20, **CA-R-004**, Purchase Receipts, 2018, P&HC, Tab 293.

¹⁷⁰ Lincoln Evidence, P Transcript, Vol. 2, January 7, pp. 269:24-270:6, P&HC, Tab 294.

¹⁷¹ Lincoln Evidence, P Transcript, Vol. 2, January 7, p. 272:8-20, P&HC, Tab 295.

¹⁷² Lincoln Evidence, P Transcript, Vol. 2, January 7, pp. 272:25-273:6, P&HC, Tab 296.

¹⁷³ Lincoln Evidence, P Transcript, Vol. 2, January 7, p. 274:5-15, P&HC, Tab 297.

¹⁷⁴ Lincoln Evidence, P Transcript, Vol. 2, January 7, pp. 274:16-24, P&HC, Tab 298.

¹⁷⁵ Wagstaff Evidence, P Transcript, Vol. 3, January 11, p. 296:7-11, P&HC, Tab 299.

¹⁷⁶ Wagstaff Evidence, P Transcript, Vol. 3, January 11, p. 295:8-13, P&HC, Tab 300.

¹⁷⁷ Wagstaff Evidence, P Transcript, Vol. 3, January 11, p. 296:12-20, P&HC, Tab 301.

and Moosomin.¹⁷⁸ He also sells his canola to Bunge Harrowby,¹⁷⁹ Bunge Altona.¹⁸⁰ While Mr. Wagstaff claimed in his witness statement that if he was “unable to sell his crop to P&H, [he] would have to drive *at least* an hour further to the next available elevator”,¹⁸¹ he confirmed on cross-examination that there are seven Elevators that are less than an hours’ drive from Virден or Moosomin; namely, Whitewood (28.7 minutes from Moosomin along the TransCanada), Cargill Oakner (38.9 minutes from Virден), Richardson Kemnay (43.7 minutes from Virден along the TransCanada), Viterra Binscarth and Paterson Binscarth (each 58.1 minutes from Moosomin) and Viterra Souris (51 minutes from Virден) and Cargill Elva (53.1 minutes from Virден);¹⁸²

- Alistair Pethick is closest to Moosomin (40km from his farm), yet he has sold wheat to Fairlight, (65km from his farm), Virден (70km from his farm) and Ceres Northgate which (200 km away from his farm).¹⁸³ Mr. Pethick has also sold 60 to 70% of his canola to the LDC crusher in Yorkton which is 160 km away from his farm.¹⁸⁴ The evidence also discloses that Mr. Pethick has sold canola to Bunge Harrowby, Richardson at Yorkton and ADM Velva.¹⁸⁵ While Ceres Northgate, LDC Yorkton, Richardson Yorkton, Bunge Harrowby and ADM Velva are much farther away from Mr. Pethick’s farm than either Virден or Moosomin, it is clear that they have offered cash prices high enough to justify the extra delivery costs;¹⁸⁶ and
- Mr. Pethick also confirmed that there are four Elevators that are closer to his farm than Ceres Northgate – namely Richardson Kemnay, Viterra Brandon, Viterra Souris East and Richardson

¹⁷⁸ Wagstaff Evidence, P Transcript, Vol. 3, January 11, pp. 296:21-297:3, P&HC, Tab 302.

¹⁷⁹ **P-A-033**, Wagstaff Statement, paras 7 and 9 P&HC, Tab 303; Wagstaff Evidence, P Transcript, Vol. 3, January 11, pp. 297:4-13, P&HC, Tab 304. He also sold Nexera canola to LDC Yorkton and Bunge Harrowby: Wagstaff Evidence, P Transcript, January 11, pp. 307:13-308:3, P&HC, Tab 305; Wagstaff Evidence, P Transcript, Vol. 3, January 11, pp. 307:11-308:3, P&HC, Tab 306.

¹⁸⁰ Wagstaff Evidence, P Transcript, Vol. 3, January 11, pp. 297:14-298:6, P&HC, Tab 307; Wagstaff Evidence, CA Transcript, Vol. 3, January 11, pp. 129:13-131:2, P&HC, Tab 308, and **CA-R-034 (Summary)**, P&HC, Tab 309.

¹⁸¹ **P-A-033**, Wagstaff Statement, para 8, P&HC, Tab 310.

¹⁸² Wagstaff Evidence, P Transcript, Vol. 3, January 11, pp. 300:13-302:2, 305:11-307:1, P&HC, Tab 311.

¹⁸³ **P-A-001**, Pethick Statement, para 8, P&HC, Tab 312. While Ceres Northgate is farther away, it has offered bid prices high enough to justify the extra delivery costs: see Pethick Statement, para 12, P&HC, Tab 313 Pethick Evidence, P Transcript, Vol. 1, January 6, pp. 112:18-113:5, P&HC, Tab 314.

¹⁸⁴ **P-A-001**, Pethick Statement, para 9, P&HC, Tab 315; Pethick Evidence, P Transcript, Vol. 1, January 6, pp. 113:20-114:10, P&HC, Tab 316.

¹⁸⁵ Pethick Evidence, CA Transcript, Vol. 1, January 6, pp. 29:18-30:21, 45:15–24 and **CA-R-006 (Summary)**, P&HC, Tab 317; Pethick Evidence, P Transcript, Vol. 1, January 6, pp. 105:10-16 and Exhibit 1 to P-A-001, P&HC, Tab 318.

¹⁸⁶ **P-A-001**, Pethick Statement, para 12, P&HC, Tab 319.

Whitewood.¹⁸⁷

115. More broadly, the evidence before the Tribunal (including the transactions data collected by the Commissioner) establishes that *all* farmers in the Commissioner's relevant geographic market and in the Commissioner's corridor within that geographic market, including each of the farmer witnesses, consistently sell to numerous Elevators and crushers beyond Virden, Moosomin and Fairlight. The evidence also establishes that they could easily switch to other Elevators and crushers without any negative financial impact on them in the event that P&H were to attempt to pay them less for their wheat or canola.¹⁸⁸

116. Elevators and crushers need to buy from many different farmers who are spatially dispersed because the farms that are closest to a single Elevator do not produce enough grain for all of that Elevator's or crusher's needs. A single farmer's trucking costs to a single Elevator or crusher will not determine purchase prices to buy grain from many farmers.¹⁸⁹ Instead, crushers and grain companies (including P&H) need to set purchase prices that are attractive to a broad set of farmers, who will have varying trucking costs to reach any one Elevator or crusher.¹⁹⁰

117. As a result, it is clear from the evidence, that trucking costs do not shield P&H from competition from more distant Elevators and crushers, nor do they artificially restrict the relevant geographic market to only containing Moosomin, Virden and Fairlight, even for farmers located between these three Elevators.

118. Farmer witnesses confirmed in their testimony that while transportation costs matter to farmers in deciding between competing Elevators and/or crushers, they don't limit the competitive alternatives

¹⁸⁷ Pethick Evidence, P Transcript, Vol. 1, January 6, pp. 107:19-112:3 and Exhibit 1 to P-A-001, P&HC, Tab 320. See also Compilation of Additional Documents Added to the Agreed Book, P&H Read-In Brief (056866), p. 115, P&HC, Tab 321; **CA-R-242**, Compilation of Additional Documents Added to Agreed Book, Agreed Statement of Facts re [REDACTED] and [REDACTED] (100234), p. 535, P&HC, Tab 322.

¹⁸⁸ Hebert Evidence, CA Transcript, Vol. 5, January 13, pp. 338:14-339:2, 339:12-341:4, 348:5-349:4 and 349:6-350:15; Lincoln Evidence, CA Transcript, Vol. 2, January 7, pp. 82:23-84:9, 85:11-86:19 and **CA-R-029** [contracts at pp. 18 and 22], P&HC, Tab 323. See also **CA-R-242**, Compilation of Additional Documents Added to the Agreed Book, P&H Read-In Brief (056866), pp. 52-54, 61-67 and 77 (#122), P&HC, Tab 324; **CA-R-242**, Compilation of Additional Documents Added to the Agreed Book, Interviewed Farmers Read-In (100237), pp. 551, 553, 554, 555, 556 and 558, P&HC, Tab 325; Paull Evidence, CB Transcript, Vol. 5, January 13, pp. 151:16-152:23 and 153:18-23, P&HC, Tab 326; **CA-R-242**, Compilation of Additional Documents Added to the Agreed Book, P&H Read-In Brief (056866), pp. 26-27, P&HC, Tab 327; **CA-R-242**, Compilation of Additional Documents Added to the Agreed Book, P&H Read-In Brief (056866), p. 558, P&HC, Tab 328.

¹⁸⁹ **CA-R-115**, CA Heimbecker Statement, para 126, P&HC, Tab 329.

available to farmers in the Commissioner’s relevant geographic market. This is so because rival Elevators and crushers consistently offer posted cash prices that are high enough to cover farmers’ hauling costs and make it worthwhile for them to sell to those Elevators and crushers.¹⁹¹

119. Similarly, while seasonal road restrictions may matter to farmers in deciding when and to which Elevators or crushers they should sell their wheat and/or canola,¹⁹² they don’t limit the competitive alternatives available to farmers in the Commissioner’s relevant geographic market because most farmers are seeding, not hauling, when restrictions are in effect or will plan their deliveries over the course of the crop year to avoid hauling when they are in effect.¹⁹³ Alternatively, if farmers choose to deliver when restrictions are operative, it is because grain companies are competing by offering higher cash prices to compensate farmers for any additional transportation costs associated with hauling more and/or smaller loads.¹⁹⁴ As one farmer who was interviewed by the Commissioner, but not called by him as a witness, told Bureau investigators in August 2020: “[t]he farmer joke is to wait until road bans – they (Fairlight) would adjust their basis to attract the grain”.¹⁹⁵

120. Despite those weight restrictions, Mr. Pethick testified that, in the last three years, on average, he’s sold an equal amount of his wheat and canola to Fairlight as he has to Moosomin, despite the fact that Fairlight is 25 km farther from his farm than the Moosomin Elevator.¹⁹⁶ Similarly, Mr. Lincoln testified that since November 2019, he’s sold all of his wheat and canola to the Fairlight Elevator.¹⁹⁷ In

¹⁹⁰ *Ibid* and **CA-R-181**, Sanderson Report, para 73, P&HC, Tab 330; Duncan Statement, para 25, P&HC, Tab 331; Paull Statement, para 28, P&HC, Tab 332; **CA-R-242**, Compilation of Additional Documents Added to Agreed Book, Ed Paull Email Read In (100236), pp. 545-49, P&HC, Tab 333; Hebert Statement, para 30, P&HC, Tab 334.

¹⁹¹ Paull Statement at para 25, P&HC, Tab 335; Hebert Statement at para 26, P&HC, Tab 336; Duncan Statement at para 21, P&HC, Tab 337; Hebert Evidence, P Transcript, Vol 5, January 13, p. 453:16-25, P&HC, Tab 338; **CA-R-242**, Compilation of Additional Documents Added to the Agreed Book, Interviewed Farmers Read-In (100237), pp. 556, P&HC, Tab 339; Lincoln Evidence, CA Transcript, Vol. 2, January 7, pp. 73:15-19, 75:15-19, 76:5-16, 122-23 and **CA-R-27**, Chris Lincoln Deliveries 2016-2019 (Summary), P&HC, Tab 340.

¹⁹² **P-A-033**, Wagstaff Statement, para 11, P&HC, Tab 341.

¹⁹³ Wagstaff Evidence, CA Transcript, Vol. 3, January 11, pp. 131:14-132:3, 132:19-24, P&HC, Tab 342; **CA-R-034**, Ian Wagstaff Deliveries 2016-2019, P&HC, Tab 343; **P-R-116**, Heimbecker Statement, para 127, P&HC, Tab 344.

¹⁹⁴ Lincoln Evidence, CA Transcript, Vol. 2, January 7, pp. 76:5-16, 122:24-123:23, P&HC, Tab 345; and **CA-R-27**, Chris Lincoln Deliveries 2016-2019 (Summary), P&HC, Tab 346; **CA-A-244**, Agreed Statement of Facts, para 171, P&HC, 347; Pethick Evidence, CA Transcript, Vol. 1, January 6, p 15-16 and **CA-R-004**, Purchase Receipts 2018; Pethick Evidence, CA Transcript, Vol. 1, January 6, 2021, pp. 20-21; Pethick Evidence, CA Transcript, Vol. 1, January 6, pp. 20:8-21:13, 26:7-27:4, P&HC, Tab 347; Geddes Evidence, CA Transcript, Vol. 4, January 12, pp. 316:6-317:7; P&HC, Tab 348.

¹⁹⁵ **CA-R-242**, Compilation of Additional Documents Added to the Agreed Book, Interviewed Farmers Read-In (100237), pp. 556, P&HC, Tab 349. Note also that certain farmers interviewed by the Commissioner but not called as witnesses by him raised concerns about road and hauling restrictions in respect Moosomin and/or Virden: see **CA-R-242**, Compilation of Additional Documents Added to the Agreed Book, Interviewed Farmers Read-In (100237), pp. 554, 556 and 558, P&HC, Tab 350.

¹⁹⁶ **P-A-001**, Pethick Statement at para 8, P&HC, Tab 351.

¹⁹⁷ **P-A-026**, Lincoln Statement at para 8, P&HC, Tab 352.

2018, he sold 80% of his wheat and canola to Fairlight.¹⁹⁸ More broadly, the transactions data collected by the Commissioner establishes that, despite seasonal road restrictions, in 2018-2019, Viterra Fairlight and Cargill Oakner (which was also identified as being located on a weight restricted road¹⁹⁹) were the [REDACTED] purchasers, respectively, of wheat from farmers in the Commissioner's relevant geographic market.²⁰⁰ Similarly, Viterra Fairlight was the [REDACTED] purchaser of canola from those farmers.²⁰¹

121. Finally, while road conditions matter to some farmers in deciding which Elevators or crushers they should sell their wheat and/or canola, they don't limit the competitive alternatives available to farmers in the Commissioner's relevant geographic market. For example, while Mr. Pethick described a steep hill on the road from his farm to Bunge Harrowby which he said can add time to the journey,²⁰² Bunge Harrowby is [REDACTED] of canola from farmers in the Commissioner's relevant geographic market.²⁰³

122. The Miller Report diversion results (see Exhibit 11) also confirm the anecdotal evidence. Distance (and hence trucking costs) between individual farms and Elevators was included in Dr. Miller's farm choice model which found that Virden would lose [REDACTED] of its CWRS sales to rival Elevators *other than Moosomin and Fairlight*, and Moosomin would lose [REDACTED] of its canola sales to rival Elevators and crushers, *other than Moosomin and Fairlight*. Similarly, the Miller Report found Moosomin would lose [REDACTED] of its CWRS sales to rival Elevators *other than Virden and Fairlight* and [REDACTED] of its canola to rival Elevators and crushers *other than Virden and Fairlight*.²⁰⁴

Farmers in the Area Surrounding the Moosomin, Virden and Fairlight Elevators Have Access to [REDACTED] Elevators and Crushers as Exists in Other Parts of Western Canada

123. In sum, the evidence is clear that the relevant geographic market should properly include current purchasers, which the transaction data collected by the Commissioner, the diversions in the Miller Report, contemporaneous business records of P&H and LDC,²⁰⁵ ²⁰⁶ and the testimony of Mr.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid* at para 11, P&HC, Tab 353.

²⁰⁰ CA-R-183, Slides of Ms Margaret Sanderson, p. 79, P&HC, Tab 354.

²⁰¹ CA-R-183, Slides of Ms Margaret Sanderson, p. 77, P&HC, Tab 355.

²⁰² Pethick Evidence, P Transcript, Vol. 1, January 6, pp. 125:17-126:18, P&HC, Tab 356.

²⁰³ CA-R-183, Slides of Ms Margaret Sanderson, p. 77 and Figures 10 and 13, P&HC, Tab 357.

²⁰⁴ CA-A-170, Miller Report, Exhibit 11, P&HC, Tab 358; CA-R-181, CA Sanderson Report, Figure 50, P&HC, Tab 359.

²⁰⁵ CA-R-238, Compilation of Documents Listed in Exhibit B to Ms. Sanderson's Expert Report (Confidential – Level A): [REDACTED]

Heimbecker²⁰⁷ and the farmer witnesses (including the Commissioner's farmer witnesses), clearly show the relevant geographic market cannot be properly limited to only include Moosomin, Virden and Fairlight. To the contrary, based on the evidence before the Tribunal, it should include (at least) [REDACTED]

[REDACTED]

THE ACQUISITION WILL NOT SUBSTANTIALLY LESSEN COMPETITION: P&H DOES NOT HAVE MARKET POWER IN THE PURCHASE OF WHEAT OR CANOLA FROM FARMERS IN THE AREA SURROUNDING THE VIRDEN, MOOSOMIN AND FAIRLIGHT ELEVATORS

Legal Framework

124. In order for a merger to be subject to a remedial order by the Tribunal, it is not enough to merely

[REDACTED]

See also **CA-R-242**, Compilation of Additional Documents Added to the Agreed Book, P&H Read-In Brief (056866), pp. 30-31, 36-39, 101-11, P&HC, Tab 361.

²⁰⁶ See, e.g., **CA-R-115**, CA Heimbecker Statement, Exhibits 23-27, P&HC, Tab 362; **CA-R-240**, Compilation of Miscellaneous Document, [REDACTED]

[REDACTED]

show that a likely or actual lessening of competition will result. Rather, under section 92(1) of the *Competition Act*, the Commissioner must adduce sufficiently clear, convincing and reliable evidence to demonstrate, on a balance of probabilities that competition has been, or is likely to be lessened substantially.²⁰⁸

Barriers to Entry and Expansion are Low

125. P&H's ability to exercise any alleged monopsony power would be constrained and thwarted by the expansion of existing Elevators' purchases and/or by new entry.²⁰⁹

126. The evidence on the record establishes that rival Elevators collectively have excess capacity (significantly in excess of the highest combined tonnage purchased by Virden and Moosomin in any single year in the last five years) and could easily increase their purchases of wheat and canola from farmers in the Virden/Moosomin area.²¹⁰ The Commissioner did not adduce (or obtain) any evidence as to excess capacity nor did he challenge the evidence put forward by P&H in this regard.

127. Similarly, while their excess capacity makes it unnecessary, the uncontroverted evidence from Mr. Heimbecker with respect to the timing and cost of P&H's own capacity and throughput expansions makes it clear that rival Elevators could add grain purchasing capacity of significant scale and scope, both quickly and easily.²¹¹ More particularly, as detailed by Mr. Heimbecker, P&H has been able to complete rail and storage expansions at several of its Elevators in nine months or less. In each case, those projects significantly increased throughput capacity at the facility in question.²¹²

128. As for new entry, the record establishes that a rival grain company could timely build a new

²⁰⁷ **CA-R-115**, CA Heimbecker Statement, paras 118-27, P&HC, Tab 364; Heimbecker Evidence, CB Transcript, Vol. 7, January 15, p. 433:1-17, P&HC, Tab 365.

²⁰⁸ *Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 [VAA] at paras 639, 646 and 803-807, P&HC, Tab 366, citing *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 [*Tervita SCC*] at para 65, P&HC, Tab 367, *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 [*TREB FCA*] at para 87, P&HC, Tab 368, *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233 [*Canada Pipe FCA*] at para 58, P&HC, Tab 369; *Hillsdown* at paras 116-117, 119, 125 and 127, P&HC, Tab 370; see also *Director of Investigation and Research v Imperial Oil Ltd*, [1990] CCTD 1 at para 218 (Comp Trib) [*Imperial Oil*], P&HC, Tab 371.

²⁰⁹ MEGs at para 7.1, P&HC, Tab 372.

²¹⁰ **CA-R-115**, CA Heimbecker Statement, paras 141-51 and Exhibits 35 and 36, P&HC, Tab 373; McQueen Evidence, P Transcript, Vol 3, January 11, pp. 317-22, P&HC Tab 374; McQueen Evidence, P Transcript, Vol 3, January 11, p. 323 and **P-R-043**, P&HC, Tab 375; McQueen Evidence, P Transcript, Vol 3, January 11, pp. 325-27 and **P-R-044**, P&H, Tab 376; Wildeman Evidence, P Transcript, Vol 4, January 12, pp. 391-95 and **P-R-043 & P-R-044**, P&HC, Tab 377; *Canada Grain Regulations*, CRC, c 889, sections 26 and 27, P&HC, Tab 378.

²¹¹ **CA-R-115**, CA Heimbecker Statement, paras 152-55, P&HC, Tab 379.

²¹² **CA-R-115**, CA Heimbecker Statement, paras 152-55, P&HC, Tab 380.

Elevator in the Virden/Moosomin area to thwart an attempt by P&H to exercise monopsony power. More particularly, the evidence with respect to entry is as follows:

- the cost associated with building a new Elevator (which in P&H’s experience range between [REDACTED] and between [REDACTED] is not an impediment to entry by the large and, in most cases, multinational corporations competing in the grain industry. Any claim to the contrary is contradicted by the fact that at least 20 new high throughput Elevators have been built in Western Canada since 2015, including ten G3 Elevators,²¹⁴ two P&H Elevators, one Ceres Elevator and four GrainsConnect Elevators;²¹⁵
- P&H’s experience constructing greenfield Elevators shows that a motivated competitor could build a new Elevator in the Virden/Moosomin area in approximately 18 months.²¹⁶ Mr. Heimbecker’s testimony in this regard was not challenged by the Commissioner; and
- Although the transactions data collected by the Commissioner confirm that [REDACTED] the Reply Witness Statement from Mr. Malkoske indicates that G3 is a motivated competitor and, more particularly, that constructing a new Elevator in the Virden/Moosomin area “[REDACTED] [REDACTED].²¹⁷ While Mr. Malkoske has indicated that it [REDACTED],²¹⁸ that estimate should be discounted by the Tribunal in light of G3’s clear commercial interest in purchasing either the Virden or Moosomin Elevator in the event that a divestiture order was made by the Tribunal²¹⁹ and given the absence of any documents from G3 corroborating that purported timeline.²²⁰

²¹³ CA-R-115, CA Heimbecker Statement, paras 157-58, P&HC, Tab 381.

²¹⁴ CB-A-048, Witness Statement of Mr. Brett Malkoske, para 7 (“Malkoske Statement”), P&HC, Tab 382. As Mr. Malkoske notes in his Witness Statement (at para 7), G3 is also “currently constructing three additional elevators in Alberta (Irricana, Stettler County and Vermillion) and one in Saskatchewan (Swift Current)”.

²¹⁵ CA-R-242, Compilation of Additional Documents Added to the Agreed Book, Grain Elevators in Canada – Crop Year 2016-2017 (100215) (Table 6), pp. 140-42, Grain Elevators in Canada – Crop Year 2019-2020 (100218) (Table 6), pp. 350-54, GrainsConnect Canada has Arrived in East Central Alberta (100224), GrainsConnect high-speed terminal in Vegreville now open (100225), P&HC, Tab 383; CA-R-115, CA Heimbecker Statement, Exhibit 35, p. 2760 (Northgate), P&HC, Tab 384.

²¹⁶ CA-R-115, CA Heimbecker Statement, paras 156-59, P&HC, Tab 385

²¹⁷ CB-A-050, Reply Witness Statement of Mr. Brett Malkoske (“Reply Malkoske Statement”), para 5, P&HC, Tab 386.

²¹⁸ CB-A-048, Malkoske Statement, para 8, P&HC, Tab 387.

²¹⁹ CB-A-050, Reply Malkoske Statement, para 4, P&HC, Tab 388; Malkoske Evidence, CB Transcript, Vol. 4, January 12, pp. 55:3-56:6, P&HC, Tab 389; Malkoske Evidence, CA Transcript, Vol. 4, January 12, pp. 238:19-239:24, P&HC, Tab 390.

P&H Has Made Virden a Vigorous and Effective Competitor

129. The acquisition does not remove a vigorous and effective competitor. To the contrary, the evidence establishes that because it had limited (in Vancouver) or no (in Thunder Bay) export terminal access and a small network, LDC was not utilizing the Virden Elevator to its full potential and, more generally, was hindered in its ability to compete effectively in Canada (with the result that it ultimately decided to exit the market).²²¹ This is confirmed by an [REDACTED]

130. As Mr. Heimbecker testified, since completing the Transaction in December 2019, P&H has sought to maximize throughput and capacity utilization at the former LDC Elevators,²²³ including Virden, leveraging its superior port terminal access and larger network, with the result that for FY2020-2021, P&H is forecasting an increase in the 12-month turn rate for the ten LDC Elevators and has increased Virden's CWRs and canola purchases by [REDACTED] respectively, over the ten months ended October 31, 2020, compared to the ten months ended October 31, 2019.²²⁴

The Transaction (and Acquisition) Enhances Non-Price Competition

131. Since the acquisition, P&H has increased the different types of grain purchased at Virden. The evidence on the record establishes that when it was owned by LDC, the Virden Elevator did not buy commodities other than canola and mainly 1 CWRs 13.5. As a result of the acquisition, however, Virden (like all of the other Elevators in the P&H network in western Canada) now buys all commodities/grains (including barley, oats, flax, and feed wheat), all protein levels and all moisture levels of wheat. Hence, P&H's Acquisition of the Virden Elevator has *expanded* and *increased* demand (and competition) for farms' wheat and other commodities in the Virden and Moosomin area.²²⁵

²²⁰ CA-R-053, G3's Response to the Competition Bureau RFI, P&HC, Tab 391; Malkoske Evidence, CB Transcript, Vol. 4, January 12, pp. 49:21-50:6, P&HC, Tab 392; Malkoske Evidence, CA Transcript, Vol. 4, January 12, pp. 243:4-244:11, P&HC, Tab 393.

²²¹ CA-R-115, CA Heimbecker Statement, paras 46-50, P&HC, Tab 394; CA-R-121, CA Reply Heimbecker Statement, paras 5-16, P&HC, Tab 395.

²²² CA-R-240, Compilation of Miscellaneous Documents, LDC email re Canada call with LDCH board dated August 29, 2019 (056527), p. 248, P&HC, Tab 396.

²²³ CA-R-121, CA Reply Heimbecker Statement, para 7, P&HC, Tab 397.

²²⁴ CA-R-121, CA Reply Heimbecker Statement, para 12, P&HC, Tab 398; CA-R-115, CA Heimbecker Statement, para 50, P&HC, Tab 399. See also P-R-104, Paull Statement, para 27, P&HC, Tab 400; CB-R-167, P&H Shipped Tonnage Budget Fiscal 2021, P&HC, Tab 401; Heimbecker Evidence, CB Transcript, Vol. 7, January 15, pp. 438:23-442:6, P&HC, Tab 402.

²²⁵ CA-R-115, CA Heimbecker Statement, paras 172-73, P&HC, Tab 403; P-R-095, Duncan Statement, para 23, P&HC, Tab 409.

Additionally, P&H is investing in crop inputs at Virden (which prior to the Acquisition was a pure grain facility), further expanding the services available there.²²⁶

132. All of these are enhancements to competition at Virden that are non-price related.

The Purported Connection between the Scope and Timing of the Moosomin Expansion and the Alleged Anti-Competitive Effects of the Acquisition is Spurious

133. Dr. Miller’s suggestion that “P&H has restructured, downsized, and postponed its proposed railcar expansion at the Moosomin Elevator (‘Moosomin expansion’), which may be a manifestation of the Acquisition’s effect on competition”²²⁷ is directly contradicted by the evidence on the record.

134. As a matter of prudent financial management in light of the fact that it was spending more than [REDACTED] to purchase the Louis Dreyfus Elevators, in late 2019, P&H decided to postpone *all* capital expenditures, including the Moosomin expansion, for a period of one year.²²⁸

135. Mr. Heimbecker confirmed in his testimony that, subject to the outcome of this Application (as a result of which P&H could potentially be ordered to divest the Moosomin Elevator), [REDACTED]

EFFICIENCIES

136. Based on the separate but equal objective in the *Act*, “to expand opportunities for Canadian participation in world markets” competition in domestic markets does not outweigh a consideration of a net increase in exports in international markets that may result from the transaction. The entire analysis under the merger provisions must respect these separate but equal objectives. Therefore, while the ordinary focus may be competitive effects in domestic markets, limiting the analysis to this focus when exports are an issue that arise in the facts of this case would in essence ignore the statutory intent of Parliament. Clearly in this case the evidence is uncontroverted that the purpose and effect of the transaction is to increase export sales by P&H.

²²⁶ CA-R-115, CA Heimbecker Statement, paras 39 and 55, P&HC, Tab 404; CA-A-244, Agreed Statement of Facts, paras 76-80, P&HC, Tab 405.

²²⁷ P-A-170, Miller Report, para 143, P&C, Tab 406.

²²⁸ CA-R-115, CA Heimbecker Statement, paras 128-38 and Exhibits 29 to 34, P&HC, Tab 407.

²²⁹ CA-R-115, CA Heimbecker Statement, para 138, P&HC, Tab 408.

137. While it is submitted that s.96 specifically refers to and mandates a consideration of efficiencies that give rise to exports, it does not limit the import solely to an efficiencies examination.

138. Pierre Blais, the Parliamentary Secretary to the Minister of Agriculture, made the following comment regarding efficiencies that give rise to increased exports in 1986:

One job out of three depends on international trade. This is why when a merger would greatly improve efficiency, thereby increasing exports or substitutions to imports, the Tribunal will have to authorize it. For Canada, Mr. Speaker, international trade is practically a matter of life and death. Through our domestic market of 26 million people, we enjoy the standard of living of an economic superpower. To maintain this enviable position, we must succeed as a trading nation. Out of every dollar of our national income, nearly 30 cents come from sales to foreign countries. That is a lot. These sales to foreign countries are responsible for over 3 million jobs in Canada. Let us not forget it.²³⁰

139. Important issues of first instance emerge in this case with respect to the section 96 analysis. The analysis of efficiencies claims to date have been under sections 96(1) and 96(3). In this case the delineation of the efficiencies consideration invokes both the traditional analysis as the case is defined by the Commissioner, but also the intersection of exports under section 96(2) to the analysis as the case is defined by the Respondent.

140. This case requires a first instance consideration of exports under section 96(2) and the relationship of the 4-part analysis traditionally undertake under sections 96(1) and 96(3).

141. There are three interpretations that can arise regarding the intersection of exports under section 96(2) and the traditional analysis under section 96(1):

- That consideration of efficiencies related to exports is subsumed under the section 96(1) analysis. This would mean that all of the tests traditionally applied under section 96(1) would be applied to exports examined under s. 96(2);
- That consideration of exports under section 96(2) is a separate consideration which would not confine the consideration of those efficiencies only arising in the local or domestic markets. Any efficiencies arising either domestically or in export markets that lead to a 'significant' increase in exports has to be separately considered under this interpretation. In this interpretation, the efficiency gains that lead to significant increases in the real value of exports would not be subsumed in the section 96(1) analysis, including the offset test and the counterfactual 'but for' test; and
- That section 96(2) only deals with efficiency gains that lead to increases in the real value of exports and that exports *per se* should be considered under the broader analysis under section 92 and 93 of

²³⁰ Bill C-91 Debates, P&HC, Tab 410.

the *Act*.

142. Clear support for the interpretation that section 96(2) analysis is separate from section 96(1) comes from comments of the SCC in *Tervita* where it was stated: “In the context of the relatively small Canadian economy, to which international trade is important, the efficiencies defence is Parliamentary recognition that, **in some cases, consolidation is more beneficial than competition.**”²³¹ [emphasis added]

143. In the end, the interpretation must accord with Parliamentary intent with respect to the analysis of mergers, including the analysis of efficiency gains. As noted, it the clear the Parliamentary intent with respect to exports is two fold. Firstly, that mergers should be assessed “in such a way as to encourage competition between Canadian businesses at home in Canada, without putting them at a disadvantage when carrying out business dealings in international markets”. This the overall balance between two separate but equal objectives of the *Act*. Secondly, “when a merger would greatly improve efficiency, thereby increasing exports or substitutions to imports, the Tribunal will have to authorize it”. This is a focus on efficiencies that lead to increased exports, as distinct from the more general consideration.

144. Both the more general consideration of exports and efficiencies that will lead to increased exports are invoked in this case. Increased throughput to the export terminals is the uncontroverted objective of the transaction. The increased capacity utilization of FGT is a clear and ‘cognizable’ efficiency that it has “been brought about”, making any speculation about whether it is “likely” inappropriate and particularly not within the ambit of expert opinion where the expert is not qualified to provide an opinion as an industry expert and can provide no evidence with respect to the grain industry which is not hearsay or otherwise directly observable by the Tribunal itself. This is also not a mere pecuniary benefit as disqualified under section 96(3). Increased throughput to the export facility of P&H is a more efficient utilization of an asset in the purest sense.

145. The evidence establishes that the Elevators that were acquired will be capable at full utilization to fill the 4 million metric tonnes of capacity at the FGT.²³² This capacity utilization represents a 9% increase in export sales capacity at the west coast and approximately 6.5% of total Canadian export

²³¹ *Tervita ibid.*, at pp. 15-17.

²³² **CA-R-115**, CA Heimbecker Statement, Exhibit 33, LDC Invitation to Submit Indication of Interest, pp. 2592, 2594, 2596, 2598, 2600, 2602, 2604, 2606, 2608, and 2610, P&HC, Tab 411; **CA-R-242**, Compilation of Additional Documents Added to the Agreed Book, “The Western Producer – Grain trains: new models are bigger, haul more” (100277), pp. 1686-87, P&HC, Tab 412.

capacity.²³³ The contribution of the LDC Elevators to export sales pre-acquisition was 1.2 million MT. At full capacity, within the P&H network, these Elevators will add 2.2 million MT of export throughput to FGT for a net increase of 84%.²³⁴ Hence the transaction as a whole clearly leads to a significant increase in the real exports of grain within the meaning of section 96(2).

146. This focus on exports does not mean that P&H does not have a claim of efficiency gains in the local input market as well. With respect to this efficiency gain, P&H meets of the criteria in sections 96(1) and 96(3). The ‘offset’ test efficiencies at the Virden elevator that have been achieved are [REDACTED]²³⁵ as compared to the purported value of the anti-competitive effects, as assessed by Dr. Miller as [REDACTED] for canola and [REDACTED] for wheat.²³⁶ However, as Ms. Sanderson testified, if proper account is taken of producer surplus transfers to rival Elevators and crushers outside Fairlight, Dr. Miller’s deadweight loss for canola becomes a [REDACTED], while his deadweight loss for wheat falls to [REDACTED].²³⁷

147. With respect to the counterfactual or ‘but for’ test, as noted by Mr. Harington, [REDACTED]²³⁸ That assessment is impossible in this case because the Commissioner did not provide the Tribunal, the expert witnesses or the Respondent with the evidence or data that would permit that analysis to be completed. Mr. Harington also testified that the same impediment applied to the disqualifying ‘redistribution of income’ test under section 96(3). However, the efficiencies claimed are not ‘merely pecuniary’ within the meaning of Superior Propane.

148. Mr. Harington suggests that the efficiencies claimed at the Virden elevator can only be recognized in one of two ways: “[REDACTED]”,²³⁹ or “[REDACTED]”

²³³ CA-R-242, Compilation of Additional Documents Added to Agreed Book, Canadian Grain Commission - Exports of Canadian and Wheat Flour - Crop Year 2019-2020 (100251), P&HC, Tab 413; CA-R-240, Compilation of Miscellaneous Documents, P&H created West Coast shipping summary (056878), P&HC, Tab 414.

²³⁴ CA-R-115, CA Heimbecker Statement, Exhibit 6, Elevator Turn Rates, P&HC, Tab 415; CA-R-242, Compilation of Additional Documents Added to the Agreed Book, “The Western Producer – Grain trains: new models are bigger, haul more” (100277), P&HC, Tab 416; CA-R-115, CA Heimbecker Statement, Exhibit 33, LDC Invitation to Submit Indication of Interest, P&HC, Tab 417; CA-R-238, Documents Listed in Exhibit B to Margaret Sanderson’s Expert Report, LDCCA Ticket Detail 2016-2018.xlsx (056549), P&HC, Tab 418; CA-R-115, CA Heimbecker Statement, para 7, P&HC, Tab 419.

²³⁵ CA-R-121, CA Reply Heimbecker Statement, Table 4, P&HC, Tab 420.

²³⁶ CA-R-183 Slides of Ms. Margaret Sanderson, p. 99, P&HC, Tab 421;

²³⁷ CA-R-183 Slides of Ms. Margaret Sanderson, p. 99, P&HC, Tab 422; CA-R-181, CA Sanderson Report, para 27, P&HC, Tab 423.

²³⁸ Harington Evidence, CA Transcript, Vol. 11, January 25, pp. 892:3-894:9, P&HC, Tab 424.

²³⁹ CA-A-196, CA Harington Report, para 113, P&HC, Tab 425.

[REDACTED]

[REDACTED].²⁴⁰ Mr. Harington opines that an increase in farmers' grain production is unlikely. He is not qualified to provide that opinion. The only evidence on this issue is the evidence of Dr. Brooks and Mr. Hebert, together with the evidence from Sask Wheat, the CGC and Statistics Canada which indicates that not only can farmers increase production they are in fact doing so. With respect to the second potential assessment identified by Mr. Harington, again that assessment is impossible in this case because the Commissioner did not provide the Tribunal, the expert witnesses or the Respondent with the evidence or data that would permit it to be completed.

149. The Respondent specifically reserved its right to raise issues with respect to the boundaries of Mr. Harington's evidence. The following paragraphs should be struck or given no weight by the Tribunal:

- **Opinions of law** - paragraphs 14, 15, 24-67, 70, 72 and 75-76 of the Harington Report should be struck or given no weight as constituting opinions of law related to statutory construction or the interpretation of case law. Mr. Harington cannot claim as he attempted to, that this is simply stating the framework under which he provided his opinion. The framework could have been succinctly stated without providing a legal opinion. It clearly reads like a memorandum of law or legal argument; and
- **Opinion evidence or hearsay related to the grain industry** - paragraphs 113,116-119, 127-130, 133, 135, 137-139 and 145 should be struck or given no weight as constituting lay opinion evidence with respect to the grain industry; in particular, lay opinion with respect to the 'likelihood' of an efficiency arising, the 'likelihood' of a competitor's ability to achieve the same efficiency or the 'likelihood' of the farmer's increased grain production. In this latter regard, he contradicts the evidence of a number of the farmers who testifies and the evidence of Dr. Brooks and Mr. Heimbecker who are lay witnesses that are able to provide opinion evidence relative to the grain industry within the bounds of the decision made in this proceeding.

150. The question of which party bears the legal burden (also known as the "ultimate" or "persuasive" burden) of establishing, on a balance of probabilities, whether the section 96 efficiencies exception is engaged is a matter of substantive law.²⁴¹ In *Tervita SCC*, the Supreme Court of Canada did not analyze this issue because the "parties [did] not take issue" with the issue of the appropriate burden.²⁴²

151. Close inspection of the critical *Superior Propane* decision on the burden of proof²⁴³ – demonstrates that the Federal Court of Appeal's decision to place the legal burden of proving the

²⁴⁰ CA-A-196, CA Harington Report, p. 51, footnote 159, P&HC, Tab 426.

²⁴¹ Sidney N. Lederman et al., *The Law of Evidence in Canada*, 5th ed., at s. 3.1 ("**Law of Evidence**"), P&HC, Tab 427.

²⁴² *Tervita SCC* at para 122, P&HC, Tab 428.

“ultimate issue” of the efficiency gains being greater than, and offsetting, any anti-competitive effects, was driven by two propositions. First, “the party who asserts, must prove the assertion”²⁴⁴. Second, “[t]he burden of proving a defence generally rests with the defendant”.²⁴⁵ However, *Superior Propane II* also held that it may be appropriate to allocate a burden where “one party is peculiarly situated to prove a fact”.²⁴⁶

LEGAL AND EVIDENTIARY BURDEN

152. It is well-established that where the party who bears the burden is not the party best situated to adduce the evidence because “the facts lie particularly within the knowledge” of the other party, then “very little affirmative evidence” may be required by the party with the burden to create an inference in its favour. It then falls on the other party to decide whether to respond. In the absence of evidence to the contrary by the party with particular knowledge of the facts, the inference may be drawn.²⁴⁷

153. The failure of a party to elicit evidence that was within its power to have produced may be considered as a matter of evidentiary weight and can lead to an adverse inference being drawn against it. In *R. v. Jolivet*,²⁴⁸ the Supreme Court of Canada endorsed the “general rule” dating back to at least the late 18th century: “It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted”.²⁴⁹

154. When the “missing proof” lies within the “peculiar power” of the party against whom the adverse inference is sought to be drawn, there is a “stronger basis” for such an inference; namely, “that the evidence of the absent witness would be contrary to the party’s case, or at least would not support it”.²⁵⁰

155. In weighing the evidence in the record as part of its determination under section 96 (and the Application, more generally), the Tribunal must be alive to what evidence is not in the record. If there are gaps in the evidence, and that missing evidence was uniquely within the ability of the Commissioner

²⁴³ *Canada (Commissioner of Competition) v Superior Propane Inc*, 2001 FCA 104 (“*Superior Propane II*”).

²⁴⁴ *Superior Propane II* at para 150, P&HC, Tab 429.

²⁴⁵ *Superior Propane II* at para 150, P&HC, Tab 430.

²⁴⁶ *Superior Propane II* at para 150-154, 157, P&HC, Tab 431.

²⁴⁷ *Snell v Farrell*, [1990] 2 SCR 31, 1990 CarswellNB 218, paras 31-34, P&HC, Tab 432; *Benhaim v. St-Germain*, 2016 SCC 48, para 48, P&HC, Tab 433; *R. v. Welch*, 1931 CarswellNS 56 (NSSC), para 15, P&HC, Tab 434.

²⁴⁸ 2000 SCC 29 [*Jolivet*].

²⁴⁹ *Jolivet* at para 25, P&HC, Tab 435.

²⁵⁰ *Jolivet*, paras 27-28, P&HC, Tab 436; **Law of Evidence**, s 6.471, P&HC, Tab 437.

to obtain, the Tribunal should weigh this consideration, and be prepared to draw an adverse inference that such evidence if it had been produced would not support the Commissioner's position with respect to section 96 (or the Application).

156. The Respondent respectfully submits that an adverse inference should be drawn against the Commission with respect due to the failure to produce evidence 'peculiarly' within his power related to section 96(3), the counterfactual test in section 96(1) (insofar as the evidence relating to 'variable costs' of competitors is required to determine the matters related to these issues) and the Application, more generally.²⁵¹

CONCLUSION

157. The evidence assembled by the Commissioner is insufficient to demonstrate, on a balance of probabilities, that competition has been, is or is likely to be lessened substantially. There is no harm from the acquisition, much less "substantial harm". To the contrary, the acquisition is pro-competitive. The Commissioner's Application should be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st DAY OF FEBURARY 2021



BORDEN LADNER GERVAIS LLP

Lawyers for the Respondent, Parrish & Heimbecker, Limited

²⁵¹ **CA-R-242**, Compilation of Additional Documents Added to the Agreed Book, P&H Read-In Brief (056866), pp. 34-37, 42-46, 74-76, P&HC, Tab 438; McQueen Evidence, CB Transcript, Vol 3, January 11, pp. 20:23-21:4 and **CA-R-039**, P&HC, Tab 439; McQueen Evidence, CB Transcript, Vol 3, January 11, pp. 30:6-31:8 and **CA-R-039**, P&HC, Tab 440; Elliot Evidence, CB Transcript, Vol 4, January 12, pp. 37:13-16 and **CA-R-039**, P&HC, Tab 441; Elliot Evidence, CB Transcript, Vol 4, January 12, pp. 42:22-43:17, P&HC, Tab 442; Malkoske Evidence, CB Transcript, Vol 4, January 12, p. 50:2-6 and **CA-R-039**, P&HC, Tab 443; Malkoske Evidence, CA Transcript, Vol 4, January 12, pp. 243:18-244:2, P&HC, Tab 444; Malkoske Evidence, CA Transcript, Vol 4, January 12, pp. 245:25-249:15 and **CA-R-039**, P&HC, Tab 445; Jordan Evidence, CB Transcript, Vol 4, January 12, p. 79 and **CA-R-039**, P&HC, Tab 446; Jordan Evidence, CA Transcript, Vol 4, January 12, pp. 258:24-259:19, P&HC, Tab 447; Hawryluk Evidence, P Transcript, Vol 4, January 12, pp. 375:16-376:4, P&HC, Tab 448; Hawryluk Evidence, P Transcript, Vol 4, January 12, pp. 376:18-24, P&HC, Tab 449; Hawryluk Evidence, P Transcript, Vol 4, January 12, pp. 376:18-24, P&HC, Tab 450; Wildeman Evidence, CB Transcript, Vol 4, January 12, p. 88:4-10 and **CA-R-039**, P&HC, Tab 451; Wildeman Evidence, CA Transcript, Vol 4, January 12, pp. 278:11-282:4, P&HC, Tab 452; Irons Evidence, CA Transcript, Vol 4, January 12, p. 289:9-18, P&HC, Tab 453; Sanderson Evidence, CA Transcript, Vol 9, January 20, pp. 512:18-513:7, P&HC, Tab 454; Sanderson Evidence, CA Transcript, Vol 9, January 20, pp. 515:2-516:1, P&HC, Tab 455; Sanderson Evidence, CA Transcript, Vol 9, January 20, p. 516:3-21, P&HC, Tab 456; Lincoln Evidence, CA Transcript, Vol 2, January 7, pp. 112:15-113:8, P&HC, Tab 457; Wagstaff Evidence, CA Transcript, Vol 3, January 11, pp. 150:21-151:13, P&HC, Tab 458; Wagstaff Evidence, CA Transcript, Vol 3, January 11, pp. 154:14-155:1 and **CA-R-034**, P&HC, Tab 459; Wagstaff Evidence, CA Transcript, Vol 3, January 11, pp. 166:9-167:4, P&HC, Tab 460.

CT-2019-005

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

PARRISH & HEIMBECKER, LIMITED

Respondent

CLOSING SUBMISSIONS OF P&H

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