CT-2022-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34,

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

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

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS INC.
SHAW COMMUNICATIONS INC.

Respondents

and

ATTORNEY GENERAL OF ALBERTA
VIDÉOTRON LTD.

Intervenors

WRITTEN REPRESENTATIONS OF THE COMMISSIONER
(Respondents' Motion to Introduce New Witness Statement – McKinsey Witness Statement)

OVERVIEW

1. The Respondent, Rogers, filed inadmissible hearsay evidence before the Tribunal. More specifically, [redacted]

[redacted]

2. [redacted] One of many such statements that the Commissioner is seeking to strike in a parallel motion. However, the bigger problem for the Respondent is that the time for filing evidence before the Tribunal in this proceeding, as established by the Scheduling Order, has long passed. The consequence on the proceeding is therefore serious.

3. If the Respondent is permitted to file new evidence, the Commissioner will be prejudiced. The Commissioner filed a responding witness statement in response to [redacted]

The manner in which the evidence was put forward informed the Commissioner's response. If this Tribunal allows the Respondent to file a new witness statement, the Commissioner will be required to supplement with a responding witness statement. To which there would be a reply and possible motions.

4. It is not for the Respondent to decide whether there is sufficient evidence that has been filed by the Commissioner in response to a given witness statement or whether there is sufficient evidence in response to a new witness statement on record. This is left to the Commissioner alone. The door has closed on the evidence.

5. The Commissioner respectfully requests that the Respondent not be granted leave to file a new witness statement.

PART I – THE FACTS

6. The Scheduling Order issued by this Tribunal required the parties to file witness statements by September 23, 2022. The Order further provides that all parties are to serve additional documents relied upon and responding witness statements by October 20, 2022. These steps have all been satisfied.

7. [redacted]

8. [redacted]

9. [redacted]

[redacted]

	[redacted]	[redacted]

	[redacted]	

10. The Commissioner has brought a Motion to Strike portions of the [redacted] This is explained in the chart above.

PART II – ISSUE

11. Is the Respondent, Rogers, entitled to file a new witness statement after the parties have all filed their evidence?

PART III - SUBMISSIONS

12. The Respondent, Rogers, sought to file inadmissible hearsay evidence. [redacted] The request for leave to file an additional witness statement is an attempt to remedy the obvious inclusion of hearsay evidence. If leave is granted, the Commissioner will be denied the ability to respond to this new evidence or the Tribunal will need to delay the hearing to allow the Commissioner to file responding evidence.

13. This Tribunal is not a stranger to situations where a party to a proceeding seeks to remedy a witness statement that is imbued with a deficiency on the eve of a hearing. The very same situation arose in *Parrish & Heimbecker, Limited*, 2020 CanLII 100059 (CT) ("P&H") where hearsay statements were struck from a witness statement and where this Tribunal denied a request to file new witness statements.[1]

14. In P&H, the Tribunal remarked that allowing one of the parties to file a new witness statement would also require that it grant the Commissioner the right to file reply witness statements, and it would further require amendments to the

[1] Parrish & Heimbecker, Limited, 2020 CanLII 100059 (CT), attached at Appendix A.

schedule to allow for possible motions challenging these new statements. None of these additional steps were ever contemplated by the Scheduling Order in that case, which was an important consideration for the Tribunal. The same hold true here. The request for leave to file a new witness statement has a consequence on the schedule.

15. The Tribunal in P&H held that the Scheduling Order does not contemplate additional witness statement to remedy deficiencies. It was assumed that highly sophisticated parties to a proceeding will exercise reasonable care and file only admissible evidence. This is a matter clearly provided for under the Tribunal Rules As stated by the Tribunal in P&H:

> **[63]** The process whereby the Tribunal provides for witness statements to be served in advance and for parties to file motions challenging the proposed evidence ahead of the hearing on the merits is to streamline the hearing process and to make the management of applications before it more efficient. **The process is not there to give the parties an opportunity to correct the deficiencies that might be revealed in their proposed evidence through an early challenge of the evidence. Indeed, the Tribunal's scheduling orders typically provide that motions related to the evidence are heard shortly before the hearing on the merits, and do not contemplate a new round of witness statements further to such motions.**".

16. The request by the Respondents for leave to file new evidence was never within contemplation of the Scheduling Order as it was presumed that they understood that only admissible evidence is to be filed and which excludes both inadmissible opinion evidence and hearsay.

17. This is not a minor mishap that sits on the margins of what is admissible evidence. [redacted] This was a calculated risk for which it was challenged by the Commissioner.

18. There is an important fairness issue that arises. There are about three weeks left before the hearing begins on the merits. The Commissioner has delivered his reply evidence. The new witness statement now opens the door on a new

round of exchanges that would surely delay the hearing or force the Commissioner to muster new evidence in response. It would be manifestly unfair to the Commissioner to add an additional new stage of evidence delivery to accommodate the proposed new witness statement and possible challenges to their contents at this late hour.

19. The Respondent, Rogers, is represented by a battery of legal counsel. They took a calculated risk in including hearsay evidence in the [redacted] They must live with the consequence of that decision. Attempting to remedy it on the back of the Commissioner is simply unfair.

20. While the Respondent suggests that the consequence on the Commissioner is marginal given [redacted] it is not for the Respondent to pass judgment on how the Commissioner responded to the evidence or whether there is sufficient evidence on record from the Commissioner to address the [redacted] This lies entirely with the Commissioner. The public eye is clearly on this merger and the perception that either the Tribunal or the Respondent decided on the sufficiency of the Commissioner's evidence does not instill confidence.

PART III – ORDERS REQUESTED

21. The Commissioner seeks from the Tribunal the following relief:

(a) an Order dismissing the Respondents' motion granting them leave to file a new witness statement; and

(b) costs of this motion

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of October, 2022

Alexander M. Gay

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Competition Tribunal Tribunal de la Concurrence

CONFIDENTIAL VERSION

Citation: *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 15
File No.: CT-2019-005
Registry Document No.: 178

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 as amended**.**

BETWEEN:

The Commissioner of Competition
(applicant)

and

Parrish & Heimbecker, Limited
(respondent)

Date of hearing: December 4, 2020
Before: D. Gascon J. (Chairperson)
Date of order: December 15, 2020

ORDER AND REASONS FOR ORDER ON COMMISSIONER'S MOTION OBJECTING TO THE ADMISSIBILITY OF PROPOSED EVIDENCE

I. INTRODUCTION

[1] On November 27, 2020, the Commissioner of Competition ("**Commissioner**") filed a motion before the Tribunal to strike certain paragraphs from the proposed witness statement signed by Mr. John Heimbecker ("**Witness Statement**"), the CEO of Parrish & Heimbecker, Limited ("**P&H**"). The Commissioner claims that some of the challenged paragraphs constitute improper lay opinion evidence and that some others contain inadmissible hearsay ("**Disputed Proposed Evidence**"). The Commissioner brought this motion in the context of an application he filed against P&H pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 ("**Act**"), with respect to the acquisition by P&H of a primary grain elevator located in Virden, Manitoba ("**Application**"). The purchase of the Virden elevator was part of a larger transaction whereby P&H acquired ten grain elevators owned by Louis Dreyfus Company Canada ULC ("**LDC**") in Western Canada ("**Acquisition**").

[2] In his motion, the Commissioner submits that the following paragraphs of the Witness Statement constitute inadmissible lay opinion evidence:

1. Mr. Heimbecker's statements on P&H's market position in the Canadian grain industry and on market shares (paragraphs 27-29);

2. Mr. Heimbecker's statements on crop inputs expansion (paragraphs 55, 59);

3. Mr. Heimbecker's statements on excess capacity of grain elevators and potential expansion (paragraphs 141-147, 152); and

4. Mr. Heimbecker's statements on the quantification of "efficiencies" to be obtained by P&H further to the Acquisition (paragraphs 178-179).

[3] The Commissioner further maintains that the following paragraphs constitute inadmissible hearsay evidence:

1. Mr. Heimbecker's testimony relying on information provided by Mr. Klippenstein, a former LDC employee who now works for P&H, on LDC's practices and policies with respect to its purchase of particular types of grain and grading (paragraphs 166, 167, 170); and

2. Mr. Heimbecker's testimony about the relationship between a P&H customer service representative at the Moosomin elevator and one of the Commissioner's farmer witnesses (paragraph 174).

[4] The Commissioner asks the Tribunal to immediately rule, prior to the hearing of the Application on the merits, that the Disputed Proposed Evidence is inadmissible and to order that it be struck from Mr. Heimbecker's Witness Statement.

[5] On this motion, the question to be determined by the Tribunal is whether, at this preliminary stage, the Commissioner has established on a balance of probabilities that the paragraphs containing the Disputed Proposed Evidence, as read in the context of the Witness

Statement, constitute improper lay opinion evidence or inadmissible hearsay. For the reasons set out below, I will grant the Commissioner's motion in part. I conclude that certain statements contained in Mr. Heimbecker's Witness Statement can already be declared inadmissible at this stage, as they clearly constitute improper lay opinion evidence or are clear instances of inadmissible hearsay evidence.

II. LAY OPINION EVIDENCE

[6] It is well recognized that the evidence of lay witnesses must generally be limited to facts of which they are aware, and that opinion evidence from lay witnesses is only acceptable in limited circumstances (*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 ("***White Burgess***") at para 14; *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 ("***TREB FCA***") at paras 78-79, leave to appeal to SCC refused, 37932 (23 August, 2018); David Paciocco and Lee Stuesser, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law, 2015) at 189, 195). In the law of evidence, an opinion means an inference from observed facts. The main rationale for excluding lay witness opinion evidence is that it is generally not helpful to the trier of fact and may be misleading (*White Burgess* at para 14).

[7] Relying on the Federal Court of Appeal's ("**FCA**") dicta in *TREB FCA* at paras 79-81 and *Pfizer Canada Inc. v Teva Canada Ltd*., 2016 FCA 161 ("***Pfizer Canada***") at paras 105-108, the Tribunal recently summarized the state of the law regarding lay opinion evidence in *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 ("***VAA***"), at paragraphs 145-148:

> [145] […] the general rule is that a lay witness may not give opinion evidence but may only testify to facts within his or her knowledge, observation and experience (*White Burgess* at para 14; *TREB FCA* at para 78). The main rationale for excluding lay witness opinion evidence is that it is not helpful to the decision-maker and may be misleading (*White Burgess* at para 14). This principle is reflected in Rules 68(2) and 69(2) of the CT Rules, which both state that "[u]nless the parties otherwise agree, the witness statements shall include only fact evidence that could be given orally by the witness together with admissible documents as attachments or references to those documents."
>
> [146] The SCC has however recognized that "[t]he line between 'fact' and 'opinion' is not clear" (*Graat v The Queen*, [1982] 2 SCR 819, 144 DLR (3d) 267 at p 835). The courts have thus developed greater freedom to receive lay witnesses' opinions when the witness has personal knowledge of the observed facts and testifies to facts within his or her observation, experience and understanding of events, conduct or actions. In that respect, the FCA recently stated, again in the context of a Tribunal proceeding, that opinion from a lay witness is acceptable "where the witness is in a better position than the trier of fact to form the conclusions; the conclusions are ones that a person of ordinary experience can make; the witnesses have the experiential capacity to make the conclusions; or where giving opinions is a convenient mode of stating facts too subtle or complicated to be narrated as facts" (*TREB FCA* at para 79). As such, when a witness has personal knowledge of observed facts such as a company's relevant, real

> world, operations, its evidence may be accepted by a court or the Tribunal even if it is opinion evidence (*TREB FCA* at para 80; *Pfizer Canada* at paras 105-108).
>
> [147] Furthermore, it has been recognized that lay witnesses can provide opinions about their own conduct and their own business (*TREB FCA* at paras 80-81). The FCA however specified that there are limits to such lay opinion evidence: "lay witnesses cannot testify on matters beyond *their own conduct* and that of *their businesses* in the 'but for' world" and they "are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the 'but for' world, nor do they have the experiential competence" [emphasis in original] (*TREB FCA* at para 81).
>
> [148] In other words, when a witness had "an opportunity for observation" and was "in a position to give the Court real help," the evidence may be admissible and the real issue will be the assessment of weight (*Imperial Brush* at para 11). […]

[8] This summary of the applicable law remains true today. The FCA and the Tribunal thus clearly established that, as lay witnesses, corporate executives can testify about what their company "would have done in the 'but for' world in circumstances where [they have] actual knowledge of the company's relevant, real world, operations" but that they "cannot testify on matters beyond their own conduct and that of their businesses" (*TREB FCA* at paras 80-81; *Pfizer Canada* at paras 105-108, 112, 121). In the same vein, lay witnesses are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the "but for" world or the impact of an alleged anti-competitive conduct on competition more generally, and doing so strays into the realm of inappropriate opinion evidence (*TREB FCA* at para 81).

[9] Therefore, in the context of applications before the Tribunal, opinion evidence from corporate lay witnesses such as Mr. Heimbecker will generally be admissible if the following conditions are met:

1. The lay witness forms conclusions on matters that are within his or her actual knowledge, observation, experience and understanding of facts, conduct or actions;

2. The lay witness is in a position to provide real assistance to the trier of fact; and

3. The lay witness provides opinions on matters relating to his or her company's own behaviour and within the scope of the company's own business(es) in the real world or in the "but for" world, as opposed to opinions on the impact of an alleged anti-competitive conduct on competition more generally or on its larger economic consequences for an industry, a market or other entities.

[10] I pause to add that, further to Rule 68(2) of the *Competition Tribunal Rules*, SOR/2008-141, a lay witness cannot, under the guise of a written witness statement, make statements that would have been otherwise inadmissible had they been made orally at the hearing.

[11] In his motion to strike, the Commissioner asserts that Mr. Heimbecker's improper lay opinion evidence falls within four different categories. Each objection will be dealt with in turn.

A. P&H's market position

[12] In paragraphs 27 to 29 of the Witness Statement, under the heading "P&H Market Position", Mr. Heimbecker uses data from the Canadian Grain Commission ("**CGC**"), P&H's internal estimates and publicly available information to calculate grain storage capacity and "annual primary handle" as well as estimates of P&H's and its rivals' market positions. The Commissioner argues that, in doing so, Mr. Heimbecker is opining on market shares and is commenting on what constitutes a proper market and how market shares should be calculated. This, says the Commissioner, constitutes opinion evidence that can only be provided by expert economists.

[13] I disagree.

[14] I accept that these statements made by Mr. Heimbecker contain lay opinion evidence, but I am satisfied that they fall within the boundaries of what has been recognized as acceptable lay opinion evidence. In my view, Mr. Heimbecker can testify as to how he views the grain industry in which P&H operates, and where P&H fits within that business sector (including its share of storage capacity and its relative market position). I agree with P&H that the tables inserted in these paragraphs state arithmetic facts based on the data and information observed by Mr. Heimbecker and obtained from internal estimates and publicly available data published by the CGC and other sources. Estimating one's own market position is something that senior corporate executives like Mr. Heimbecker do regularly in the ordinary course of their company's operations and, since market positions always are relative measures, they naturally imply an assessment of the overall business sector and of the estimated market positions of competitors.

[15] The Witness Statement of Mr. Heimbecker expressly indicates that he has personal knowledge of P&H's operations and explains his role within the company as well as his experience in the Canadian grain industry. In the impugned paragraphs of his Witness Statement, Mr. Heimbecker takes stock of data available to him and testifies to facts which are within his knowledge, observation, experience and understanding of facts, conduct or actions. As described elsewhere in the Witness Statement, Mr. Heimbecker has more than 30 years of experience in the Canadian grain industry. He has been at P&H and in the grain business for his entire professional career, starting in May 1987. He was named P&H's CEO in September 2019 and has held the position of President Grain Division Canada since April 2017. As President Grain Division Canada, he is in charge of P&H's grain business for all of Canada (including all of its elevators). In addition, the information provided is relevant to the Application and will be of assistance to the Tribunal in this litigation. Furthermore, in his discussion of market positions, Mr. Heimbecker does not venture into testifying about the relevant markets or on matters outside P&H's own conduct and businesses. For all those reasons, I see no ground to find this lay opinion inadmissible.

[16] The concerns raised by the Commissioner with respect to that proposed evidence go to the probative value and to the weight that the Tribunal should give to it, not to admissibility. The Tribunal will address those issues of reliability and weight at the hearing on the merits. Mr. Heimbecker's statements and his estimates of market shares will of course be subject to cross-examination by the Commissioner and to questioning by the panel, and it will be up to the Tribunal, further to its assessment of the evidence, to determine the weight to be given to Mr. Heimbecker's calculations, in light of the balance of the evidence on the record.

B. Crop inputs expansion

[17] Paragraphs 55 and 59 of Mr. Heimbecker's Witness Statement deal with crop inputs expansion. In paragraph 55, Mr. Heimbecker states that "the application of additional fertilizer and crop protection is expected to increase grain production in the Virden area, which is expected to increase Canadian exports". In paragraph 59, Mr. Heimbecker describes his views as to where P&H's estimated future crop inputs sales will come from and the consequences that they will have within the area.

[18] The Commissioner submits that Mr. Heimbecker can testify as to what P&H is planning, but that he cannot draw inferences from the crop inputs planning on the market in general or on the conduct of other competing grain elevators. P&H responds that, in these paragraphs, Mr. Heimbecker is simply stating "expectations" (as opposed to opinions), based on P&H's experience in running its own crop inputs business.

[19] I share the Commissioner's view that some of the statements made by Mr. Heimbecker in those paragraphs, to the extent that they go beyond P&H's own behaviour and business, constitute improper lay opinion evidence. The disputed statement in paragraph 55 clearly refers to the potential impact of the application of additional fertilizer on grain production in the Virden area, and its further effect on Canadian exports. It manifestly goes beyond P&H. This is inadmissible lay opinion evidence. As a lay witness, Mr. Heimbecker can testify about the fact that P&H is planning to add crop input facility in Virden but he cannot go beyond P&H's own plans. Save for a short statement at its very beginning, paragraph 59 suffers from the same defect and similarly contains Mr. Heimbecker's beliefs about the increase in crop inputs sales "within the area" and on what farms may generally do. In doing so, Mr. Heimbecker is straying into the expected conduct of competitors and forms conclusions on the impact of P&H's Acquisition on competition more generally, in a manner that does not respect the guidance given by the FCA in *TREB FCA*. Even if he expresses it in terms of expectations, he in fact opines on what, in his view, other players are expected to do and what will happen in the grain business in general.

[20] The last sentence of paragraph 55 and paragraph 59 starting with the words "I do" at the second line will therefore be struck from Mr. Heimbecker's Witness Statement.

[21] I pause to make a comment on the Tribunal's decision in *VAA*, since P&H heavily relied on that precedent in its submissions and repeatedly attempted to draw parallels between the present motion and a similar motion dismissed by the Tribunal in *VAA*. With respect, the factual situations in the two cases fundamentally differ.

[22] In *VAA*, the respondent challenged the admissibility of evidence to be given by two of the Commissioner's witnesses, Ms. Stewart from Air Transat and Ms. Bishop from Jazz, on the ground that it constituted improper lay opinion evidence or inadmissible hearsay. In that case, the Tribunal deferred its ruling on the admissibility of this proposed evidence until after Ms. Stewart and Ms. Bishop had testified at the hearing, noting that their testimonies would provide a better factual context to assist the Tribunal in assessing the disputed evidence.

[23] However, the issue in dispute before the Tribunal in *VAA* was whether the conclusions reached by both Ms. Stewart and Ms. Bishop, with respect to their evidence of alleged missed

savings and increased expenses due to the alleged conduct of the respondent, were within their personal knowledge given that they did not themselves perform the calculations underlying their testimonies. After hearing the testimonies of Ms. Stewart and Ms. Bishop at the hearing, the Tribunal found that their evidence was admissible and that the concerns raised by the respondent went to the probative value and to the weight that the Tribunal should give to their evidence, not to admissibility. In that case, the Tribunal was ultimately satisfied that both Ms. Stewart and Ms. Bishop had the required personal knowledge, observation and experience to testify on the issues challenged by the respondent.

[24] Contrary to the present situation, the disputed evidence in *VAA* clearly related to the two witnesses' own companies. On this motion, the debate about the lay opinion evidence does not revolve around the scope of Mr. Heimbecker's actual knowledge, observation and experience of facts, conduct or actions within P&H. Here, the problem with Mr. Heimbecker's statements on crop inputs expansion is that they go beyond P&H's own behaviour and business.

C. Excess capacity and expansion

[25] I now turn to paragraphs 141 to 147 and 152 of Mr. Heimbecker's Witness Statement, where Mr. Heimbecker discusses maximum observed throughput and actual throughput at P&H and other elevators in the grain industry. The Commissioner argues that Mr. Heimbecker can provide his opinion to the effect that P&H's own Moosomin and Virden elevators have excess capacities – which are facts that he can observe – but that he cannot opine as to what rival elevators can do. More specifically, the Commissioner takes exception with Mr. Heimbecker's statements that rival elevators "could easily increase their purchases of wheat and canola from farms in the Virden/Moosomin area" or "add significant grain purchasing capacity", made at paragraphs 141 and 152 respectively.

[26] P&H responds that the statements made by Mr. Heimbecker in the paragraphs singled out by the Commissioner simply set out mathematical facts and computations of capacity and throughput figures, or otherwise constitute permissible lay opinion evidence.

[27] I agree with P&H that, in general, those paragraphs on average throughput and capacity merely describe Mr. Heimbecker's observations and perceptions from data published by the CGC showing the volume of grain that P&H and rival elevators purchased and shipped (i.e., their effective and maximum throughput) in the five-year period between 2014-2015 and 2018-2019. As was the case for the market share figures in paragraphs 27 to 29, I am satisfied that the statements on the actual measures of capacity and throughput generally reflect Mr. Heimbecker's own observation of data and amount to simple arithmetical calculations required to establish averages, totals and differences regarding throughput capacity. I am not persuaded that Mr. Heimbecker does not have the required actual knowledge, observation, experience and understanding of facts to testify on these measures of capacities based on publicly available data available to P&H as part of its usual operations. Given his long experience in the grain industry, Mr. Heimbecker is well positioned to assist the Tribunal in this regard. For the same reasons expressed above in relation to P&H's market position, I am satisfied that, save for the specific exceptions discussed below, the statements made by Mr. Heimbecker in paragraphs 141 to 147 and 152 are admissible evidence.

[28] However, Mr. Heimbecker cannot testify or form conclusions as to what the rival elevators will do with their alleged excess capacity. As a lay witness, Mr. Heimbecker cannot extrapolate from his own observations on throughput data and opine on what rival elevators could do in their businesses and on their future conduct in terms of purchases of wheat and canola. These are inferences or conclusions that can be done by experts or argued by counsel, and which will ultimately be for the Tribunal to determine. I therefore agree with the Commissioner that, in specific portions of paragraphs 141, 146, 147 and 152, Mr. Heimbecker oversteps the recognized limits of lay opinion evidence and in fact makes statements about the greater economic consequences of the alleged anti-competitive conduct or the impact of P&H's Acquisition on competition generally and on competitors. This is inadmissible lay opinion evidence.

[29] For that reason, the statements made by Mr. Heimbecker in the second half of paragraph 141 (starting with the word "such"), in the last sentence of paragraph 146, at the end of the first sentence in paragraph 147 (starting with the words "-- or their") and in the first sentence of paragraph 152 will be struck from his Witness Statement.

[30] Again, this does not mean that the Tribunal will accept Mr. Heimbecker's throughput and excess capacity calculations. It will be up to the Tribunal, at the hearing on the merits, to determine the weight of that evidence and what it will mean in terms of what the other grain elevators not owned by P&H could do with their throughput capacity and how it translates in terms of their purchases of wheat and canola.

D. Quantification of efficiencies

[31] Finally, the Commissioner challenges two paragraphs of Mr. Heimbecker's Witness Statement relating to efficiencies. In paragraph 178, Mr. Heimbecker explains that "[i]ncreased throughput at Virden is an efficiency that accrues entirely to the Canadian economy" and, in paragraph 179, he quantifies what he qualifies as the "annual efficiency" expected by P&H further to the Acquisition.

[32] The Commissioner argues that these statements are improper lay opinion evidence and that Mr. Heimbecker cannot give his opinion as to what constitutes a cognizable efficiency under the Act. P&H claims that Mr. Heimbecker does not use the words "cognizable efficiency" in his Witness Statement and that he can properly quantify the value of increased throughput at the Virden elevator.

[33] With the exception of the last sentence in paragraph 178, I agree with P&H and find that Mr. Heimbecker's statements on efficiencies do not amount to inadmissible lay opinion evidence.

[34] I accept that what will constitute a cognizable efficiency under section 96 of the Act is a question of law and that no lay or expert witness is competent to provide an opinion on whether claimed savings, synergies, economies of scale or efficiencies from a transaction – however they may be called – will qualify as acceptable productive, dynamic or allocative efficiencies. This will be for the Tribunal to determine further to the hearing on the merits. As rightly pointed out by P&H, the words "cognizable efficiency" do not appear in paragraphs 178 and 179 of Mr. Heimbecker's Witness Statement and nowhere does Mr. Heimbecker opine that P&H has achieved a cognizable efficiency for the purpose of section 96 of the Act. In paragraph 179, Mr. Heimbecker

simply quantifies what, in his view, is the value of the increased throughput in 2020 for P&H at Virden. I am satisfied that, given his actual knowledge, observation, experience and understanding of facts, conduct or actions relating to P&H's business, Mr. Heimbecker can testify on the increased throughput at Virden and on what it means for P&H's grain margins. The annual value of that additional throughput as perceived and measured by Mr. Heimbecker and P&H is the result of a mathematical calculation using inputs from P&H's business and (presumably) some assumptions in relation to the months of forecasted data. As CEO of P&H, Mr. Heimbecker is well placed to give that evidence on behalf of P&H. The calculation, including its inputs and the assumptions on which the forecasted months are based, can be tested in cross-examination. While I agree that Mr. Heimbecker cannot testify and provide an opinion on what these perceived savings mean in terms of acceptable efficiencies under section 96 of the Act, I am of the view that his use of the word "efficiency" at paragraph 179 cannot be read as necessarily implying that these are acceptable "gains in efficiency" as the term has been interpreted under section 96. It might have been preferable for a lay witness like Mr. Heimbecker to use words such as "savings" or "synergies" instead of the legally-infused notion of "efficiency", but this is insufficient in substance to find the statement inadmissible.

[35] Once again, it will be up to the Tribunal to determine the weight to be given to this statement and whether, in light of all the evidence on the record, what Mr. Heimbecker describes as "annual efficiency" indeed constitutes cognizable productive, dynamic or allocative efficiencies under section 96 of the Act. But such evidence is admissible.

[36] However, the same cannot be said about the last sentence of paragraph 178, where Mr. Heimbecker states that the "[i]ncreased throughput at Virden is an efficiency that accrues entirely to the Canadian economy". As was the case for some previous comments made by Mr. Heimbecker in his Witness Statement, Mr. Heimbecker steps outside the boundaries of what he can testify about as a lay witness in saying so. This statement is an inference based on observed facts that goes well beyond the accepted limits of permissible lay opinion evidence as it does not relate to P&H's own behaviour and business but ventures into claiming an impact on the Canadian economy in general. This is an inadmissible lay opinion and the last sentence of paragraph 178 will therefore be struck.

III. HEARSAY EVIDENCE

[37] Hearsay is an out-of-court statement tendered for the truth of its contents. Its essential defining features are "(1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant" (*R v Khelawon*, 2006 SCC 57 ("***Khelawon***") at para 35). As such, statements that are outside a witness' personal knowledge are hearsay (*Canadian Tire Corp Ltd v PS Partsource Inc,* 2001 FCA 8 at para 6; *VAA* at para 156). It is well established that hearsay evidence is presumptively inadmissible because it is often difficult for the trier of fact to assess its truth, and that relying on such evidence therefore threatens the integrity of the hearing's truth-seeking process and fairness (*R v Bradshaw*, 2017 SCC 35 ("***Bradshaw***") at para 1).

[38] However, as the Tribunal reminded in *VAA*, hearsay may exceptionally be admitted into evidence when it satisfies the twin criteria of "necessity" and "reliability" under the principled approach developed by the courts (*Bradshaw* at para 23; *VAA* at para 157).

[39] On this motion, the Commissioner submits that some of Mr. Heimbecker's statements responding to the Commissioner's farmer witnesses contain inadmissible hearsay evidence. More specifically, in paragraphs 166, 167 and 170 of his Witness Statement, Mr. Heimbecker refers to statements made by Mr. Klippenstein, who is now P&H's General Manager of the Virden elevator, relating to LDC's practices and policies with respect to LDC's purchase of particular grades and types of grain prior to the Acquisition, at the time LDC owned the Virden elevator and Mr. Klippenstein was employed by LDC. In addition, at paragraph 174, Mr. Heimbecker refers to statements made by a P&H customer sales representative at the Moosomin elevator (whose name is confidential), with respect to a particular request made to him by one of the Commissioner's farmer witnesses and to the business of this farmer. The Commissioner maintains that all of these statements reported by Mr. Heimbecker are inadmissible hearsay evidence.

[40] In response, P&H argues that these statements are admissible because they fall under what counsel for P&H calls the "corporate subordinate exception" to the rule excluding hearsay evidence. P&H claims that this exception was recognized by the FCA in *O'Grady v Canada (Attorney General)*, 2016 FCA 221 ("***O'Grady***"). P&H affirms that, under that exception to the inadmissibility of hearsay evidence, a witness "is entitled to give evidence that is corporate in nature on information and belief from a subordinate for which he is responsible". According to P&H, this is precisely what Mr. Heimbecker is doing in the four disputed paragraphs.

[41] I do not agree with P&H, and I instead find that Mr. Heimbecker's disputed statements do not fit within the narrow exception invoked by P&H to justify their admissibility. On the contrary, they bear all the attributes of inadmissible hearsay.

[42] In my view, there is no doubt that, save for one exception, the challenged statements are clear cases of hearsay and should be struck. They repeat out-of-court declarations and observations of two declarants will not be at the hearing to be cross-examined on their affirmations. It is also undisputed that P&H is not producing these statements to merely establish that they were made; the object of the proposed evidence is rather to establish the truth of their contents. Moreover, while I recognize the existence of a so-called "corporate subordinate exception" to the rule of inadmissible hearsay, it is obvious that the impugned statements made by Mr. Heimbecker do not meet the requirements of this exception as these were developed by the FCA. Finally, the observations relayed by Mr. Heimbecker cannot be said to fall within the principled exception to hearsay as they do not have the required qualities of reliability or necessity.

A. Mr. Klippenstein

[43] I will first look at the three paragraphs incorporating statements made by Mr. Klippenstein. In these paragraphs – and P&H does not dispute this –, Mr. Heimbecker does not refer to corporate evidence relating to P&H itself (whether in writing or otherwise), but rather attempts to submit as his own evidence statements made by a current P&H employee about another corporation (i.e., LDC) regarding events that this employee observed while he was at LDC and while he was not a subordinate of Mr. Heimbecker. All the statements attributed to Mr. Klippenstein use the past tense and indisputably refer to LDC's conduct prior to the Acquisition.

[44] P&H claims that the "corporate subordinate exception" covers this situation. With respect, this is an ill-founded understanding and interpretation of the exception. In fact, there is a

fundamental disjoint between the scope P&H wants to give to the "corporate subordinate exception" and the very essence of what that exception stands for. P&H's argument ironically boils down to saying that the "corporate subordinate exception" to the inadmissibility of hearsay evidence could apply even when neither its "corporate" element nor its "subordinate" element are present. This amounts to turning the exception on its head, and would deprive it of its defining features (as they were described by P&H itself in its submissions).

[45] The most recent, and most relevant, FCA decision on this issue is Justice Stratas' decision in *Coldwater First Nation v Canada (Attorney General)*, 2019 FCA 292 ("***Coldwater***"), which cites the *O'Grady* precedent invoked by P&H as well as *Pfizer Canada*. I pause to underline that this decision, like others cited by the parties, deals with the concept of hearsay in the context of affidavit evidence, as opposed to witness statements. For the purposes of the decision on this motion, these precedents will be applied to witness statements used in a hearing. It is useful to cite paragraphs 42 and 46 of *Coldwater*, where the FCA summarized the substance of the exception named as the "corporate subordinate exception" by P&H. They read as follows:

> [42] This holding in *Tsleil-Waututh No. 2* is consistent with *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723 at paras. 105-116. In that case, this Court held that evidence is admissible from departmental supervisors or similar individuals about the activities of their department, the conduct of their employees and events taking place in relation to the department where their knowledge is sufficiently direct and personal. To give this evidence, they need not be directly involved in all of the conduct, activities and events in and around the department. However, a departmental supervisor cannot introduce particular statements made by department personnel for the truth of those statements. In the words of *Pfizer* at para. 115, there is no general "department head" exception to hearsay.
>
> […]
>
> [46] In my view, *Tsleil-Waututh No. 2, Pfizer, O'Grady, Twentieth Century Fox, Kon Construction* and *Advance Rumely* all support the proposition that deponents who are department heads or supervisors with significant responsibilities in and
>
> oversight of their departments have enough personal knowledge to testify first-hand about the conduct, activities and events in and around the department.
>
> [Emphasis added]

[46] In *Coldwater*, the FCA thus recognized that a person in a supervisory role in a department is considered to have sufficient personal knowledge to testify first-hand with regard to the conduct, activities and events in and around that department. In his reasons, Justice Stratas further referred to *Pfizer Canada*, where he had similarly observed that evidence is admissible from departmental supervisors or similar individuals concerning the activities of their department, the conduct of their employees and events taking place in relation to their department, given that their knowledge is sufficiently direct and personal of such activities in light of the functions they exercise and the authority they have over the employees.

[47] In other words, these precedents leave absolutely no doubt that the exception has a limited scope: it only applies to situations where a person is in a supervisory role in relation to specific corporate actions within his or her own company, when these actions are accomplished through subordinates under his or her supervision. In those situations, a supervisor is not required to be directly involved in all of the conduct, activities and events involving his or her department, in order to be able to make statements about these conduct, activities or events, and the supervisor can be found to have sufficient first-hand knowledge of such actions to be able to testify about them.

[48] The "corporate subordinate exception" to inadmissible hearsay evidence only allows a trier of fact to rely upon the hearsay evidence adduced by a witness when this evidence relates to "the conduct, activities and events in and around" the company or department where the witness has a supervisory role. It is by virtue of his or her responsibilities in the company or department and by the fact that he or she is acting in a supervisory capacity that a witness is in a position to testify about the work or actions of members of his or her team without necessarily having direct knowledge. It is because the witness is acting in a supervisory capacity and is closely overseeing the activities of the company that he or she is in a position to know that the facts contained in the statements from the subordinates are true.

[49] Contrary to what P&H appears to argue, the "corporate subordinate exception" to inadmissible hearsay is not a generic, disincarnated and timeless exception. It is instead firmly anchored in two elements: it is circumscribed by the corporation or the department where the supervisor exercises his or her authority (i.e., the "corporate" dimension) and by the relationship of subordination at the time the employee acts under the authority of the supervisor (i.e., the "subordinate" dimension).

[50] Here, the impugned statements made by Mr. Heimbecker at paragraphs 166, 167 and 170 of his Witness Statement satisfy none of the core attributes of the "corporate subordinate exception" identified by P&H itself. First, the statements are not "corporate" in nature, as they do not relate to P&H's ordinary course of business at the Virden elevator at the time it was acquired by P&H. Instead, they refer to situations at a different corporate entity before the Acquisition. In other words, they do not involve P&H as a corporation. Second, Mr. Klippenstein is Mr. Heimbecker's subordinate now, but he was not at the time of the affirmations imported into Mr. Heimbecker's Witness Statement. True, Mr. Heimbecker was closely involved in the transaction to acquire the former LDC elevators and he is now involved in the ongoing management of P&H's relationship with farms which sell to the Virden or Moosomin elevators. However, Mr. Heimbecker was not involved in LDC's business before the Acquisition, at the time when Mr. Klippenstein worked at LDC. As President Grain Division Canada of P&H, Mr. Heimbecker was not ultimately responsible for Mr. Klippenstein when the latter was at LDC. That is, the challenged evidence lacks the "subordinate" attribute.

[51] I have found no precedent, and counsel for P&H could not point to any, that stands for the proposition that the "corporate subordinate exception" could extend to behavior or statements made at a time where neither the "corporate" element nor the "subordinate" element were present. On the contrary, I find that the FCA's approach on the limited scope of the exception has been consistent throughout its decisions in *Pfizer Canada*, *O'Grady* and *Coldwater*. In *O'Grady*,

notably, the affiant was clearly acting in a supervisory capacity and referred to work done by one of his subordinates at the time he was supervising the work at issue.

[52] Not only does P&H's proposed interpretation find no support in the case law and disregard the FCA's teachings, but it also offends common sense and defies the fundamental logic underlying the "corporate subordinate exception". It would essentially mean that, by some sort of magical incantation, the acquisition of an entity would suddenly vest the corporate executives of the acquiror with imputed personal knowledge of actions or events at the acquired entity they were not supervising and had no familiarity with, and over which they had no authority at the time they were done. It would extend and metastasize the "corporate subordinate exception" to the very opposite of what it is meant to cover.

[53] For those reasons, the extracts identified by the Commissioner in paragraphs 166, 167 and 170 will be struck as inadmissible hearsay.

B. The P&H customer sales representative

[54] I now turn to paragraph 174 of the Witness Statement, where Mr. Heimbecker notably refers, in the middle of the paragraph, to a specific statement allegedly made to a P&H customer sales representative by one of the Commissioner's farmer witnesses. Here, both the *Coldwater* and the *Pfizer Canada* decisions provide a clear answer and indicate that the "corporate subordinate exception" does not apply to such a situation: "a departmental supervisor cannot introduce particular statements made by department personnel for the truth of those statements. In the words of *Pfizer* at para. 115, there is no general 'department head' exception to hearsay" (*Coldwater* at para 42).

[55] This again leaves no doubt that Mr. Heimbecker's statement regarding information provided by the P&H employee with respect to the latter's specific interaction with one of the Commissioner's farmer witnesses is inadmissible hearsay and cannot be introduced for the truth of its contents. In other words, the "corporate subordinate exception" cannot be invoked to give to a supervisor an imputed first-hand knowledge of the truth of particular statements made by employees in the course of their duties or of particular exchanges these employees may have had.

[56] At the hearing, counsel for P&H argued that the *O'Grady* and *Lukacs v Canada (Transportation Agency)*, 2019 FC 1256 ("***Lukacs***") cases allowed the admission of direct hearsay statements like the disputed one from the P&H customer sales representative. I disagree and, further to my review, I can find no indication in either of these decisions supporting P&H's proposition that these cases can be distinguished from the FCA's affirmations in *Coldwater* and *Pfizer Canada*. In fact, neither *O'Grady* nor *Lukacs* deal with a situation where a supervisor testified about a specific statement made by a subordinate. Both were cases where a supervisor testified about the acts of a subordinate in the scope of his functions and was in a position to state that the facts sworn on information and belief were true. Indeed, counsel for P&H could not identify any passage in those decisions that would contradict or qualify the affirmation made by the FCA in each of the *Coldwater* and *Pfizer Canada* decisions.

[57] Again, it is understandable that the "corporate subordinate exception" to inadmissible hearsay evidence cannot extend to such specific statements made by subordinate employees

several steps removed from the supervisor. Whereas Mr. Heimbecker was ultimately responsible for the P&H customer sales representative at the time of the impugned statement, he is not in a position to testify to the specific exchanges or conversations between this employee and a farmer. The middle sentence of paragraph 174 will therefore be struck as inadmissible hearsay. However, Mr. Heimbecker could certainly testify to the elements mentioned in the last portion of paragraph 174 of his Witness Statements, as these refer to P&H's current business and are therefore admissible evidence meeting the requirements of the "corporate subordinate exception".

[58] I would add that the conclusion I reach with respect to the inadmissibility of the statements contained in paragraphs 166, 167, 170 and 174 of Mr. Heimbecker's Witness Statement is consistent with and buttressed by the principled exception to hearsay. The function of the trier of fact is to determine whether a particular hearsay statement exhibits sufficient indicia of necessity and reliability to afford him or her a satisfactory basis for evaluating the truth and trustworthiness of the statement. Under the principled exception to hearsay, hearsay evidence can only be admitted if it satisfies the threshold requirements of necessity and reliability. Here, the challenged evidence about the statements made by Mr. Klippenstein and the P&H customer sales representative is neither necessary nor reliable. The necessity element is not met as P&H has provided no reason why it could not have submitted witness statements from the two individuals on whom Mr. Heimbecker relied and could not have called them to testify about their statements. I note that this is a case where the hearsay evidence would simply have required P&H to prepare and file two additional witness statements, not tens of them. The hearsay evidence is also unreliable as it does not possess circumstantial guarantees of trustworthiness and the nature of the testimony at stake would make it virtually immune to cross-examination by the counsel for the Commissioner. In sum, all of the mischief associated with admitting hearsay evidence is present in this case.

IV. TIMING OF THIS RULING AND REMEDY

[59] In their written and oral submissions, counsel for P&H argued that, as was the case in *VAA*, it would be premature for the Tribunal to rule on the Commissioner's motion and on the admissibility of the Disputed Proposed Evidence, and that I should defer my decision until the hearing on the merits. I do not agree.

[60] As the Tribunal stated in *The Commissioner of Competition v Vancouver Airport Authority*, 2018 Comp Trib 15 ("***VAA Motion***"), it is true that only in clear cases will the Tribunal be ready to find proposed witness evidence inadmissible on a preliminary motion, prior to the witness being examined and cross-examined (*VAA Motion* at para 12). This is such a case. Here, I am of the view that we have both clear instances where some of the impugned evidence challenged by the Commissioner is not inadmissible and will go to weight, as well as other clear instances where the impugned evidence is inadmissible and can be struck at this early stage.

[61] As was stated in *VAA Motion*, the Tribunal has the discretion, depending on the factual circumstances before it, to defer a ruling on admissibility of evidence until later, as long as fairness is respected. Conversely, it also has the discretion to do the reverse. A fundamental principle governing all applications before the courts or the Tribunal is that facts must be proven by admissible evidence (*Pfizer Canada* at para 79). Moreover, determining the admissibility of evidence is an analytical step that is distinct from determining the weight to be given to the

evidence (*Pfizer Canada* at para 83). Further to my review of the Commissioner's motion, and after having considered the written and oral submissions of the parties, I consider that, in this particular case and given the language used by Mr. Heimbecker in his Witness Statement, I do not have to wait until the hearing to determine whether or not the challenged paragraphs constitute improper lay opinion evidence or inadmissible hearsay, and that I have all the elements allowing me to rule on the issue of admissibility now.

[62] Again, the present motion must be distinguished from the situation in *VAA*. In *VAA*, since the concern was the extent and scope of the actual knowledge of Mss. Stewart and Bishop with respect to the disputed evidence, the Tribunal was of the view that subjecting the witnesses to examination by counsel for the Commissioner, to cross-examination by counsel for the respondent and to questioning by the panel would shed light on the issue of admissibility. Here, I am satisfied that the impugned paragraphs do not raise matters that need to be clarified with Mr. Heimbecker's testimony at the hearing on the merits, and that the testimony of Mr. Heimbecker would not provide a better factual context to assist the Tribunal in making a determination on the admissibility of the evidence.

[63] One last point needs to be addressed. At the very end of his submissions at the hearing, counsel for P&H asked the Tribunal that, in the event I find some portions of Mr. Heimbecker's Witness Statement inadmissible, P&H be granted leave to file an amended version of the Witness Statement to deal with the inadmissible lay opinion evidence, as well as leave to file additional witness statements from the two subordinate employees should any proposed evidence be found to constitute inadmissible hearsay. The Commissioner opposed these requests.

[64] For the reasons that follow, I will deny P&H's requests and will not exercise my discretion to give P&H permission to amend Mr. Heimbecker's Witness Statement or to serve and file any new witness statements at this stage.

[65] First, with respect to those paragraphs found to constitute inadmissible lay opinion evidence, there is nothing to amend or to correct. These are simply statements that go beyond the boundaries of what Mr. Heimbecker, as a lay witness, can testify about. These statements just cannot be made by Mr. Heimbecker.

[66] Second, with respect to those paragraphs found to constitute inadmissible hearsay, I observe that, in its responding motion record, P&H's main relief was asking the Tribunal to dismiss the Commissioner's motion with costs. In the alternative, P&H asked the Tribunal to defer its ruling on admissibility on the basis that it was not a clear case where the Tribunal could rule on the issue without the benefit of Mr. Heimbecker's testimony. But, nowhere in its responding record was P&H asking for leave to prepare and serve revised or new witness statements should the Commissioner be successful on his motion, nor did P&H provide the proposed additional witness statements that could be filed to correct any inadmissible hearsay statements. Counsel for P&H only raised this alternative option at the hearing of the motion, again without providing the proposed additional witness statements.

[67] I also point out that the multiple versions of the scheduling orders issued by the Tribunal in this Application, in each case after lengthy consultations with the parties, never provided for the possibility of additional witness statements after the hearing of any motions related to the proposed

evidence. As acknowledged by P&H, authorizing the filing of additional witness statements by P&H would require granting the Commissioner the right to file reply witness statements, and it would further require amendments to allow for possible motions challenging these new statements. None of these additional steps were contemplated in the scheduling orders issued in this Application.

[68] Moreover, the process whereby the Tribunal provides for witness statements to be served in advance and for parties to file motions challenging the proposed evidence ahead of the hearing on the merits is to streamline the hearing process and to make the management of applications before it more efficient. The process is not there to give the parties an opportunity to correct the deficiencies that might be revealed in their proposed evidence through an early challenge of the evidence. Indeed, the Tribunal's scheduling orders typically provide that motions related to the evidence are heard shortly before the hearing on the merits, and do not contemplate a new round of witness statements further to such motions.

[69] Most importantly, there is also a fairness element here. There are about three weeks left before the hearing begins on the merits on January 6, 2021. The Commissioner has delivered his reply evidence. P&H did not provide witness statements of Mr. Klippenstein and the P&H customer sales representative in draft for the Commissioner and the Tribunal to consider, or a date by which they would be delivered. These factors, and the upcoming Holiday Season, lead to the concern that it would be unfair to the Commissioner to add an additional new stage of evidence delivery to accommodate the proposed new witness statements and possible challenges to their contents, at this late hour. Realistically, there is insufficient time left before the hearing to have a new process to deal with such additional proposed evidence in a manner that is fair to both parties and consistent with the Tribunal's practices in its scheduling orders. I further underline that the hearsay evidence contained in Mr. Heimbecker's Witness Statement was arguably offered to challenge the evidence of the Commissioner's farmer witnesses, and counsel for P&H will have the opportunity, at the hearing on the merits, to test this evidence on cross-examination of these witnesses.

[70] Finally, I observe that, if the Tribunal had accepted P&H's submission on an alternative remedy and decided to rule on the alleged hearsay evidence later, at the hearing on the merits in January 2021, P&H would have had no opportunity to submit new witness statements to replace the inadmissible hearsay. It would be odd if P&H would be able to obtain, on losing a pre-hearing motion brought by the Commissioner in accordance with the Scheduling Order, a benefit that it would not have if the Tribunal had accepted its proposed alternative remedy and had only considered the matter at the hearing.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[71] The Commissioner's motion is granted in part.

[72] The following portions of Mr. Heimbecker's Witness Statement constitute inadmissible lay opinion and are hereby struck:

1. The last sentence of paragraph 55;

2. Paragraph 59, starting with the words “I do” at the second line;

3. The second half of paragraph 141, starting with the word “such” at the second line;

4. The last sentence of paragraph 146;

5. The end of the first sentence of paragraph 147, starting with the words “-- or their”;

6. The first sentence of paragraph 152; and

7. The last sentence of paragraph 178.

[73] The following portions of Mr. Heimbecker’s Witness Statement constitute inadmissible hearsay and are hereby struck:

1. The last three sentences of paragraph 166;

2. The fifth and sixth sentences of paragraph 167;

3. The second sentence of paragraph 170; and

4. The second sentence of paragraph 174.

[74] Revised public and confidential versions of the Witness Statement of Mr. Heimbecker, reflecting the terms of this Order, shall be provided to the Tribunal and served by P&H by the end of the day on December 18, 2020.

[75] P&H’s verbal request to serve and file additional witness statements is denied.

[76] As success on this motion is divided, costs shall be in the cause.

DATED at Ottawa this 15th day of December 2020.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL OF RECORD:

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The Commissioner of Competition

Jonathan Hood
Ellé Nekiar

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Parrish & Heimbecker, Limited

Davit Akman
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THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS INC.
SHAW COMMUNICATIONS INC.

Respondents

and

ATTORNEY GENERAL OF ALBERTA
VIDEOTRON LTD.

Intervenors

WRITTEN REPRESENTATIONS OF THE COMMISSIONER
(Respondents' Motion to Introduce New Witness Statement – McKinsey Witness Statement)
