PUBLIC

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

WRITTEN ARGUMENT OF PARRISH & HEIMBECKER, LIMITED WITH RESPECT TO THE TRIBUNAL'S SUPPLEMENTARY QUESTION

Question from the Tribunal

The Tribunal asked for the following Question to be addressed by the parties:

> *There are three main provisions in the Competition Act dealing with the concept of substantial lessening of competition: one is the mergers; the other is the abuse of dominance provision; the third one is civil agreements between competitors. The provisions dealing with abuse of dominance and agreement between competitors refers -- in the language of the Act refers to a substantial lessening of competition in a market. Section 92 does not have the words "in a market", it has four subparagraphs referring to "in a trade, industry or profession" and other elements.*
>
> ***Does that have an impact on the interpretation that should be given to the application of a substantial lessening of competition, looking at the different language in that provision compared to the other provisions of the Act?***

Introduction

1. The concept of a market or antitrust market is explicitly referred to throughout the *Competition Act* (Act), for the identification of the conduct and for the materiality threshold that must be applied to the assessment of anti-competitive effects.[1] The focus of the question is therefore whether the fact that s. 92 does not include the word 'market' should be interpreted to impact either the identification of the competitive effects being analyzed or the threshold for intervention by the Tribunal.

2. It is well-established that the absence of the word 'market' from a provision of the Act does not mean that a relevant antitrust market does not need to be defined and utilized. For example, s. 79(1)(a) of the Act does not contain the word 'market', yet the Tribunal has consistently interpreted the words "throughout Canada or any area thereof" and "class or species of business" to mean the geographic and product dimensions of a properly defined relevant antitrust market.[2] These phrases are interpreted to have the same meaning as the word 'market' in s. 79(1)(c).[3] Similarly, the subparagraphs of s. 92(1) have consistently been interpreted as synonymous with 'market' by the Tribunal and courts including the Supreme Court of Canada ("**SCC**")[4] and the Commissioner.[5] The question, as stated by the SCC is "whether the merger is likely to facilitate the exercise of new or increased market power by the merged entity…**in a contestable market**".[6] Crampton C.J., while he was in private practice, summarized the history of this provision and concluded that "Parliament intended that competition must be shown to be likely to be prevented or lessened substantially in an antitrust, or competition law market."[7]

3. Mergers have been included in Canada's competition legislation since its inception in 1889.[8] The first stand-alone definition of mergers was incorporated into Canada's competition legislation in 1960. This definition of merger related to control over a 'business' where that business competed "among the ***sources***

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[1] *Canada v Pharmaceutical Society (Nova Scotia),* [1992] 2 SCR 606 at para 100, noting the general importance of defining market structure in assessing market power under the *Competition Act*.
[2] See e.g. *Canada (Commissioner of Competition) v Canada Pipe Co*, 2005 Comp Trib 3 at paras 65-67, affirmed 2006 FCA 236 at paras 16, 44; *Commissioner of Competition v Vancouver Airport Authority*, 2019 CACT 6 at para 423; *Commissioner of Competition v Toronto Real Estate Board*, 2016 Comp Trib 7 ("***TREB***") at paras 117, 164; *Canada (Director of Investigation & Research) v D & B Co of Canada*, 1995 CarswellNat 2684 (Comp Trib) at para 38; *Canada (Director of Investigation & Research) v Laidlaw Waste Systems Ltd*, 1992 CarswellNat 1628 (Comp Trib) at para 2; *Canada (Director of Investigation & Research) v NutraSweet Co*, 1990 CarswellNat 1368 at para 83; *Canada (Director of Investigation & Research) v Tele-Direct (Publications) Inc*, 1997 CarswellNat 3120 at para 71.
[3] See e.g. *TREB* at para 117.
[4] *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 ("***Tervita***") at para 44.
[5] See Competition Bureau, Merger Enforcement Guidelines, (Gatineau: Competition Bureau, 2011) at para 2.1 and 2.13.
[6] *Tervita* at paras 55, 60 and 78.
[7] Paul S. Crampton, *Mergers and the Competition Act*, (Toronto: Carswell, 1990) (**"Crampton"**) at p. 261.
[8] *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade*, SC 1889, c 41; repealed and replaced by *The Combines and Fair Prices Act,* SC 1919, c 45, s.15. This introduced a new test: whether the merger was likely to operate to the "detriment of or against the interests of the public" (s.2); replaced with the *Combines Investigation Act,* SC 1923, c 9, s.2 which retained the same test of "detriment of or against the interests of the public".

of supply of a trade or industry or among the ***outlets for sales*** of a trade or industry".[9] This definition of 'business' made it clear that the conceptual framework for review had a 'duality' in respect of markets, where products were both bought or sold. The threshold for intervention that had been introduced in 1919, prohibiting a merger which led to a "detriment of or against the interests of the public" (**which made no reference to a 'market' similar to s. 92**) remained unchanged.

4. In the first merger case, *Canadian Breweries (1960)*, McRuer, C.J.H.C., held that the conceptual framework was with respect to various provincial 'markets' for the sale of beer.[10] In *K.C. Irving (1978)*, Laskin, C.J.C., considered the 'proper market area', noting that the merger did not "result in any change in the market areas, served by the newspapers before their acquisition".[11] Therefore, the conceptual framework of relevant antitrust markets for the analysis of competitive effects was well in place prior to the current Act. When Bill C-91 was introduced, which led to the current Act, the threshold for intervention was changed to 'substantially', conforming to the threshold for intervention in other sections of the Act. However, more relevant to the current consideration is that the word 'market' was not included in the threshold for intervention. Notably, the definition of 'business' did not change materially from the previous legislation, and therefore the conceptual framework of markets was not altered.

5. A 'merger' as defined in s. 92 is clearly defined by the concept of a market or markets. A merger is defined in s. 91 as the taking of control of a 'business'. 'Business' is defined in s. 2 as "the business of (a) manufacturing, producing, transporting, acquiring, supplying, storing and **otherwise dealing in articles**, and (b) acquiring, supplying and **otherwise dealing in services**."[12] The word 'business' in the definition of 'merger' makes clear that a merger for the purposes of the s. 92 assessment, is with respect to the 'market activity' of the 'business'. A 'business' is defined as dealing in articles or services. As a result, the relevant product markets must be in respect of an article or service that is bought or sold, and the 'duality' of both input and output markets, defines the assessment of the competitive effects of a 'merger' under s. 92.

6. This conclusion is also supported by related provisions. s. 92(2) prohibits the Tribunal from making a finding and exercising its discretionary power to impose a remedy under s. 92(1) "solely" on the basis of evidence of concentration or 'market' share. Additionally, the assessment under s. 92 is informed and limited by s. 93 and its sustained references to the concept of a 'market'. Crampton concluded that "the most plausible explanation of why the word 'market' is employed in ss. 93(d), (e) and (h), whereas 'relevant

[9] *Combines Investigation Act,* SC 1960, c 45.
[10] *R v Canadian Breweries Ltd*, [1960] OR 601 (Ont SC) at para 41.
[11] *R v KC Irving Ltd*, [1978] 1 SCR 408 at para 16.
[12] Amendments in 1975 brought 'services' within the definitions of 'mergers' and 'business'; see Consumer and Corporate Affairs, *Proposals for a New Competition Policy for Canada*, First Stage, November 1973 at pp. 54-57.

market' is employed in s. 93(g): the latter is restricted to an assessment of the market that is the focus of analysis, whereas the former contemplates an assessment of the merger on this market **and on other markets**".[13]

7. One aspect of Bill C-91 that has been noted as entrenching the "guiding philosophy in to our competition law" was s. 1.1.[14] Crampton noted that the objectives stated in s. 1.1 "underscore the government's commitment to **viewing the Canadian economy in a global context**". He also noted that the amendments also broaden the markets that could be analyzed, including those markets impacted by **vertical mergers as well as horizontal mergers.**[15] Vertical mergers clearly also have very different input and output markets that must be considered. The duality of markets inherent in a merger, the input market and the output markets, means that there may need to be a balancing in the assessment, if for example, if the output market had pro-competitive effects but the input market had anti-competitive effects. This balancing was implicit in the statement by the SCC in *Tervita* where it stated: **"**in some cases, consolidation is more beneficial than competition."[16]

8. As noted by the SCC in *Tervita*, the relevant market framework is necessary for the quantitative assessment, but that does not preclude the necessary qualitative assessment. The distinction that markets are necessary to examine quantitative effects, but does not preclude the necessary consideration of qualitative effects (e.g. impacts on innovation), provides an explanation for why the word 'market' is not embedded in the threshold for assessment in s. 92(1). This is consistent with s. 92(2), which precludes an assessment 'solely' on a quantitative basis. This ensures that neither the analytical focus, nor threshold for intervention, is based on a single market or confined to only quantitative assessment.

9. The final consideration that arises from the Tribunal's question is whether there are any implications for the case at hand. The first aspect of the analysis, that the competitive effects should be considered in more than one 'market', was not addressed by the Commissioner. He provided no assessment either quantitatively or qualitatively of the competitive effects of the merger in the output markets. The duality of markets clearly present in this case is underscored by the fact that P&H is a "Canadian participant" under s. 1.1, fitting squarely within one of the separate but equal statutory objectives. P&H competes against foreign-owned multinationals who not only compete with it for sale of grain in export markets, but those multinational competitors may also purchase grain in foreign markets from foreign producers. When P&H

[13] Crampton at pp. 261-262, footnote 2.
[14] *Ibid* at p. 57; see also *House of Commons Debates*, 33-1, No 8 (7 April 1986) at 11975, Mr. Bill Domm Comments.
[15] *Ibid* at pp. 60-61; see also *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91*, (23 April 1986) at 1:26.
[16] *Tervita* at para 87.

enters into contracts with customers in foreign markets, it must source the grain to fulfill these contracts in Canada, as it does not have operations in other grain-producing countries. Hence, P&H's competition in foreign markets, as a Canadian grain company that sources its grain in Canada, is a net benefit to Canadian farmers relative to farmers in other grain-producing countries. As a result, the Commissioner's failure to consider the impact on export markets meant that he also failed to fully consider the benefit to farmers or the Canadian economy as a whole. The Commissioner's approach precludes the Tribunal's ability to consider, assess and balance any alleged anti-competitive effects against competitive effects in all the markets which are impacted by the merger.

10. A second aspect also emerges from the analysis. As noted above, within the definition of 'business' there must be an "acquiring, supplying or dealing" in articles or services. As noted above, the quantitative analysis that the market framework provides depends on a price and the price effects related to the article or service. A value-add, where the article or service is neither bought nor sold, does not fall within the definition of 'business' because it is not "acquired, supplied or dealt in" and consequently is not within the assessment of the anticompetitive effects of a 'merger' which the s. 92 assessment is confined to. There is no separate relevant 'market' in which to conduct the necessary quantitative analysis. Further, there is no 'price' that would permit a quantitative analysis. Hence the need for Dr. Miller to artificially construct a product market called GHS and to 'impute' a price for that market. This point was identified by the Court in the *Metcash* case, and was the reason for the rejection of the so-called value-add approach in that case.[17] Crampton observed that "relevant markets are constructed … in order to assess whether market power is or is likely to be exercised in a given context", and that within that relevant market framework, "the proscribed degree of market power is usually **defined in terms of prices**" in the market. He notes specifically that a value add price "has been employed in situations **where the value added is billed as a separate fee**, with no mark-up being applied to the product in relation to when the service is performed".[18] That is not the case here, where a partial and imputed value-add price is imputed to an artificial product market the Commissioner calls GHS.

11. The SCC in *Tervita* focused on the need for this quantitative assessment as well as the qualitative assessment of a merger and the need for both assessments **to be based on the evidence**. The relevant evidence is determined by the markets relevant to the markets assessed under s. 92:

> "Likely" reflects the reality that merger review is an inherently predictive exercise, but it does not give the Tribunal license to speculate; its findings must be based on evidence… in order for s. 92

[17] *Australian Competition and Consumer Commission v Metcash Trading Limited*, [2011] FCA 967 at paras 196-202.
[18] Crampton at p. 265; see also footnote 11 at p. 265: "'value added price': difference between the cost of all inputs and the cumulative price.

> of the Act to be engaged, the Tribunal must be of the view that it is more likely than not that the merger will result in a substantial prevention of competition…**Mere possibilities are insufficient to meet this standard**…neither the Tribunal nor courts should claim to make future business decisions for companies. **Factual findings about what a company may or may not do must be based on evidence of the decision the company itself would make;** not the decision the Tribunal would make in the company's circumstances. [19]

12. Despite the pro-competitive benefits cited by P&H in its Response and in the evidence presented by P&H related to the output markets, the Commissioner has failed to bring forward any evidence to permit the Tribunal to consider any competitive effects in the output markets and to weigh any alleged anti-competitive effects in the input market against any pro-competitive benefits in the output markets. The Commissioner, and both of his experts, explicitly ignored the evidence of the export objectives of P&H relying exclusively on their pure speculation that P&H was posturing until the case was over, even in respect of examining the competitive effects in the input market. The anti-competitive effects, the deadweight loss calculated by Dr. Miller and Mr. Harington's analysis of efficiencies, are all completely dependent on an **assumed 10% reduction of purchases**. In order to make this assumption, both experts ignore the evidence of P&H's objectives to increase throughput to the FGT export terminal. The alleged anti-competitive effects and deadweight loss completely disappear if the Tribunal properly recognizes P&H's objective of becoming more competitive in export markets and ignores the Commissioner and his experts' speculation. As noted by the SCC in *Tervita*, the Commissioner's case fails when it rests on speculation without proof, or where it fails to fully quantify the competitive effects from a merger.[20]

13. As noted by the SCC in *Tervita*, the Commissioner has the onus and evidentiary burden at first instance to permit the Tribunal to assess the competitive effects of the merger.[21] The Commissioner completely ignored the obvious duality of markets, particularly the export market present in this case. As such, pursuant to *Tervita,* a presumption should operate against the Commissioner to the effect that the pro-competitive benefit in export markets would outweigh any anti-competitive effects in local input markets. As noted by the SCC, *"*where a party has failed to discharge its burden of proof … setting the effects at zero where the Commissioner has failed to meet her legal burden is **consistent with taking an approach to the balancing analysis that is objectively reasonable.**" [22]

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[19] *Tervita* at paras 65, 76.
[20] *Ibid* at paras 65-66, 76, 151. While in *Tervita* the failure was related to a failure to quantify the anti-competitive effects, the same can be said concerning the pro-competitive effects that must be balanced by the Tribunal.
[21] *Ibid* at paras 28, 123, 125, 129, 151-152.
[22] *Ibid* at para 129.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16th DAY OF FEBURARY 2021

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