COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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OTTAWA, ONT. #2

CT-2019-

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

NOTICE OF APPLICATION

TAKE NOTICE THAT the Applicant, the Commissioner of Competition (the "**Commissioner"**), will make an application to the Competition Tribunal (the "**Tribunal**"), on a day and place to be determined by the Tribunal, pursuant to section 92 of the *Competition Act,* R.S.C. 1985, c. C-34 (the **"Act"**) for:

1. an order requiring the Respondent, Parrish & Heimbecker, Limited ("**P&H**"), to dispose of all of the assets of the ongoing business of a primary grain elevator in the Relevant Markets (defined below), as well as such other assets, if any, as are required for an effective remedy;

2. an order that P&H is prohibited from acquiring, within a period of five years from the date of the order, any primary grain elevator in the Relevant Markets, unless P&H provides the Commissioner with at least 30 days' advance written notice of such proposed merger, where the proposed merger would not otherwise be subject to notification pursuant to the Act;

3. an order directing P&H to pay costs; and

4. such further and other relief as the Commissioner may request and this Tribunal may consider appropriate.

AND TAKE NOTICE that if you do not file a response with the Registrar of the Tribunal within 45 days of the date upon which this Application is served upon you, the Tribunal may, upon application by the Commissioner and without further notice, make such order or orders as it may consider just, including the orders sought in this application.

AND TAKE FURTHER NOTICE that the Commissioner will rely on the Statement of Grounds and Material Facts ("**SGMF**") in support of this Application and on such further or other material as counsel may advise and the Tribunal may permit.

AND TAKE FURTHER NOTICE that a concise statement of economic theory of the case is attached as Schedule "A" to the SGMF.

THE ADDRESSES FOR SERVICE ARE:

For the Respondent:

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Attention:

Robert S. Russell
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For Commissioner of Competition

Department of Justice Canada
Competition Bureau Legal Services
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Tel.: 416.954.5925
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Attention:

Jonathan Hood
Ellé Nekiar

The Applicant proposes that the hearing of this matter be held in the City of Ottawa, Ontario and be heard in English.

STATEMENT OF GROUNDS AND MATERIAL FACTS

I. OVERVIEW

1. Farmers benefit when primary grain elevators ("**Elevators**") compete to buy their grain. Without an order of the Tribunal, P&H will exercise enhanced market power at the expense of farmers in certain parts of Saskatchewan and Manitoba. Through an acquisition, P&H has the ability and incentive to increase the price of Grain Handling Services (defined below) for wheat and canola resulting in farmers being paid less.

2. On December 10, 2019, P&H acquired all ten Elevators owned by Louis Dreyfus Company Canada ULC ("**Louis Dreyfus**") in Western Canada (the "**Acquisition**").

3. This Application seeks an order to remedy the likely substantial lessening of competition ("**SLC**") stemming from P&H acquiring the Elevator previously owned by Louis Dreyfus on the TransCanada Highway in Virden, Manitoba (the "**Virden Elevator**"). For many farmers, the Virden Elevator was the closest and most effective competitor to P&H's Elevator located on the TransCanada Highway in nearby Moosomin, Saskatchewan (the "**Moosomin Elevator**").

4. Post-Acquisition, P&H controls both Elevators along a 180 km stretch of the TransCanada Highway. Farmers in and around this area are left with limited options. The next closest Elevator is owned by Viterra Inc. in Fairlight, Saskatchewan (the "**Fairlight Elevator**"). However, the Fairlight Elevator is located 35 kilometres south of the TransCanada Highway on a secondary road and, due to highway weight restrictions, farmers may pay more to transport their wheat and canola.

5. P&H will be able to materially raise the implicit price farmers pay for Grain Handling Services for wheat and canola in the Virden-Moosomin corridor. Farmers will be paid less for their wheat and canola.

6. P&H's enhanced market power post-Acquisition will not be effectively constrained by other Elevators or other buyers of wheat and canola due to transportation costs and capacity constraints.

7. The loss of competitive rivalry between the Virden Elevator and the Moosomin Elevator will not be offset by existing competitors expanding or by new competitors entering because barriers to entry are high.

8. Accordingly, the Commissioner brings this application seeking an order requiring P&H to divest itself of such assets as required to ensure that the Acquisition does not or is not likely to lessen competition substantially.

II. THE PARTIES

9. The Commissioner is an officer appointed by the Governor in Council pursuant to section 7 of the Act and is responsible for the administration and enforcement of the Act.

10. P&H is a vertically integrated Canadian agribusiness headquartered in Winnipeg, Manitoba. P&H has operations spanning across Canada in grain trading, handling and merchandising, as well as crop input retail, flour milling and feed mills. P&H employs over 1,500 people with customers in 24 countries.

11. P&H's grain handling and trading business purchases and stores grains of all varieties and then markets that grain to customers around the world. P&H now owns 30 Elevators in Western Canada and has ownership interests in multiple grain terminals at ports in Canada.

III. THE ACQUISITION

12. Pursuant to an Asset Purchase Agreement dated September 3, 2019, P&H agreed to acquire ten Elevators and related assets such as inventories, equipment, machinery and vehicles, in Western Canada from Louis Dreyfus.

13. On December 10, 2019, 32 days after certifying responses to supplementary information requests, P&H and Louis Dreyfus closed the Acquisition.

IV. BACKGROUND

14. Farmers are a vital part of the Canadian economy producing grains such as wheat, canola, barley, corn, oats and rye. In 2018, they produced approximately 31.8 million tonnes of wheat, 20.3 million tonnes of canola, 8.4 million tonnes of barley and 3.4 million tonnes of oats. This Application seeks to address market power with respect to Canada’s two biggest grain crops – wheat and canola.

15. Wheat and canola purchasers and processors, such as flour mills, feed mills and canola crushing plants, purchase wheat and canola for use as or as inputs into food, animal feeds, processed products, fuels and other industrial uses. Canadian wheat and canola are sold to customers around the world.

16. Canadian farmers most often sell their wheat and canola to a marketing company like P&H. The marketing company generally has a local presence through Elevators to which the farmers will transport their grain.

17. An Elevator is designed to stockpile or store grain. A farmer’s wheat and canola is generally transported by truck from a farm to an Elevator

where it is elevated, graded, and segregated and may be cleaned, dried, blended or stored ("**Grain Handling Services**").

18. Elevators post prices daily based on type of grain, its quality, protein content and month of delivery. The Elevator's price takes into consideration the costs of Grain Handling Services. As such, the costs and the margin earned by the Elevator for Grain Handling Services are implicit in the price paid to the farmer for their wheat and canola. When competing for farmers' wheat and canola, an Elevator regularly pays more than its posted price.

19. Many farmers also set "grain pricing orders" or "target contracts" with Elevators where the farmer chooses a preferred price to sell a certain quantity of grain; however, the Elevators choose whether and when to buy grain pursuant to the contract.

20. Elevators are always located on a rail line to ensure cost-effective transportation. The grain may subsequently be moved to a process elevator whose principal purpose is the receipt and storage of grain for direct manufacture or processing into other products. Usually, grains sold for export move from Elevators by rail to an export terminal either on the West Coast or to the East.

V. THE RELEVANT MARKETS

21. The relevant markets in this Application are the supply of Grain Handling Services for wheat and the supply of Grain Handling Services for canola for the aggregated locations of farmers that benefited from competition between the Virden Elevator and Moosomin Elevator ("**Relevant Markets**"). Farmers most affected are located in the corridor between these two Elevators.

A. The relevant product markets

22. The supply of Grain Handling Services for wheat is a relevant product market and the supply of Grain Handling Services for canola is a separate relevant product market.

23. There are no functional substitutes for these services.

24. Some farmers can sell their wheat and canola directly to processors in Western Canada such as canola crushing facilities. However, these facilities do not have the capacity to constrain Elevators from profitably imposing and sustaining a small but significant non-transitory increase in the price of Grain Handling Services for wheat or canola.

B. The relevant geographic market is local

25. The draw area of an Elevator is local because of transportation costs. Each Elevator has a unique draw area due to characteristics such as road conditions, crop output and local topography. Usually the wheat and canola purchased by an Elevator originates from farms within a one-hour drive time of that Elevator.

26. Elevators can and do charge farmers different implied prices for Grain Handling Services for wheat and canola based on farmers' locations.

27. The relevant geographic market for this Application is the aggregated locations of farmers that benefited from competition for Grain Handling Services for wheat and canola between the Virden Elevator and Moosomin Elevator. Farmers most affected are located in the corridor between these two Elevators.

VI. THE ACQUISITION IS LIKELY TO SUBSTANTIALLY LESSEN COMPETITION

28. The Acquisition is likely to cause a SLC in the Relevant Markets owing to the elimination of Louis Dreyfus as a vigorous and effective competitor. The Virden Elevator and Moosomin Elevator were close competitors in part due to their proximity along the TransCanada Highway. The two Elevators closely monitored each other’s wheat and canola prices and responded to competitive activity from the other by offering farmers better prices.

29. As a result of the Acquisition, P&H controls both Elevators along a 180 km stretch of the TransCanada Highway. The Virden Elevator and Moosomin Elevator also compete with the Fairlight Elevator. The Fairlight Elevator, however, is located on a secondary road 35 km south of the TransCanada and, due to highway weight restrictions, farmers may pay more to transport their wheat or canola.

30. With control of the Virden Elevator, P&H has the ability and incentive to unilaterally exercise market power in the Relevant Markets. Affected farmers will be paid less for their wheat and canola.

31. Additionally, prior to the Acquisition, P&H intended to expand the rail car capacity at the Moosomin Elevator, effectively increasing the Elevator’s ability to handle more wheat and canola and thereby increasing the level of competition in the Relevant Markets. But for the Acquisition, the capacity expansion at the Moosomin Elevator would have increased the rivalry with the Virden Elevator to the benefit of farmers. P&H no longer intends to expand capacity at the Moosomin Elevator.

32. Direct purchasers or other more distant Elevators are not sufficient to constrain an exercise of market power by P&H in the Relevant Markets. Canola crushers and other direct purchasers do not have

sufficient capacity to constrain an exercise of market power. More distant Elevators are unable to constrain an exercise of market power owing to higher transportation costs for farmers to deliver their wheat and canola.

33. Because barriers to entry and expansion are high, P&H's ability to exercise market power is unlikely to be constrained by new entry or expansion by existing Elevators.

34. The barriers to entry into the Relevant Markets faced by a potential entrant include capital costs of $40 to $50 million to construct an Elevator. It is also difficult to find a location that is a suitable site permitting adequate rail and road access. A potential entrant would take more than two years to build an Elevator.

A. There are no mitigating factors to the SLC

35. Other relevant section 93 factors support the conclusion that the Acquisition actually or likely substantially lessens competition in the Relevant Markets:

a. *Foreign competitors.* Elevators and direct purchasers in other countries cannot compete directly for the purchase of wheat and canola from farmers in the Relevant Markets because of transportation costs.

b. *No alternative substitutes*. For the vast majority of farmers in the Relevant Markets, there are no viable substitutes.

c. *Barriers to entry are high*. As described in paragraph 34 above, barriers to entry and expansion are high owing to significant capital costs and difficulty finding a suitable location to build an Elevator.

d. *Limited effective remaining competition*. The closest remaining Elevator to the Virden Elevator and Moosomin Elevator is insufficient to constrain an exercise of market power by P&H owing to its location on a secondary road off the TransCanada Highway. Other more distant Elevators are not effective competitors owing to higher transportation costs faced by the farmer.

e. *Removal of a vigorous and effective competitor*. The Virden Elevator was a vigorous and effective competitor to the Moosomin Elevator prior to the Acquisition by virtue of its proximity on the TransCanada Highway.

f. *Not a market subject to change through innovation*. The provision of Grain Handling Services is unlikely to change materially due to innovation in the near future.

VIII. RELIEF SOUGHT

36. The Commissioner therefore seeks:

a. an order requiring P&H to dispose of all of the assets of the ongoing business of an Elevator in the Relevant Markets, as well as such other assets, if any, as are required for an effective remedy;

b. an order that P&H is prohibited from acquiring, within a period of ten years from the date of the order, any Elevator in the Relevant Markets, unless P&H provides the Commissioner with at least 30 days' advance written notice of such proposed merger, where the proposed merger would not otherwise be subject to notification pursuant to the Act;

c. an order directing P&H to pay costs; and

d. such further and other relief as the Commissioner may request and this Tribunal may consider appropriate.

DATED AT Montréal, Quebec, this 19th day of December, 2019

ORIGINAL SIGNED BY

Matthew Boswell
Commissioner of Competition

I hereby certify this to be a true copy of the original document/
Je certifie par la présente que ceci est une copie conforme au document original

Dated this / Fait ce December 19, 2019

ORIGINAL SIGNED BY BIANCA ZAMOR

For Registrar, Competition Tribunal /
Pour Registraire, Tribunal de la concurrence

SCHEDULE “A”

CONCISE STATEMENT OF ECONOMIC THEORY

1. Elevators compete to purchase grain from farmers. A farmer's grain is generally transported by truck from a farm to an Elevator where the grain is elevated, graded, and segregated and may be cleaned, dried, blended or stored - defined in this application as Grain Handling Services.

2. Elevators post prices daily for each type of grain they accept which vary by the grain quality, protein content, and month of delivery. Factors that affect any given grain’s price includes global supply and demand conditions, the individual grain company’s need for the grain to meet its supply agreements, and local competitive conditions. The Elevator’s price takes into consideration the costs of Grain Handling Services. As such, the costs and margin earned by the elevator for Grain Handling Services are implicit in the price paid to the farmer for their grains.

3. The supply of Grain Handling Services for wheat is a relevant product market and the supply of Grain Handling Services for canola is a separate relevant product market. A hypothetical monopolist of Grain Handling Services for wheat or canola could profitably impose a small but significant and non-transitory price increase. There are no functional substitutes for Grain Handling Services for wheat and canola.

4. The relevant geographic market is the aggregated locations of farmers that benefited from competition for Grain Handling Services between the Virden Elevator and Moosomin Elevator. Farmers most affected are located in the corridor between these two elevators. Elevators can and do charge farmers different implicit prices for Grain Handling Services for wheat and canola based on, among other factors, a farmer’s location. A hypothetical monopolist could profitably impose a small but significant and non-transitory price increase on these farmers.

5. The Relevant Markets are therefore the supply of Grain Handling Services for wheat and the supply of Grain Handling Services for canola for the aggregated locations of farmers that benefited from competition between the Virden Elevator and Moosomin Elevator.

6. The Acquisition causes the loss of competition between the Moosomin Elevator and Virden Elevator likely resulting in an increase in the implicit price paid by farmers for Grain Handling Services in the Relevant Markets. This means that farmers in the Relevant Markets will be paid less for their wheat and canola.

7. The Virden Elevator was a close and effective competitor to the Moosomin Elevator.

8. The closest remaining competing Elevator to the Virden Elevator and the Moosomin Elevator is insufficient to constrain an exercise of market power by P&H. Other more distant Elevators are not effective competitors owing to higher transportation costs faced by the farmer.

9. The Acquisition increases concentration in the Relevant Markets. As such, P&H is likely to find it profitable to raise its prices after the Acquisition because some of the sales that would have been lost prior to the Acquisition will likely be diverted to either one of their Elevators. This diversion may make increasing prices profitable when it would not have been profitable prior to the Acquisition.

10. Entry or expansion by competitors is unlikely to occur in a timely and sufficient manner due to barriers to entry. The barriers to entry faced by a potential entrant include capital costs of $40 to $50 million to construct an Elevator. It is also difficult to find a location where there is sufficient demand and also a suitable site permitting adequate rail and road access. A potential entrant would take more than two years to build an Elevator.

11. Based on the above, it is likely that the Acquisition provides P&H with an increased ability to exercise market power. Therefore, the Acquisition will lead to a likely substantial lessening of competition in the Relevant Markets.