COMPETITION TRIBUNAL
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CT-2011/003

THE COMPETITION TRIBUNAL

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

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*

AND IN THE MATTER OF certain rules, policies and agreements relating to the residential multiple listing service of the Toronto Real Estate Board.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

REPLY BRIEF OF AUTHORITIES OF THE CANADIAN REAL ESTATE ASSOCIATION

(Re: Request For Leave To Intervene)

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TAB 1

Case Name:

United Grain Growers Ltd. v. Canada (Commissioner of Competition)

Reasons and Order Granting Request for Leave to Intervene
IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended;
AND IN THE MATTER OF an application by United Grain Growers Limited under section 106 of the Competition Act;
AND IN THE MATTER OF the acquisition by United Grain Growers Limited of Agricore Cooperative Ltd., a company engaged in the grain handling business;
AND IN THE MATTER OF a request under section 9(3) of the Competition Tribunal Act, R.S.C. 1985, c. 19, as amended, for leave to intervene.
Between:
United Grain Growers Limited, applicant, and
The Commissioner of Competition, respondent, and
The Canadian Wheat Board, applicant for leave to intervene

[2005] C.C.T.D. No. 33

2005 Comp. Trib. 35

File No. CT-2002-001

Registry Document No. 142

Canada Competition Tribunal
Ottawa, Ontario

Before: Simpson J., Presiding Judicial Member

Decision: November 4, 2005.
(Decided on the basis of the written record.)

(23 paras.)

Appearances:

Counsel

For Agricore United:

Mr. Kent Thomson
Ms. Sandra Forbes

For the Commissioner:

Mr. Jonathan Chaplan

For the Canadian Wheat Board:

Mr. James E. McLandress
Ms. Margaret I. Wiebe

. . . .

Reasons and Order Granting Request for Leave to Intervene

1 On September 7th, 2005, the Canadian Wheat Board (the "CWB") filed a request for leave to intervene in the proceedings before the Tribunal involving Agricore United ("AU") and the Commissioner of Competition (the "Commissioner").

BACKGROUND

2 United Grain Growers Limited ("UGG") acquired Agricore Cooperative Limited ("Agricore") on November 1, 2001. Since the closing of the acquisition, UGG and Agricore have been carrying on business as Agricore United.

3 On January 2, 2002, the Commissioner of Competition (the "Commissioner") filed an application with the Competition Tribunal (the "Tribunal") alleging that the acquisition of Agricore by UGG would likely prevent or lessen competition substantially in the market for the provision of port terminal grain handling services in the Port of Vancouver (the "Merger Case").

4 On September 12, 2002, the Tribunal made a finding that the acquisition caused a substantial lessening of competition as alleged by the Commissioner; this allegation was not contested by UGG for the purposes of the proceedings before the Tribunal. On October 17, 2002, the Commissioner and AU registered a consent agreement (the "Consent Agreement") whereby AU was to divest either the UGG Terminal or its interest in the Pacific Complex, another Port Terminal in Vancouver.

5 AU subsequently decided to divest the UGG Terminal (the "Terminal"). The Consent Agreement provided that if the Terminal was not divested by a certain date (the "Date"), a Trustee would be appointed to sell the Terminal.

6 The Date was extended eleven times until it became August 15, 2005. When AU sought a twelfth extension, the Commissioner refused. AU then applied to the Tribunal (the "Application"), under subsection 106(1) of the Competition Act, R.S.C. 1985, c. C-34, as amended (the "Act"), for an order rescinding the Consent Agreement, on the grounds that circumstances have changed and that divestiture of the Terminal is no longer feasible.

7 AU's main allegation involves the dwindling supply of independent grain. Because of it, the prospects of an effective divestiture are much diminished. Moreover, the reduced volume of uncommitted independent grain demonstrates that the divestiture is no longer needed, as independent grain companies have been able, apparently, to secure port terminal grain handling services at the Port of Vancouver at competitive rates.

8 The Commissioner opposes the application, mainly on the grounds that the circumstances leading to the signing of the Consent Agreement have not changed: the Commissioner is still concerned with the SLC in the port terminal grain handling services in the Port of Vancouver flowing from the merger of United Grain Growers and Agricore. The Commissioner also submits that the levels of uncommitted grain have not substantially changed since the signing of the Consent Agreement.

CWB'S REQUEST FOR LEAVE TO INTERVENE

9 The CWB is a farmer controlled marketing organization, incorporated pursuant to the provisions of the Canadian Wheat Board Act, R.S.. c. C-12. It has exclusive jurisdiction over the purchase and sale of wheat, durum and barley ("CWB grains") grown in Western Canada and intended for export or domestic human consumption. All the sales revenue earned by the CWB, after deducting operating costs, is returned to the approximately 70,000 producers of CWB grains.

10 The CWB does not own any grain handling facilities in Canada, including any at the Port of Vancouver, and it therefore relies on grain handling services and the facilities provided by both integrated and non-integrated companies. The CWB submits that the port terminal grain handling services in the Port of Vancouver are essential to its operations.

11 The CWB was granted intervenor in the Merger Case (The Commissioner of Competition v. United Grain Growers Limited, 2002 Comp. Trib. 20) for the purposes of the proceeding which ended with the registration of the Consent Agreement. It was granted leave to intervene on the sole substantive issue in that proceeding, namely whether the proposed divestiture "would satisfy the four conditions [concerning the buyer] and [would] effectively remedy the substantial prevention or lessening of competition in the market for port terminal grain handling services in the Port of Vancouver".

12 In this Application, the issue is whether the circumstances have changed and if so, whether the parties would have signed the Consent Agreement in the new circumstances or whether the Consent Agreement would have been effective in achieving its intended purpose.

13 By letter dated September 9th, 2005, the Commissioner indicated that it supports the CWB's request to intervene in this Application, on terms similar to those ordered in the Merger Case.

14 AU, in its response to the request for leave to intervene, submits that leave should be denied because the CWB has failed to establish that it has relevant submissions to make that are unique or distinct from the position of the Commissioner. The CWB is not in a position, according

to AU, to make representations as to the respective intentions of the Commissioner or of AU at the time the Consent Agreement was signed or at the time the section 106 application was made. In the alternative, any representation made by AU would simply be repetitive. Should the Tribunal grant leave, the intervention should be limited to attendance and submissions under section 32 of the Competition Tribunal Rules, SOR/94-290 (the "Tribunal Rules").

15 The Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), as amended (the "CTA") gives the Tribunal authority to grant intervenor status to any person who is not a party to the proceedings. Subsection 9(3) of the CTA reads as follows:

> (3) Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the Competition Act, to make representations relevant to those proceedings in respect of any matter that affects that person.

* * *

> (3) Toute personne peut, avec l'autorisation du Tribunal, intervenir dans les procédures se déroulant devant celui-ci, sauf celles intentées en vertu de la partie VII.1 de la Loi sur la concurrence, afin de présenter toutes observations la concernant à l'égard de ces procédures.

16 Section 30 of the Tribunal Rules provides the following:

> 30. The Tribunal may grant a request for leave to intervene, refuse the request or grant the request on such terms and conditions as it deems appropriate.

* * *

> 30. Le Tribunal peut soit accorder la demande d'autorisation d'intervenir en imposant, le cas échéant, les conditions qu'il juge indiquées, soit la refuser.

17 In the Merger Case, Mr. Justice McKeown, then Chairman of the Tribunal, considered the test for leave and said:

> [12] Further, as previously stated in The Commissioner of Competition v. Canadian Waste Services Holdings (26 June 2000), CT2000002/20, Reasons and Order Granting Request for Leave to Intervene at paragraph 3, [2000] C.C.T.D. No. 10 (QL) (Comp. Trib.) referred to in Commissioner of Competition v. Air Canada [2001], C.C.T.D. No. 5 (QL) (Comp. Trib.) at paragraph 11, the Tribunal must be satisfied that all of the following elements are met in order to grant the status of intervenor:
>
> (a) The matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate (see Director of Investigation and Research v. Air Canada (1992), 46 C.P.R. (3d) 184 at 187, [1992], C.C.T.D. No. 24 (QL)).

(b) The person seeking leave to intervene must be directly affected. The word "affects" has been interpreted in Air Canada, ibid., to mean "directly affects".

(c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (see Tele-Direct, cited above in s. [2]).

(d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (see Washington v. Director of Investigation and Research, [1998] C.C.T.D. No. 4 (QL) (Comp. Trib.)).

18 The Tribunal is of the view that CWB's request for leave in this Application satisfies the test stated above. Whether the Consent Agreement is rescinded or not, and whether the divestiture occurs or not are issues which directly impact the CWB and its member producers.

19 The Application in this case is not made by the Commissioner, but by AU. Accordingly, the representations to be made by CWB must be relevant to the issue raised by AU, namely, whether there has been a change of circumstances such that the Consent Agreement should no longer be maintained. The Tribunal is of the view that CWB, given its in-depth knowledge of the industry and the large number of grain producers it represents, is in a unique position to make original representations on this issue. The concern expressed by AU, that the CWB cannot speak to the intentions of either the Commissioner or AU at the time of the signing of the Consent Agreement, is valid, but does not preclude the CWB from being able to contribute its point of view on the alleged change of circumstances nor on the issue of whether, in the new circumstances, the Consent Agreement would have been ineffective.

20 In its submissions on the issue of the CWB intervention, AU argues that if the CWB is granted leave to intervene, its intervention should be limited to appearances and submissions under section 32 of the Tribunal Rules.

21 However, in the Merger Case, the CWB was allowed to call viva voce evidence, cross-examine witnesses and introduce expert evidence within the scope of its intervention. The participation was subject to any confidentiality order in the proceedings, and was premised on being non-repetitive. The Tribunal believes these terms should be repeated in this Application because they allow for meaningful participation by the CWB, without imposing an undue burden on the other parties.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

22 The CWB is granted leave to intervene on the following substantive issues in this Application:

> Whether the circumstances that led to the making of the agreement have changed and whether, in the circumstances that exist at the time the application is made, the agreement would not have been made or would have been ineffective in achieving its intended purpose.

23 In the course of its intervention, the CWB may

[i] review any cross-examination transcripts and, subject to confidentiality orders, access any documents produced by parties to the Application, on written request;

[ii] call viva voce evidence if the CWB provides: (1) the names of the witnesses sought to be called; (2) a will-say statement for each witness, with an explanation as to what issue within the scope of the intervention such evidence would be relevant; (3) a demonstration that such evidence is not repetitive, that the facts to be proven have not been adequately dealt with in the evidence so far; and (4) a statement that the Commissioner has been asked to adduce such evidence and has refused;

[iii] cross-examine witnesses at the hearing of the Application to the extent that it is not repetitive of the cross-examinations of the parties to the Application;

[iv] submit legal arguments, at the hearing of the Application and at any pre-hearing motions or case management conferences, that are non-repetitive in nature;

[v] introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the Tribunal Rules and case management decisions.

DATED at Ottawa this 4th day of November, 2005.

SIGNED on behalf of the Tribunal by the Chairperson of the Tribunal.

(s) Sandra J. Simpson

cp/e/qllkm

TAB 2

Indexed as:

Washington v. Canada (Competition Act, Director of Investigation and Research)

Reasons for Order Denying Intervention
IN THE MATTER OF an application by Dennis Washington et al., for an order pursuant to section 106 of the Competition Act, R.S.C. 1985, c. C-34;
AND IN THE MATTER OF the merger whereby Dennis Washington and K & K Enterprises acquired a significant interest in, and control of, Seaspan International Ltd.
Between:
Dennis Washington, K & K Enterprises, Seaspan International Ltd., C.H. Cates and Sons, Ltd., Applicants, and
The Director of Investigation, Respondent and
Smit International (Americas) Inc., Applicant for Leave to Intervene

[1998] C.C.T.D. No. 4

Trib. Dec. No. CT9601/255

Also reported at:78 C.P.R. (3d) 479

Canada Competition Tribunal
Ottawa, Ontario

Before: McKeown J., Presiding Judicial Member

Heard: February 3, 1998
Decision: February 9, 1998

(15 pp.)

Counsel for the Applicants:

Dennis Washington
K & K Enterprises
Seaspan International Ltd.
C.H. Cates and Sons, Ltd.

Nils E. Daugulis
Sharon Dos Remedios

Counsel for the Respondent:

Director of Investigation and Research

William J. Miller

Counsel for the Applicant for Leave to Intervene:

H. Peter Swanson

. . . .

Reasons for Order Denying Intervention

1 At the pre-hearing conference call in this matter on February 3, 1998 the Tribunal heard the request for leave to intervene of Smit International (Americas) Ltd. ("Smit"). The Tribunal denied the request for leave to intervene and indicated that reasons would follow. These are the reasons for that decision.

I. BACKGROUND

2 By notice of application filed December 1, 1997, Dennis Washington, K & K Enterprises, Seaspan International Ltd. ("Seaspan") and C. H. Cates and Sons, Ltd. ("Cates") (collectively "Washington et al.") seek to have the Tribunal's January 29, 1997 Consent Order ("Consent Order")[1] varied pursuant to section 106 of the Competition Act ("Act").[2] The Consent Order arose out of an application brought in 1996 by the Director of Investigation and Research ("Director") as a result of Dennis Washington's 1992 acquisition of Cates, a ship berthing business operating in Burrard Inlet, and his 1994 acquisition of Seaspan ("Seaspan merger"), a company which provides ship berthing services in Burrard Inlet and in Roberts Bank. The Director alleged that the Seaspan merger resulted in a substantial lessening of competition in the market for ship berthing services in Burrard Inlet and Roberts Bank. Seaspan entered the ship berthing market in Burrard Inlet in 1992, a market in which Cates had formerly been the sole provider of ship berthing services. The Seaspan merger resulted in the common ownership of the only two providers of ship berthing services in Burrard Inlet. Seaspan has historically been the sole provider of ship berthing services in Roberts Bank. The Seaspan merger removed Cates as a credible, potential entrant into the Roberts Bank market for ship berthing services.[3]

3 The Consent Order required Washington et al. to divest themselves of certain ship berthing assets ("divestiture package") to remedy the substantial lessening of competition. The proposed variation to the Consent Order, which would eliminate the requirement that Washington et al. sell the divestiture package, was brought as a result of the entrance of a new competitor into the market for ship berthing services in Burrard Inlet. In October 1997, Tiger Tugz Inc. ("Tiger Tugz"), an af-

filiate of Rivtow Marine Ltd. and Rivtow Straits Limited (together "Rivtow"), commenced ship berthing operations in Burrard Inlet. It is alleged in the application to vary that the entry of Tiger Tugz restores an effective competitor to the market for ship berthing services in Burrard Inlet and creates a credible, potential entrant in Roberts Bank such that it is no longer necessary that Washington et al. sell the divestiture package.

4 Smit filed its request for leave to intervene on January 12, 1998. By notice of motion filed January 28, 1998, Washington et al. and the Director together sought an order amending the December 1, 1997 application to vary the Consent Order to reflect the Director's consent to the proposed variation. The amendment, which was granted at the pre-hearing conference on February 3, 1998, converted the contested application to vary into an application to vary on consent ("consent variation application"). After concluding that there would be no prejudice to his client's position, counsel for Smit did not object to arguing the request for leave to intervene in the context of the amended application and did not seek an adjournment to file any further material.

II. TEST FOR GRANTING LEAVE TO INTERVENE

5 The test for granting intervenor status is set out in subsection 9(3) of the Competition Tribunal Act:

> Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal to make representations relevant to those proceedings in respect of any matter that affects that person.[4]

The word "affects" has been interpreted by the Tribunal to mean "directly affects".[5] Leave to intervene will only be granted where the Tribunal is convinced that the representations which will be made by the intervenor will be relevant and will assist the Tribunal in deciding the issues before it. Additionally, an intervenor must bring to the Tribunal a unique or distinct perspective of the subject matter in dispute.

III. SMIT'S REQUEST FOR LEAVE TO INTERVENE

6 Smit is in the business of providing marine related services to companies in various parts of the world and has extensive experience in providing ship berthing services. Smit does not currently provide ship berthing services in the Port of Vancouver, although it has an interest in doing so. It was in pursuing this interest that Smit investigated and ultimately tendered a bid for the divestiture package. Washington et al. oppose Smit's request for leave to intervene. The Director takes no position.

A. DIRECTLY AFFECTED

7 Smit advances what are essentially two bases for asserting that it is directly affected by the issues raised in the consent variation application. First, Smit argues that it is a potential competitor in the ship berthing market in the Port of Vancouver. As a bidder for the divestiture package, it has "entered into arrangements as a result of the Consent Order". If the Consent Order is varied in the manner proposed by the parties in the consent variation application the divestiture package will be removed from the market, nullifying Smit's attempt to purchase the divestiture package. Therefore, it is argued, Smit's proposed acquisition of the divestiture package, and consequently its position as a potential competitor, is entirely dependent on the outcome of the consent variation application.

8 In arguing that Smit is not directly affected by the consent variation application, Washington et al. assert that as one of five bidders for the divestiture package, Smit has less than a contingent interest in the divestiture package itself, let alone in these proceedings. Washington et al. place considerable emphasis on the fact that Smit, apart from having bid on the divestiture package, appears to have no other connection to the relevant market as, for example, a consumer or supplier of services. Washington et al. argue that Smit is in no different position than any other "operator from outside the market" who has indicated some interest in the divestiture package. At best, it is submitted, Smit is a potential competitor in the market for ship berthing assets and that alone is not enough to warrant being made an intervenor in these proceedings.

9 In Air Canada the Tribunal acknowledged that third parties who enter into arrangements based on an order of the Tribunal could be directly affected by a variation to that order:

> I think it would be a legitimate concern of the tribunal, if it were satisfied that the relief sought by the Director would result in the destruction of Gemini, that any remedy framed should avoid as much as possible harming third parties who may be able to show that they entered into arrangements with Gemini on the strength of the tribunal's order of 1989.[6]

This statement in Air Canada, although factually very different, raises an interesting consideration in this case in that third parties have relied on the Tribunal's Consent Order. I am not unmindful that in the present proceedings Smit has not entered into any formal arrangements with Washington et al. for the purchase of the divestiture package. Nor is it certain, assuming the consent variation application fails and the Consent Order is fully implemented, that Smit would ultimately be the purchaser of the divestiture package. However, it is clear that Smit has, presumably at some expense, investigated the possibility of competing in the relevant market by purchasing the divestiture package and has tendered a bid for the divestiture package.

10 The Tribunal cannot overlook the fact that Smit has taken the course of action it has in reliance, at least in part, on the divestiture required by the Tribunal through the Consent Order. Indeed, it was clearly the intention of the parties to the Consent Order in drafting the remedy they did that third parties would rely on the provisions of the Consent Order. The success of the remedy which the parties submitted to the Tribunal in January 1997 as being necessary to eliminate the substantial lessening of competition is dependent on the willingness of third parties to come forward, to investigate the viability of the divestiture package and to bid on that package. This is precisely what Smit has done.

11 The parties now come before the Tribunal with the consent variation application submitting that it is no longer necessary that Washington et al. sell the divestiture package and that the Consent Order should be varied to eliminate this requirement. Such an outcome is contemplated by section 106 of the Act. This does not, however, alter the fact that bidders such as Smit have acted in reliance on the strength of an existing Tribunal order. The Tribunal can simply not take the position that although it intends that third parties take a particular course of action on the strength of its orders, if those orders are subject to changes such that course of conduct would have been taken in vain, those third parties are not directly affected by those changes. Such a position would only compromise the effectiveness of ordering divestiture of assets as third parties would be less willing to come forward as potential purchasers.

12 For these reasons I am satisfied that Smit's position as a potential competitor and its reliance in taking the course of action it did on the Tribunal's Consent Order are sufficient to ground a finding that Smit is directly affected by the consent variation application. This is not to say that Smit should be granted leave to intervene in this proceeding simply to argue that because it has bid on the divestiture package the consent variation application should fail. Rather, Smit must demonstrate that it has unique and helpful submissions to make on a relevant issue before the Tribunal before it will be made an intervenor.

13 In light of this conclusion, it is not necessary for me to deal with Smit's second argument that it is directly affected by the consent variation application because there are business and legal obstacles which would prevent it from entering the market otherwise than by acquiring the divestiture package.

B. SMIT'S PROPOSED AREAS OF INTERVENTION

14 On a preliminary reading of the pleadings the consent variation application appears to raise one relatively narrow issue: does the entry of Tiger Tugz in Burrard Inlet eliminate the substantial lessening of competition caused by the Seaspan merger such that divestiture is no longer required? At a minimum, the areas on relation to which Smit proposes to focus its intervention must be relevant to this question and Smit's proposed representations must offer a unique perspective which is of some assistance to the Tribunal.

15 As a general proposition, Smit argues that given the Director's consent to the proposed variation it is obvious that only Smit, as an intervenor, would put before the Tribunal evidence that differs from that contained in the consent variation application. In this sense, it is argued, Smit's representations would assist the Tribunal and would advance a unique perspective on the matters in issue.

16 More specifically, Smit argues that as a potential entrant into the market there are three areas in relation to which it will provide relevant and unique representations to assist the Tribunal. First, Smit asserts that the consent variation application raises the issue of the impact of Tiger Tugz's entry into Burrard Inlet on the substantial lessening of competition caused by the Seaspan merger. In particular, Smit refers to the question of whether Tiger Tugz's entry into Burrard Inlet restores the pre-merger competitive situation in that market. This position is based on Smit's assertion that prior to the Seaspan merger Rivtow was a potential entrant in Burrard Inlet as it carried on operations in neighboring ports, including New Westminister. The argument seems to be that Rivtow's entrance in Burrard Inlet through Tiger Tugz means that there is no longer a potential entrant into Burrard Inlet and that this raises competitive concerns.

17 The impact of Tiger Tugz's entry on the level of competition in the relevant market is precisely the issue before the Tribunal. There is no question, therefore, as to the relevance of this aspect of Smit's proposed intervention. What Smit is unable to satisfy the Tribunal of, though, is that it is uniquely positioned to provide evidence or representations which will assist the Tribunal in determining this issue.

18 In arguing Smit's request, counsel asserted that the facts upon which the parties rely to demonstrate the strength of Tiger Tugz's entry are not particularly persuasive of the position that the substantial lessening of competition has been eliminated. He further argued that the implication of the Director's consent to the proposed variation is that the only evidence which will be placed be-

fore the Tribunal on the question of Tiger Tugz's impact on the relevant market is that which the parties have already put before the Tribunal. The basis for Smit's proposed intervention on this point appears to be that the effect of Tiger Tugz's entry into the market is a question of fact that will have to be determined by investigation and that as an intervenor in these proceedings, Smit would undertake that investigation and would put before the Tribunal evidence and perhaps expert opinions which differ from what the parties have submitted.

19 The difficulty with Smit's position is that it is essentially asking the Tribunal for leave to replicate the investigation into this matter which has already been undertaken by the Director. The mere fact of the Director's consent to a proposed variation does not in itself create an evidentiary void which must be filled by an intervenor. It is the Director's responsibility as a representative of the public interest to investigate the proposed variation and to determine whether or not it should be opposed. The Director has used the authority given to him under the Act to investigate the impact of Tiger Tugz's entry and he has concluded that the variation will not compromise the level of competition in the relevant market. This should not be taken as an indication that the Tribunal will accept without question the Director's conclusions. That is far from the case. If a potential intervenor were to come forward and satisfy the Tribunal that it had some unique knowledge of the matters at issue which would provide the Tribunal with a perspective different than the Director's, the Tribunal would be most interested. However, in this case Smit has not satisfied the Tribunal that it has any unique perspective nor any facts of assistance on the question of the impact of Tiger Tugz's entry in Burrard Inlet. There is no basis to allow the intervention on this point.

20 Particular attention must be paid to one argument advanced by Smit. Relying on subsection 27(1) of the Competition Tribunal Rules counsel for Smit argued that an applicant for leave to intervene is not required to file all the evidence on which it intends to rely if leave is granted:

> A request pursuant to subsection 9(3) of the Competition Tribunal Act for leave to intervene shall be made by
>
> (a) serving on each of the parties a request for leave to intervene and an affidavit setting out the facts on which the request is based. . .

I agree with counsel for Smit that that is not the intention of paragraph 27(1)(a). However, it is not sufficient for an applicant for leave to intervene to merely come before the Tribunal indicating that it believes that there are certain areas in relation to which it expects to be able to make representations and that it expects that through an investigation it will uncover the facts which will support those representations. At the very least a proposed intervenor has to satisfy the Tribunal that it is in a unique position to make those representations and that it has some facts to present without conducting a fishing expedition. Smit has not done so.

21 The second issue in relation to which Smit asserts it will provide relevant and unique representations and evidence is on the impact that Tiger Tugz's entry will have in Roberts Bank. Smit argues that there is presently no competition for ship berthing services in Roberts Bank and that this lack of competition will persist if the consent variation application is successful. Additionally, Smit seeks to intervene to address the competitive impact of the expansion of Roberts Bank with the construction of Delta Port, a new container facility. Smit argues that this issue is essentially "ignored" in the consent variation application.

22 The impact of the Seaspan merger on the existence of competition in Roberts Bank was certainly relevant to the Consent Order. Paragraph 10 of the Consent Order Impact Statement filed in support of the Consent Order clearly stated that the Seaspan merger removed competition in Roberts Bank. However, the elimination of competition in Roberts Bank as a result of the Seaspan merger was not the elimination of actual competition in that market. It is clear from paragraph 38 of the Agreed Statement of Facts filed in the original proceedings that Seaspan is the sole competitor for ship berthing services in Roberts Bank:

> A development subsequent to the Seaspan Merger has altered the nature of possible entry into the Roberts Bank ship berthing market. In the Fall of 1995, a coalition of interested parties, including the Vancouver Port Corporation, issued a request for proposals regarding the provision of ship berthing services in Roberts Bank. The objective was to award one ship berthing company with a lease on the only tug basin at Roberts Bank, effectively, to designate one ship berthing company as the exclusive provider of ship berthing services at Roberts Bank for five years. The initiative was undertaken as a result of a desire on the part of the coalition to facilitate the application of competitive forces on the provision of ship berthing services at Roberts Bank. The request for proposals went to five specific companies only, Cates, Crowley Maritime, Foss Maritime, Rivtow and Seaspan. Cates and Seaspan responded to the request for proposals, Seaspan was the successful bidder.

In light of this situation, the Consent Order was not intended to eliminate Seaspan's position as exclusive provider of ship berthing services in Roberts Bank. However, as a result of the Seaspan merger, Cates was removed as a potential future competitor to Seaspan in that market. It was the elimination of this potential future competitor which the Consent Order was intended to remedy by creating a situation where the purchaser of the divestiture package would be a credible competitor for future business in Roberts Bank as is clear from paragraph 29 of the Consent Order Impact Statement. The relevant issue in the context of the consent variation application is whether Tiger Tugz represents a credible potential competitor for future business in Roberts Bank. Smit has provided the Tribunal with no indication that it has any useful evidence or unique representations to make on this issue.

23 The third area in relation to which Smit proposes to intervene is on the issue of the barriers to entry which would prevent it from entering the relevant market otherwise than by purchasing the divestiture package. This proposed area of intervention is simply not relevant to the issue before the Tribunal, namely, whether the entry of Tiger Tugz eliminates the substantial lessening of competition caused by the Seaspan merger. I agree with counsel for Washington et al. who argued that the real question in relation to barriers to entry is whether Tiger Tugz has been able to overcome existing barriers so as to become an effective and vigorous competitor in the relevant market. The significant barriers to entry involved in the relevant product and geographic markets were identified by the parties in paragraphs 15 and 16 of the Consent Order Impact Statement filed in support of the Consent Order. In the consent variation application the parties have addressed the issue of whether Tiger Tugz has overcome those barriers. Smit has not demonstrated that it has any relevant or unique representations to make on that question.

24 For these reasons, Smit's request for leave to intervene is denied. In accordance with subsection 82(2) of the Rules, the issues raised by Smit in its request will remain on the record and will be considered by the Tribunal in its assessment of the consent variation application.

DATED at Toronto, this 9th day of February, 1998.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) W.P. McKeown W.P. McKeown

qp/d/evd/lls

1 Director of Investigation and Research v. Dennis Washington (29 January 1997), CT9601/223, Consent Order, [1997] C.C.T.D. No. 3 (QL) (Comp. Trib.).

2 R.S.C. 1985, c. C-34.

3 The Director's application also alleged a substantial lessening of competition in the market for ship barging services. The Consent Order required the divestiture of certain barging assets. That divestiture has been completed and is not relevant to the present proceedings.

4 R.S.C. 1985 (2d Supp.), c.19.

5 Director of Investigation and Research v. Air Canada (1992), 46 C.P.R. (3d) 184 at 187, [1992] C.C.T.D. No. 24 (QL) (Comp. Trib.).

6 Supra note 5 at 189.

TAB 3

Indexed as:

Canada (Competition Act, Director of Investigation and Research) v. Canadian Pacific Ltd.

Reasons and Order
Regarding Requests for Leave to Intervene
IN THE MATTER of an application by the Director of Investigation and Research for orders pursuant to section 92 of the Competition Act, R.S.C. 1985, c. C-34;
AND IN THE MATTER of the merger whereby CP Containers (Bermuda) Limited acquired certain assets held by The Cast Group Limited and of the acquisition by 3041123 Canada Inc. of all the shares of Cast North America Inc. by way of agreements entered into between or among Royal Bank of Canada, The Cast Group Limited, 3041123 Canada Inc., CP Containers (Bermuda) Limited and Canadian Pacific Limited.
Between:
The Director of Investigation and Research, Applicant, and Canadian Pacific Limited, Canada Maritime Limited, CP Containers (Bermuda) Limited, 3041123 Canada Inc., Cast North America Inc., Royal Bank of Canada, Respondents,
and
Newfoundland Capital Corporation Limited, Société du port de Montréal, Applicants for Leave to Intervene

[1997] C.C.T.D. No. 14

Trib. Dec. No. CT9602/63

Also reported at:74 C.P.R. (3d) 37

Canada Competition Tribunal
Ottawa, Ontario

Before: Noël J., Presiding Judicial Member

Heard: March 13, 1997
Decision: March 21, 1997

(17 pp.)

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Canada Maritime Limited
CP Containers (Bermuda) Limited
3041123 Canada Inc.
Cast North America Inc.

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. . . .

Reasons and Order
Regarding Requests for Leave to Intervene

1 Two requests for leave to intervene have been filed in these proceedings. In brief, the proceedings involve the challenge by the Director of Investigation and Research ("Director") of the 1995 merger which resulted in Canadian Pacific Limited, through various subsidiaries, acquiring assets of The Cast Group Limited and shares of Cast North America Inc. (together "Cast"). The Director alleges that the merger has led to, or is likely to lead to, a substantial lessening or prevention of competition in the provision of intermodal non-refrigerated containerized shipping services

through the Port of Montreal between Northern Continental Europe and the United Kingdom and Ontario and Quebec.

2 The first applicant for leave to intervene, Newfoundland Capital Corporation Limited ("NCC"), has its head office in Dartmouth, Nova Scotia and describes itself in its request as engaged in marine transportation, the management of container handling terminal facilities in Nova Scotia and Newfoundland and the provision of trucking and freight forwarding services. The other applicant for intervenor status is the Montreal Port Corporation ("the Port"). The Director supports the request to intervene of NCC and does not oppose the request of the Port, although he submits that the participation of the Port should be limited beyond what the Port itself asks for. The respondents Canadian Pacific Limited et al. (collectively "CP") and the Royal Bank of Canada ("RBC") oppose the intervention of NCC and support broad participation by the Port.

3 Subsection 9(3) of the Competition Tribunal Act provides that:

> Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal to make representations relevant to those proceedings in respect of any matter that affects that person.

In deciding whether to grant leave to intervene, the Tribunal must consider whether the person applying for leave is "affected" by the proceedings. Previous decisions have established that "affected" means "directly affected". Further, the Tribunal must also be convinced that the representations that the intervenor will make, if leave is granted, will be relevant to and will assist the Tribunal in deciding the issues before it. If leave to intervene is granted, the intervenor is automatically accorded the right to present argument. Any further participation rights, for example, the right to call evidence, must be expressly granted by the Tribunal in the exercise of its discretion.

Newfoundland Capital Corporation Limited ("NCC")

4 With respect to the request for leave to intervene of NCC, it is necessary to provide some detail as to how the matter has so far unfolded. On December 20, 1996, the Director filed the application challenging the merger. Notice of the application was published in several newspapers on January 8 and 15, 1997, and in the Canada Gazette on January 11, 1997. As prescribed by the Competition Tribunal Rules ("Rules"), the notices stated that requests for leave to intervene had to be filed by February 10, 1997, a delay of 30 days from the date of publication in the Canada Gazette. Responses to the application were to have been filed by January 20, 1997. On that date, the respondents brought a motion for an extension of time to file their responses. On January 24, 1997, the Tribunal granted an extension to February 7, 1997.

5 NCC filed its request for leave to intervene on February 10, 1997. The Rules prescribe the contents of a request for leave to intervene. In addition to the name and address of the applicant for leave, the title of the proceedings, the applicant's preferred official language and the degree of participation requested, the request must set out:

> (c) a concise statement of the matters in issue that affect that person [the applicant];
> (d) a concise statement of the competitive consequences arising from the matters referred to in paragraph (c) with respect to which that person wishes to make representations;
> (e) the name of the party whose position that person intends to support. . . .

An affidavit setting out the facts on which the request is based must also be filed.

6 In its request for leave to intervene, NCC stated that the matters that affect it and that it wishes to demonstrate to the Tribunal are as follows: NCC is willing and able to purchase and manage Cast as an effective competitor; NCC "is a competitively preferable purchaser" of the assets and shares that are the subject of the merger. In his supporting affidavit, Roy Rideout, the President and Chief Operating Officer of NCC, affirmed NCC's interest in purchasing the assets or shares and that NCC is a competitively preferable purchaser and added that, in his view, Cast was not a failing firm at the time of the merger. In addition to presenting argument, NCC requested the right to attend discoveries, obtain discovery transcripts and copies of documents produced by the parties.

7 The parties delivered their responses to the request for leave to intervene of NCC on February 24, 1997. The respondents opposed the request; the Director supported the request. The Director's response is somewhat unusual in that it states that NCC is affected for reasons over and beyond those stated by NCC in its request, and provides affidavit evidence to support those grounds upon which the Director says that NCC would be additionally affected. Specifically, the Director's response states that NCC is also directly affected as: a major customer of Canada Maritime Limited (another respondent owned by CP); a supplier of inland transportation of containerized cargo to the merged parties and other industry participants through its trucking subsidiaries; a supplier of domestic containerized transportation through the Port of Montreal; and an operator of an international container handling terminal at the Port of Halifax. Filed with the response is copious affidavit material regarding NCC and its operations sworn by a law clerk with the firm representing the Director. The facts sworn to by the affiant are all within the direct knowledge of NCC and most have as their source material published by it.

8 On March 7, 1997, NCC filed a memorandum of argument which states that "the record of these proceedings to date demonstrates that NCC would be directly affected by the matters in issue." The "direct affects" listed are: NCC's commercial interest as a customer of Canada Maritime Limited; its commercial interest as a supplier of inland transportation for containerized cargo; the fact that it provides containerized transportation through the Port of Montreal as part of a joint venture; the fact that it operates a container-handling terminal in the Port of Halifax; its interest in purchasing Cast; and its desire to demonstrate that it is a competitively preferable purchaser of Cast. In support of the first four "direct affects", the memorandum refers to the affidavits filed by the Director in his response. NCC further submits that it can make a useful contribution to the Tribunal's consideration of the issues of market definition, substantial lessening of competition and whether Cast was a failing firm. NCC repeats its request to attend discoveries, receive documentary productions and present argument and adds a request to adduce factual evidence and cross-examine witnesses.

9 The respondents who oppose the intervention of NCC say that it is the proposed intervenor which must state its interest and say how it is affected and, therefore, the Tribunal must focus on the request for leave to intervene of NCC and the Rideout affidavit, not the affidavits filed by the Director. The Director argues that the apparent insufficiency of the request for leave to intervene is an irregularity of little significance and that fairness requires that NCC be able to put all facts before the Tribunal, no matter what their source. He adds that no one was surprised by the expanded intervention which NCC now seeks.

10 I expressed during the hearing my concern with regard to the limited scope of NCC's request for intervention. I pointed out to counsel that according to the Rules, NCC was to state its in-

terest and how it was affected, and that on the face of the request, the matters affecting NCC were limited to those stated. I also pointed out that to the extent that NCC wanted to expand its request, the appropriate amendment could have been sought with supporting material. Counsel for NCC reacted by asking, at the end of his reply, for leave to amend the request by incorporating thereto NCC's memorandum of March 7, 1997, wherein it essentially adopts the expanded scope of intervention which had been propounded, presumably on its behalf, by the Director.

11 This request is too late in the making and, in any event, I do not believe that such an amendment would be of assistance to NCC. Assuming for present purposes that evidence for which a prospective intervenor is the best source but which is not introduced by it can, upon being introduced by someone else,[1] be relied upon by the prospective intervenor, it remains that in this instance there is nothing from NCC indicating how it is affected by reference to this evidence.

12 I accept that a customer, supplier or other industry participant can, in appropriate circumstances, be directly affected by matters in issue before the Tribunal, and on that ground, be granted intervenor status. However, once it is established that a proposed intervenor acts in one (or more) of those capacities, it remains incumbent upon it to state how it is affected qua customer, supplier or other industry participant as this is essential to the delineation of the scope of the intervention. Here, I have no assertion from NCC, either in its original request or its subsequent memorandum of argument, as to how it is affected by issues relating to the merger in its capacity as supplier, customer or other industry participant. To put the matter in the words of the Rules, I have no statement from NCC of the "competitive consequences" as they arise from the matters which affect it qua customer, supplier or other such capacity, and indeed, no evidence from it as to whether and how it is so affected. It follows that there is no legal or factual framework within which the intervention of NCC could be granted on the expanded grounds.

13 I now turn to the grounds for intervention which NCC does assert in its request to intervene, namely: its expression of interest in purchasing Cast and its statements that it is a competitively preferable purchaser and that Cast was not a failing firm. The link between the issues before the Tribunal when it evaluates the competitive consequences of the merger and NCC's desire to be considered as a potential "competitively preferable" purchaser of the assets and shares of Cast, if divestiture were ordered, is tenuous. Should the Director succeed in this application, it will be incumbent upon him to demonstrate to the Tribunal that if it were to order a remedy involving divestiture, the order would not be in vain. NCC's evidence might be relevant on this point. Other evidence may also be relevant; NCC may not be the only person who might be interested in purchasing the assets and shares should an order issue. While it is apparent that NCC could provide useful evidence in this regard, if called upon to do so, there seems to be little, if anything, that NCC could contribute as an intervenor.

14 With respect to Mr. Rideout's assertion on behalf of NCC that Cast was not a failing firm, it is not clear to me how an expression of opinion on one of the issues that will be before the Tribunal establishes that NCC is directly affected by the merger and its competitive consequences. The Tribunal itself will decide ultimately whether Cast was or was not a failing firm. Evidence from NCC or Mr. Rideout that goes to this issue, including Mr. Rideout's expert opinion on the question should he be so qualified in the course of the hearing, might be relevant and the Director is free to introduce evidence of his choice on this point. Beyond that, it is difficult to see how NCC could assist the Tribunal. I therefore come to the conclusion that the request for intervention by NCC should be dismissed.

Montreal Port Corporation ("the Port")

15 There is no dispute between the parties that the Port should be allowed to intervene. The controversial question is the scope of the participation to be accorded to it. As part of determining the scope of participation, the Tribunal must also indicate with some degree of precision the specific matters regarding which the Port may make "representations".

16 The Port's statement of the matters in issue that directly affect it is found at paragraph 2 of its request for leave to intervene. According to subparagraph (a), the Port is directly affected by the issues in the proceeding relating to its efficiency and its competitiveness in relation to other ports such as the Port of Halifax and the ports on the United States east coast. I accept that this is valid and that the Port can assist the Tribunal in determining the issue of efficiencies arising from the merger.

17 Subparagraph 2(c) of the request refers to the market definition advanced by the Director, which the respondents (and the Port) challenge as being too narrowly drawn. The Director alleges that the relevant geographic market should be restricted to shipments through the Port of Montreal. The respondents submit that the Port of Montreal is part of a larger relevant market including other ports. The view of the Port itself will be of assistance to the Tribunal in determining this critical issue.

18 Subparagraph 2(b) of the request is relevant only insofar as it can be linked to the issues raised in subparagraphs (a) or (c). The possible financial losses to the Port, and to the Montreal region, are, in and of themselves, irrelevant to the issues that the Tribunal must determine. It is only as they relate to efficiency or competitiveness of the Port that these considerations can be of relevance. The Port will thus be granted leave to intervene and make representations only with respect to the issues stated in subparagraphs 2(a) and 2(c) of its request for leave to intervene.

19 The parties disagree on the extent to which the Port should be allowed to participate on those issues beyond the presentation of argument. The Port, with the support of CP and RBC, requested very broad participation rights comprising the right to participate in oral discovery, the right to call evidence (factual and expert), the right to cross-examine witnesses at the hearing and the right to receive copies of documents produced by the parties. The Director opposes giving the Port a role in oral discovery but would allow it to call factual evidence at the hearing, subject to certain conditions including discovery by the Director. The Director also opposes giving the Port the right to call expert evidence or to cross-examine witnesses.

20 As the Tribunal has stated on previous occasions, participation by intervenors in the discovery process is exceptional.[2] Intervenors are usually admitted because they are at the time of their admission in a position to offer additional insight to the Tribunal; as a general rule, they should not require discovery of the parties to make their contribution. In this case, discovery will be vigorously pursued by the parties and no case for allowing the exceptional measure of participation by an intervenor in that process has been made.

21 The Port may file expert evidence in accordance with the Rules. The Director argues that intervenors should have something unique to offer to the Tribunal and should not have to resort to expert evidence to make their contribution. A contradiction of sort is said to arise from the request by the Port to be authorized to adduce expert evidence. In the circumstances before me, I do not find anything contradictory or inconsistent in recognizing that the Port has a unique perspective relating to the issues of market definition and efficiency gains while allowing it to bring forward ex-

pert evidence to support its intervention. The Port is not required to have personal expertise in the economics of competition law in relation to issues which affect it.

22 The Director's position with respect to the Port's request that it be allowed to present factual evidence is a reasonable one. The Port may adduce evidence, upon requesting leave to do so from the Tribunal panel hearing the application, on the following conditions: the evidence is relevant to the issues and relates to a matter affecting the Port; the respondents have been requested to adduce the evidence and have refused; the evidence is not repetitive; and the Port has provided documentary and oral discovery to the Director on the issues to which the evidence relates.

23 Discovery of a representative of the Port is granted to the Director to avoid surprises at the hearing and the consequent delays and disruptions. In this case, given the centrality and fundamental nature of the issues on which the Port has been permitted to intervene, there would be a strong potential for disruption if the Director was not allowed to discover the Port. The Port as an intervenor is in a different position and, for the reasons set out above, its entitlement to discovery has not been demonstrated.

24 The Port may cross-examine witnesses called by the Director at the hearing to the extent that the cross-examination is non-repetitive of previous cross-examination by the respondents. Finally, the Port shall be entitled to receive copies of the documents produced by the parties on discovery, attend at the examinations for discovery of the parties and receive transcripts of those examinations. The Director requested that the Port's access to documents be restricted to those documents which are relevant to the issues on which the Port has been granted leave to intervene. While this request is logical, it is not easily implemented; questions of relevancy are matters of judgment and debate. There will, therefore, be no restriction in the order on the class of documents which the Port is entitled to receive, subject to any order regarding confidentiality. The Port is nevertheless expected to use its best efforts to limit its entitlement to copies of documents which bear on the issues with respect to which it has been granted to leave.

25 It was argued vigorously on behalf of the Port that because it is a state-owned corporation with a public interest mandate, it should be allowed to introduce evidence separately and generally act independently of the respondents. Particular emphasis was placed on the fact that the Port has a statutory obligation to treat all users of the Port's facilities in an even-handed fashion and that it was important that it not be perceived as being too closely associated with any of the parties.

26 In its request for leave to intervene the Port clearly identified itself as a supporter of the position of the respondents. I have no doubt that the Port authorities, prior to intervening, satisfied themselves that such an intervention would be consistent with the statutory mandate of the Port. Quite obviously, the Port has determined that its own interests in this matter coincide with those of the respondents and that its statutory mandate will be better served if the merger in issue is allowed to stand despite the challenge by the Director. Keeping this in mind, I do not believe that marshalling the evidence through the respondents in the usual fashion in order to avoid duplication and allow for a co-ordinated presentation of the evidence by those who support the merger can be objected to on the grounds raised by the Port.

27 FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

1. NCC's request for leave to intervene in these proceedings is denied.

2. The Port is granted leave to intervene in these proceedings and is granted the participation rights set out in subsection 32(1) of the Rules in respect of those matters which directly affect it as set out in subparagraphs 2(a) and (c) of its request for leave to intervene.
3. In addition, the Port shall be permitted:

    (a) To adduce factual evidence at the hearing, provided that it first demonstrates to the satisfaction of the Tribunal that such evidence is relevant and within the scope of the intervention, is not repetitive, that the respondents have been asked to adduce the evidence and have refused and that the Port has provided documentary and oral discovery to the Director on the issues to which the evidence relates;
    (b) To introduce relevant expert evidence which is within the scope of its intervention in accordance with the procedure set out in the Rules;
    (c) To cross-examine witnesses after the respondents have conducted their cross-examination of witnesses, provided that it first demonstrates to the satisfaction of the Tribunal that it has questions pertinent to their intervention which the respondents were not willing to ask;
    (d) To have access to the transcripts of the examinations for discovery conducted by the parties, and its counsel may attend the examinations for discovery, subject to any order that may be issued by the Tribunal regarding confidentiality;
    (e) To inspect and make copies of the documents listed in the affidavits of documents of the parties, other than those documents subject to a claim for privilege or which are not within the party's possession, control or power, subject to the same restriction regarding confidentiality.

DATED at Vancouver, this 21st day of March, 1997.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Marc Noël Marc Noël

qp/d/lls

1 In this instance the Director, who supports the intervention.

2 Director of Investigation and Research v. Air Canada (1992), 46 C.P.R. (3d) 184, [1992] C.C.T.D. No. 24 (QL); Director of Investigation and Research v. Tele-Direct (Publications) Inc. (1 March 1995), CT9403/52, Reasons and Order Granting Requests for Leave to Intervene, [1995] C.C.T.D. No. 5 (QL).

TAB 4

Indexed as:
Canada (Commissioner of Competition) v. Air Canada

Reasons and Order Granting Request for Leave to Intervene
IN THE MATTER of an application by the Commissioner of Competition under section 79 of the Competition Act, R.S.C. 1985, c. C-34;
AND IN THE MATTER of the Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service, SOR/2000-324 made pursuant to subsection 78(2) of the Competition Act;
AND IN THE MATTER of certain practices of anti-competitive acts by Air Canada.
Between:
The Commissioner of Competition, (applicant), and Air Canada, (respondent), and WestJet Airlines Ltd., (applicant for leave to intervene)

[2001] C.C.T.D. No. 5

2001 Comp. Trib. 4

File no.: CT-2001-002

Registry document no.: 8

Canada Competition Tribunal
Ottawa, Ontario

Before: McKeown J., Chairman

Heard: April 11, 2001.
Decision: April 20, 2001.

(18 paras.)

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Suzanne Legault

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Eliot N. Kolers
Lawson A.W. Hunter, Q.C.

Counsel for the applicant for leave to intervene:

WestJet Airlines Ltd.

Daniel J. McDonald, Q.C.

. . . .

Reasons and Order Granting Request for Leave to Intervene

1 On March 5, 2001, the Commissioner of Competition (the "Commissioner") filed an application pursuant to section 79 of the Competition Act, R.S.C. 1985, c. C-34 (the "Act") for an order prohibiting Air Canada from engaging in anti-competitive practices directed against low cost carriers such as WestJet Airlines Ltd. ("WestJet"). In particular, the Commissioner's application seeks to obtain an order from the Tribunal prohibiting Air Canada from operating flights on routes in Eastern Canada at fares that do not cover its "avoidable cost" of providing the service.

2 A request for leave to intervene was filed by WestJet on April 4, 2001. This request was heard in Toronto on April 11, 2001. WestJet alleges in its request for leave to intervene that it has been directly affected by Air Canada's practices on the Air Canada Moncton Area routes as it has been unable to achieve a profitable fare mix on the Hamilton-Moncton route. WestJet also alleges that its revenues and over-all yields for the Hamilton-Moncton route have been undermined and that it may be forced to withdraw from that route. However, WestJet submits that while, the immediate financial effects on WestJet relate to competition on the Moncton Area routes, it is directly affected by Air Canada's anti-competitive conduct generally and may have to rethink its expansion strategy in Atlantic Canada and hence, should be allowed, as an intervenor, to participate generally in that regard.

3 Air Canada opposes in part the request for leave to intervene made by WestJet. While Air Canada does not dispute that WestJet may be "directly affected" by the results of these proceedings, it submits that WestJet's request to intervene is too broad. Air Canada's opposition relates to both the scope of intervention and the level of participation proposed by WestJet.

4 With respect to the scope of intervention, Air Canada submits that WestJet has not articulated the issues in respect of which it seeks leave to intervene and has filed, instead, a general request to intervene. Air Canada points out that the affidavit of Mark Hill dated April 3, 2001, provided in support of the request, implies that WestJet seeks only to intervene with respect to two issues: (1) the determination of Air Canada's avoidable costs, and (2) the issue of whether Air Canada's alleged conduct has led to a substantial lessening of competition.

5 Further, Air Canada submits that WestJet has not provided any evidence to support the position that it has a unique perspective such that it can assist the Tribunal with all aspects of the hearing. Air Canada argues that in the event that WestJet's request is limited to the two issues stated above in paragraph 4, WestJet's intervention should be limited to the issue of substantial lessening of or prevention of competition as it is alleged to affect WestJet but not to the issue of substantial lessening of competition in general as WestJet is in no special position to address the effects. Finally, Air Canada submits that WestJet has failed to show that it satisfies the intervention test as it relates to the determination of Air Canada's avoidable costs. It is the determination of Air Canada's avoidable costs that is in issue, not the concept of avoidable costs in general.

6 On the basis of these submissions, Air Canada argues that WestJet's role in the proceeding should be limited to the issue of substantial lessening or prevention of competition as it is alleged to affect WestJet and that its participation in the proceeding should be as follows:

(a) the submission of legal argument at the hearing;
(b) the filing of expert evidence, if required;
(c) the access to discovery documents, to the extent that they are relevant to the issue(s) for which leave is granted and subject to any confidentiality orders made;
(d) the access to portions of discovery transcripts relevant to the issue(s) for which leave is granted and subject to any confidentiality orders made;
(e) the right to request leave of the Tribunal hearing the application to adduce factual evidence at the hearing on the following conditions: the evidence is relevant to the issue(s) for which leave is granted and relates to a matter directly affecting WestJet; the Commissioner has been asked to adduce the evidence and the request has been refused; the evidence is non-repetitive; and WestJet has provided documentary and oral discovery to Air Canada on the issues to which the evidence relates.

7 Air Canada submits that the conditions set out in paragraph 6(e) of these reasons are in accordance with the following decisions of the Tribunal: Director of Investigation and Research v. Tele-Direct (Publications) Inc. (Reasons and Order Granting Requests for Leave to Intervene) (1995), 61 C.P.R. (3d) 528, [1995], C.C.T.D. No. 4 (QL), Director of Investigation and Research v. Air Canada (1992), 46 C.P.R. (3d) 184, [1992] C.C.T.D. No. 24 (QL) and, Director of Investigation and Research v. Canadian Pacific Ltd. (1997),74 C.P.R. (3d) 37, [1997] C.C.T.D. No. 14 (QL).

8 The Commissioner supports the request of WestJet for leave to intervene in these proceedings. Counsel submits that the matter that affects WestJet is the Commissioner's application as a whole and its three essential elements: the dominance of Air Canada, the practice of anti-competitive acts as alleged by the Commissioner and the effect of those acts on WestJet and on competition. The Commissioner submits that although WestJet has not precisely enumerated the issues it proposes to address, there is no suggestion that WestJet wishes to address issues that are

not outlined in the pleadings. With respect to the issue of avoidable costs, the Commissioner argues that WestJet has a unique perspective that will assist the Tribunal as WestJet operates an air service on some of the city-pairs routes involved in the application.

9 The Commissioner's position is that WestJet's role should be as follows:

> (a) the review of discovery transcripts and access to discovery documents of the parties to the application, subject to the appropriate confidentiality protection;
> (b) the calling of non-repetitive viva voce evidence relating to any of the issues in the application;
> (c) the non-repetitive cross-examination of witnesses at the hearing of the application;
> (d) the filing of expert evidence; and
> (e) the submission of legal argument relating to any of the issues in the application.

WestJet agreed at the hearing to limit its participation as suggested by the Commissioner.

10 The test for granting intervenor status is set out in subsection 9(3) of the Competition Tribunal Act, R.S.C. 1985, c. 19, as amended ("CTA"):

> Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the Competition Act, to make representations relevant to those proceedings in respect of any matter that affects that person.

11 As stated in The Commissioner of Competition v. Canadian Waste Services Holdings (26 June 2000), CT2000002/20, Reasons and Order Granting Request for Leave to Intervene at paragraph 3, [2000] C.C.T.D. No. 10 (QL) (Comp. Trib.), the Tribunal must be satisfied that all of the following elements are met in order to grant the status of intervenor:

> (a) The matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate (see Director of Investigation and Research v. Air Canada (1992), 46 C.P.R. (3d) 184 at 187, [1992], C.C.T.D. No. 24 (QL)).
> (b) The person seeking leave to intervene must be directly affected. The word "affects" has been interpreted in Air Canada, ibid., to mean "directly affects".
> (c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (see Tele-Direct, cited above in para. [2]).
> (d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (see Washington v. Director of Investigation and Research, [1998] C.C.T.D. No. 4 (QL) (Comp. Trib.)).

12 In applying the test stated above, it has been well established by the Tribunal in past decisions that the onus is on the intervenor and, to the extent that the Commissioner supports the inter-

venor, it is on the Commissioner as well to establish that the test is met with respect to the issues upon which the person seeks to intervene. For example, in Director of Investigation and Research v. Tele-Direct (Publications) Inc. (Reasons and Order Granting Requests for Leave to Intervene) cited above at paragraph 7 of these reasons, the five applicants, which were companies involved in or connected with the publication of telephone directories, provided a list of issues in respect of which they said they had some input. This requirement was also discussed in Washington v. Director of Investigation and Research, (1998) 78 C.P.R. (3d) 479 at 484-485, [1998] C.C.T.D. No. 4 (QL) and in Director of Investigation and Research v. Canadian Pacific Ltd. (1997), 74 C.P.R. (3d) 37 at 43-44, [1997] C.C.T.D. No. 14 (QL).

13 Further, as counsel for Air Canada points out, paragraph 27(2)(d) of the Competition Tribunal Rules (the "Rules") requires from the person seeking leave to intervene to provide a concise statement of the matters in issue that affect the person and the competitive consequences arising therefrom.

14 The Tribunal is of the view that WestJet has demonstrated that its request for leave to intervene satisfies the test stated in subsection 9(3) of the CTA. Indeed, it has demonstrated that it is directly affected and, as a successful low-cost low-fare carrier, WestJet has a unique perspective on the issues which will be before the Tribunal. However, it is less clear that WestJet's request for leave to intervene meets the requirements set out in paragraphs 27(2)(c) and (d) of the Rules as applied by the Tribunal in past cases. Indeed, without a statement from WestJet of the "competitive consequences" arising from matters affecting it, the Tribunal has no legal or factual framework to grant WestJet the status of intervenor on all of the issues stated by the Commissioner in the statement of grounds and material facts. Therefore, WestJet shall only be entitled to address the issues that meet the requirements stated by both subsection 9(3) of the CTA and by section 27 of the Rules or that will assist the Tribunal in making a decision on the Commissioner's application. I have identified those issues in the order below.

15 As to the issue of the level of participation in the proceedings by WestJet, the main area of dispute between the parties relates to the calling of non-repetitive viva voce evidence. While the Commissioner submits that WestJet should be entitled to call relevant and non-repetitive viva voce evidence on the issues that falls within the scope of WestJet's intervention, Air Canada submits that WestJet should only be entitled to adduce evidence when all the conditions stated in paragraph 6(e) of these reasons are met and that leave is granted by the Tribunal. After careful consideration, the Tribunal came to the view that, in the present case, requiring WestJet to seek leave before calling viva voce evidence could have the potential of unduly delaying the proceedings. Requiring WestJet to seek leave before introducing evidence may not be the most efficient way to proceed. Therefore, WestJet should, in my view, be entitled to adduce relevant and non-repetitive evidence subject to Air Canada's right to make objections.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

16 WestJet Airlines Ltd. is granted leave to intervene on the following issues:

(a) the substantial lessening or prevention of competition as it relates to WestJet as stated in part IX of the statement of grounds and material facts except for paragraphs 130 and 131 which deal with the effects on CanJet Airlines and Royal Airlines;

(b) the issue of avoidable costs both in general and as it relates to Air Canada's avoidable costs;
(c) the issues of "fares, restrictions and classes of service" and of "frequencies, connections, frequent flyer points and frills" as stated in sections C and D of part V of the statement of grounds and material facts;
(d) the issue of Air Canada's dominant position as it affects WestJet as stated in part VII of the statement of grounds and material facts;
(e) the issue of Air Canada's anti-competitive acts as it affects WestJet as stated in part VIII of the statement of grounds and material facts.

17 WestJet Airlines Ltd. shall be allowed to participate in the proceedings and permitted:

(a) to review discovery transcripts and access discovery documents of the parties to the application, subject to the appropriate confidentiality protection;
(b) to adduce factual evidence at the hearing, provided that it demonstrates to the satisfaction of the Tribunal that such evidence is relevant and within the scope of the intervention (i.e. relating to the issues identified in paragraph 16 of these reasons) and is non-repetitive, subject to Air Canada's right to make objections;
(c) to cross-examine witnesses at the hearing of the application after the Commissioner has conducted his cross-examination, provided that the questions are relevant to its intervention and have not been asked by the Commissioner;
(d) to introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the Rules and case management; and
(e) to submit legal argument at the hearing of the application that are non-repetitive in nature. On the latter, I will leave to the panel the responsibility to manage the instances of duplicative arguments.

18 Air Canada shall be permitted to seek documentary and oral discovery of WestJet, if necessary.

DATED at Ottawa, this 20th day of April, 2001.

SIGNED on behalf of the Tribunal by the presiding judicial member

(s) W.P. McKeown

cp/d/qlscl

TAB 5

Case Name:

Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.

Order Granting Leave to Intervene
IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended;
AND IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 92 of the Competition Act;
AND IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 104 of the Competition Act;
AND IN THE MATTER OF a joint venture between Saskatchewan Wheat Pool Inc. and James Richardson International Limited in respect of port terminal grain handling in the Port of Vancouver.
Between:
Commissioner of Competition, applicant, and
Saskatchewan Wheat Pool Inc., James Richardson International Limited, 6362681 Canada Ltd. and 6362699 Canada Ltd., respondents, and
Canadian Wheat Board, applicant for leave to intervene

[2006] C.C.T.D. No. 6

2006 Comp. Trib. 6

File No.: CT2005009

Registry Document No.: 0032

Canada Competition Tribunal
Ottawa, Ontario

Before: Simpson J. (Chairperson), Presiding Judicial Member

Decision: February 6, 2006.
(Decided on the basis of the written record.)

(6 paras.)

Appearances:

Counsel:

For the applicant:

Commissioner of Competition

André Brantz
Jonathan Chaplan
Valérie Chénard

For the respondents:

Saskatchewan Wheat Pool Inc.
6362681 Canada Ltd. and
6362699 Canada Ltd.

Peter Bergbusch

James Richardson International Limited

Adam F. Fanaki
Robert Russell

For the applicant for leave to intervene:

Canadian Wheat Board

James E. McLandress
Margaret I. Wiebe

. . . .

Order Granting Leave to Intervene

1 FURTHER TO the application filed by the Commissioner of Competition under section 92 of the Competition Act, R.S.C. 1985, c. C-34, for an order dissolving a grain handling joint venture between the Respondents at the Port of Vancouver.

2 AND FURTHER TO the request for leave to intervene filed by the Canadian Wheat Board ("CWB"), a corporation incorporated pursuant to the Canadian Wheat Board Act, R.S., c. C-12 ,which markets grain grown in Western Canada in an orderly manner in interprovincial and export trade;

3 AND FURTHER TO reading the CWB's request for leave to intervene, the affidavit of Ward Weisensel sworn on January 3, 2006, filed in support of the request, and the responses filed by the Commissioner of Competition and the Respondents;

4 AND WHEREAS the Commissioner of Competition and the Respondents consent to the request for leave to intervene filed by the CWB.

THE TRIBUNAL ORDERS THAT:

5 The CWB is granted leave to intervene on the following topic in these proceedings ("the Topic"): Any adverse effects anticipated to result from the Joint Venture on the CWB or its members including matters relating to:

- the terminal tariffs at the Port of Vancouver;
- the access to port positions at the Port of Vancouver;
- the level of service at the Port of Vancouver; and
- the costs of service at primary grain elevators.

6 The CWB is granted leave to intervene on the following terms:

(i) the CWB is permitted to review discovery transcripts and productions subject to confidentiality orders but shall not be allowed to participate in the discovery process and shall not attend discoveries;

(ii) the CWB is permitted to call viva voce evidence in respect of the Topic if it serves the Respondents with a will-say statement for each witness at a time to be determined during case management before the commencement of the hearing. The statement is to include: (1) the name of the witness to be called; (2) a description of the evidence to be provided; (3) an explanation of the relevance of the evidence; and (4) a statement that the Commissioner has been asked to adduce such evidence and has refused;

(iii) the Respondents will have the right of documentary and oral discovery of the CWB on the Topic;

(iv) the CWB is permitted to cross-examine witnesses at the hearing of the application only in respect of the Topic and only to the extent that such cross-examination is not repetitive of tlie cross-examinations of the parties to the application;

(v) the CWB is permitted to introduce expert evidence only with respect to the Topic and in accordance with the procedures set out in the Competition Tribunal Rules and case management decisions; and

(vi) the CWB is permitted to submit legal arguments at the hearing of the application and at any pre-hearing motions or pre-hearing conferences, which are not repetitive in nature.

DATED at Ottawa, this 6th day of February 2006.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson

cp/i/qlscl

TAB 6

Case Name:

Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.

Order Granting Leave to Intervene
IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended;
AND IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 92 of the Competition Act;
AND IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 104 of the Competition Act;
AND IN THE MATTER OF a joint venture between Saskatchewan Wheat Pool Inc. and James Richardson International Limited in respect of port terminal grain handling in the Port of Vancouver.
Between:
Commissioner of Competition, applicant, and Saskatchewan Wheat Pool Inc., James Richardson International Limited, 6362681 Canada Ltd. and 6362699 Canada Ltd., respondents, and Canadian Pacific Railway Company, applicant for leave to intervene

[2006] C.C.T.D. No. 7

2006 Comp. Trib. 7

File No.: CT2005009

Registry Document No.: 0033

Canada Competition Tribunal
Ottawa, Ontario

Before: Simpson J. (Chairperson), Presiding Judicial Member

Decision: February 6, 2006.

(Decided on the basis of the written record.)

(6 paras.)

Appearances:

Counsel:

For the applicant:

Commissioner of Competition

André Brantz
Jonathan Chaplan
Valérie Chénard

For the respondents:

Saskatchewan Wheat Pool Inc.
6362681 Canada Ltd. and
6362699 Canada Ltd.

Peter Bergbusch

James Richardson International Limited

Adam F. Fanaki
Robert Russell

For the applicant for leave to intervene:

Canadian Pacific Railway Company

Marc Shannon

. . . .

Order Granting Leave to Intervene

1 FURTHER TO the application filed by the Commissioner of Competition under section 92 of the Competition Act, R.S.C. 1985, c. C-34, for an order dissolving a grain handling joint venture between the Respondents at the Port of Vancouver.

2 AND FURTHER TO the request for leave to intervene filed by the Canadian Pacific Railway Company ("CPR"), a federally regulated railway which carries grain from grain elevators in western Canada to Port Terminal elevators located at the Port of Vancouver;

3 AND FURTHER TO reading CPR's request for leave to intervene, the affidavit of Michael Foran sworn on January 2, 2006, filed in support of the request and the responses filed by the Commissioner of Competition and the Respondents;

4 AND WHEREAS the Respondents support CPR's request and the Commissioner of Competition does not oppose the request and acknowledges that CPR has met the test for granting intervenor status;

THE TRIBUNAL ORDERS THAT:

5 CPR is granted leave to intervene on the following topics in these proceedings ("the Topics"):

(i) the transportation of grain by rail from primary grain elevators to the port terminals located in Vancouver;
(ii) the receipt and unloading of railvvay cars of grain at the Port of Vancouver; and
(iii) the efficiencies relating to rail operations anticipated to result from the Joint Venture.

6 CPR is granted leave to intervene on the following terms:

(i) CPR is permitted to review discolvery transcripts and productions subject to confidentiality orders but shall not be allowed to participate in the discovery process and shall not attend discoveries;
(ii) CPR is permitted to call viva vote evidence in respect of the Topics if it serves the Commissioner of Competition with a will-say statement for each witness at a time to be determined during case management before the commencement of the hearing. The statement is to include: (1) the name of the witness to be called; (2) a description of the evidence to be provided; (3) an explanation of the relevance o'fthe evidence; and (4) a statement that the Respondents have been asked to adduce such evidence and have refused;
(iii) the Commissioner will have the right of documentary and oral discovery of CPR on the Topics;
(iv) CPR is permitted to cross-examine witnesses at the hearing of the application only in respect of the Topics and only to the extent that such cross-examination is not repetitive of the cross-examinations of the parties to the application;
(v) CPR is permitted to introduce expert evidence only with respect to the Topics and in accordance with the procedures set out in the Competition Tribunal Rules and case management decisions; and
(vi) CPR is permitted to submit legal arguments at the hearing of the application and at any pre-hearing motions or pre-hearing conferences, which are not repetitive in nature.

DATED at Ottawa, this 6th day of February 2006.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson

cp/i/qlscl

TAB 7

Case Name:

Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.

Order Granting Leave to Intervene
IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended;
AND IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 92 of the Competition Act;
AND IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 104 of the Competition Act;
AND IN THE MATTER OF a joint venture between Saskatchewan Wheat Pool Inc. and James Richardson International Limited in respect of port terminal grain handling in the Port of Vancouver.
Between:
Commissioner of Competition, applicant, and
Saskatchewan Wheat Pool Inc., James Richardson International Limited, 6362681 Canada Ltd. and 6362699 Canada Ltd., respondents, and
Canadian National Railway Company, applicant for leave to intervene

[2006] C.C.T.D. No. 8

2006 Comp. Trib. 8

File No.: CT2005009

Registry Document No.: 0034

Canada Competition Tribunal
Ottawa, Ontario

Before: Simpson J. (Chairperson), Presiding Judicial Member

Decision: February 6, 2006.

(Decided on the basis of the written record.)

(6 paras.)

Appearances:

Counsel:

For the applicant:

Commissioner of Competition

André Brantz
Jonathan Chaplan
Valérie Chénard

For the respondents:

Saskatchewan Wheat Pool Inc.
6362681 Canada Ltd. and
6362699 Canada Ltd.

Peter Bergbusch

James Richardson International Limited

Adam F. Fanaki
Robert Russell

For the applicant for leave to intervene

Canadian National Railway Company

Darin J. Hannaford

. . . .

Order Granting Leave to Intervene

1 FURTHER TO the application filed by the Commissioner of Competition under section 92 of the Competition Act, R.S.C. 1985, c. C-34, for an order dissolving a grain handling joint venture between the Respondents at the Port of Vancouver;

2 AND FURTHER TO the request for leave to intervene filed by the Canadian National Railway Company ("CN"), a federally regulated railway which carries grain from grain elevators in western Canada to Port Terminal elevators located at the Port of Vancouver and which is the only railway company that directly serves the grain terminal elevators located at Vancouver's North Shore;

3 AND FURTHER TO reading CN's request for leave to intervene, the affidavit of Kirk Carroll sworn on January 6, 2006, filed in support of the request and the responses filed by the Commissioner of Competition and the Respondents;

4 AND WHEREAS the Respondents support CN's request to intervene and the Commissioner of Competition does not oppose the request and acknowledges that CN has met the test for granting intervenor status.

THE TRIBUNAL ORDERS THAT:

5 CN is granted leave to intervene on the following topics in these proceedings ("the Topics"):

(i) the transportation of grain by rail from prairie origins to port terminals located in Vancouver;
(ii) the challenges relating to the movement of grain and other traffic from both CN origins and from other railways received in interchange at Vancouver for delivery to port terminals on the North Shore of Vancouver; and
(iii) the efficiencies relating to rail oplerations anticipated to result from the Joint Venture.

6 CN is granted leave to intervene on the following terms:

(i) CN is permitted to review discovery transcripts and productions subject to confidentiality orders but shall not be allowed to participate in the discovery process and shall not attend discoveries;
(ii) CN is permitted to call viva voce: evidence in respect of the Topics if it serves the Commissioner of Competition with a will-say statement for each witness at a time to be determined during case management before the commencement of the hearing. The statement is to include: (1) the name of the witness to be called; (2) a description of the evidence to be provided; (3) an explanation of the relevance of the evidence; and (4) a statement that the Respondents have been asked to adduce such evidence and have refused;
(iii) the Commissioner will have the light of documentary and oral discovery of CN on the Topics;
(iv) CN is permitted to cross-examine witnesses at the hearing of the application only in respect of the Topics and only to the extent that such cross-examination is not repetitive of the cross-examinations of the parties to the application;
(v) CN is permitted to introduce expert evidence only with respect to the Topics and in accordance with the procedures set out in the Competition Tribunal Rules and case management decisions; and
(vi) CN is permitted to submit legal arguments at the hearing of the application and at any pre-hearing motions or pre-hearing conferences, which are not repetitive in nature.

DATED at Ottawa, this 6th day of February 2006.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson

cp/i/qlscl

TAB 8

Case Name:

Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.

Order Granting the Vancouver Port Authority Leave to Intervene
IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended;
AND IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 92 of the Competition Act;
AND IN THE MATTER OF a joint venture between Saskatchewan Wheat Pool Inc. and James Richardson International Limited in respect of port terminal grain handling in the Port of Vancouver.
Between:
Commissioner of Competition, applicant, and
Saskatchewan Wheat Pool Inc., James Richardson International Limited, 6362681 Canada Ltd. and 6362699 Canada Ltd., respondents, and
Canadian Pacific Railway Company, Canadian National Railway Company and Canadian Wheat Board, intervenors, and
Vancouver Port Authority, applicant for leave to intervene

[2006] C.C.T.D. No. 12

2006 Comp. Trib. 12

File No.: CT-2005-009

Registry document no.: 0048

Canada Competition Tribunal
Ottawa, Ontario

Before: Simpson J. (Chairperson), Presiding Judicial Member

Decision: February 24, 2006.
(Decided on the basis of the written record.)

(7 paras.)

Appearances:

Counsel:

For the applicant:

Commissioner of Competition

Andre Brantz
Jonathan Chaplan
Valerie Chenard.

For the respondent:

Saskatchewan Wheat Pool Inc., 6362681 Canada Ltd. and 6362699 Canada Ltd.

Peter Bergbusch

For the respondent:

James Richardson International Limited

Adam F. Fanaki
Robert Russell

For the applicant for leave to intervene:

Vancouver Port Authority

Richard T. Shrieves

. . . .

Order Granting the Vancouver Port Authority
Leave to Intervene

1 FURTHER TO the application filed by the Commissioner of Competition under section 92 of the Competition Act, R.S.C. 1985, c. C-34, for an order dissolving a grain handling joint venture between the Respondents at the Port of Vancouver;

2 AND FURTHER TO the r3quest for leave to intervene filed by the Vancouver Port Authority (the "VPA"), a port authority incorporated for the purpose of operating the Port of Vancouver and constituted by letters patent made pursuant to the Canada Marine Act, S.C. 1998, c.10;

3 AND FURTHER TO readjng the VPA's request for leave to intervene, the affidavit of Scott Galloway sworn on December 30,2005, filed in support of the request and the responses filed by the Commissioner of Conlpetition and the Respondents;

4 AND FURTHER TO the VPA's letter of February 20,2006, indicating that it intends to support the position of the Respondents;

5 AND WHEREAS the Respondents support the VPA's request for leave to intervene and the Commissioner of Competition does not oppose the request and acknowledges that the VPA has met the test for granting intervenor status;

THE TRIBUNAL ORDERS THAT:

6 The VPA is granted leave ;:o intervene on the following topic: The effects anticipated to result from the Joint Venture on tke VPA including any effects on rail traffic into and out of the grain handling facilities at the Pon: (the "Topic").

7 The VPA is granted leave i;o intervene on the following terms:

(i) the VPA is pennitted to review discovery transcripts and productions subject to confidentialil; orders but shall not be allowed to participate in the discovery process and shall not attend discoveries;
(ii) the VPA is pennitted to call viva voce evidence in respect of the Topic if it serves the Commissioner of Competition with a will-say statement for each witness at a time to be determined during case management before the commencement of the hearing. The statement is to include: (1) the name of the witness to be called; (2) a description of the evidence to be provided; (3) an explanation of the relevance of the evidence; and (4) a statement that the Respondents have been asked to adduce such evidence and have refused;
(iii) the Commissiolier will have the right of documentary and oral discovery of the VPA on the Topic;
(iv) the VPA is pennitted to cross-examine witnesses at the hearing of the application only in respect of the Topic and only to the extent that such cross-examination is not repetitive of the cross-examinations of the parties to the application;
(v) the VPA is permitted to introduce expert evidence only with respect to the Topic and in acc:ordance with the procedures set out in the Competition Tribunal Rules and case management decisions; and
(vi) the VPA is permitted to submit legal arguments at the hearing of the application and at any pre-hearing motions or pre-hearing conferences, which are not repetitive in nature.

DATED at Ottawa, this 24th day of February 2006.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

cp/i/qlplh

TAB 9

LAW OF INTERVENTION

STATUS AND PRACTICE

Paul R. Muldoon

1989
Canada Law Book Inc.
240 Edward Street, Aurora, Ontario

(ii) Protection of other interests

Courts do more than adjudicate private disputes; they also decide cases which touch upon, and may directly impact, social, economic and political activities within society. In doing so, they may not only apply law, but in effect make it.

When a law-making function is vested with a non-elected judiciary, it seems not only fair, but imperative, that there be some means of access by which those interested or potentially affected by the decision can have input into that decision. In a narrow context, this function of intervention rests with the principle that a court should not adjudge the rights of persons without their presence before the court.[38]

In a wider context, this function suggests that when courts are adjudicating upon matters that have significant societal impact, those personally affected or representatives of those affected should be afforded the opportunity to have input into the process.[39] Professor Bryden makes the point that "despite the extent to which our traditional conceptions of representative democracy have been modified in order to take into account the size and complexity of our governmental apparatus, we continue to cling to the idea that citizens are entitled to participate in the process whereby the rules that govern their lives are formulated".[40]

In this context, intervention represents a rare access point for many interests to become involved in legal proceedings.[41] It is an avenue available for litigants who may not otherwise have standing to initiate an action in their own right. Standing rules in Canada have evolved considerably in recent years, allowing interested members of the public to initiate various actions both within the context of constitutional challenges[42] and even in a more general context.[43] However, despite this gradual relaxation of the standing

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[38] Reed, *loc. cit.*, footnote 23, at p. 331.

[39] In *C.N.R. v. B.C. Ry. Co.; C.P. Ltd. (applicant)* (1977), 6 C.P.C. 249 (B.C.S.C.), at p. 254, Fulton J. stated:

> It would be contrary to natural justice, to say the least, that a person should find himself debarred by the Court from the continued enjoyment of such a right [to a contractual service], which he presently enjoys, without having had the opportunity of speaking to the matter.

See also Jaffe, *loc. cit.*, footnote 8, at p. 1044.

[40] Bryden, *loc. cit.*, footnote 8, at p. 506.

[41] *Ibid.*, at p. 512; A.J. Roman, "Barriers to Access: Including the Excluded" (a paper presented at the Conference on Access to Civil Justice, sponsored by the Ministry of the Attorney-General, June 20, 1988), at pp. 11-15.

[42] *Thorson v. A.-G. Can. et al. (No. 2)*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, 1 N.R. 225; *N.S. Bd. of Censors v. McNeil*, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, 32 C.R.N.S. 376; *Minister of Justice of Canada et al. v. Borowski*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588, 64 C.C.C. (2d) 97.

[43] *Minister of Finance of Canada et al. v. Finlay*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321, [1987] 1 W.W.R. 603.

requirements, there are still numerous areas where the rules for standing pose a significant barrier to accessing the judicial system.[44] Similarly, class action rules in Canada[45] (with a few exceptions such as in Quebec[46]) are notoriously limited, making the device an extremely limited one. Therefore, intervention, either as added party or friend of the court, represents one of the few procedural mechanisms whereby this wider array of interests can become involved in judicial decision-making.

(c) A Better-Informed Court

Apart from judicial efficiency and protection of absentees' interests, intervention also seeks to ensure better judicial decisions by allowing the court the opportunity, when necessary, to be fully informed of all sides of an issue and the consequences of its decision.

(i) Benefit of a "different perspective"

A number of courts in the past have suggested that intervention assists in giving a different perspective to a case which it might not otherwise achieve on its own, especially in public interest cases.[47] For instance, Wilson J.A. in *Re Schofield and Minister of Consumer and Commercial Relations*[48] stated that the application before the Court was not one "on behalf of a private or public interest group which might bring a different perspective to the issue before the Court". In the same decision, Thorson J.A. observed that it may be possible for an applicant to be granted leave to intervene even if the applicant does not have a direct interest in the proceeding. In giving an example, he noted:

> ... one can envisage an applicant with no interest in the outcome of an appeal in any such direct sense but with an interest, because of the particular concerns which the applicant has or represents, such that the applicant is in an especially advantageous and perhaps even unique position to illuminate some aspect or facet of the appeal which ought to be considered by the Court in reaching its decision but which, but for the applicant's intervention, might not receive any

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[44] See P. Muldoon, "The Fight for an Environmental Bill of Rights" (1988), 15:2 Alternatives 33. See also, generally, D.L. Haskett, "Locus Standi and the Public Interest" (1981), 4 Can.-U.S. L.J. 39.

[45] See, *e.g.*, Ontario Rules of Civil Procedure, Rule 12; *Naken et al. v. General Motors of Canada Ltd. et al.*, [1983] 1 S.C.R. 72, 144 D.L.R. (3d) 385, 32 C.P.C. 138.

[46] *An Act respecting the class action*, S.Q. 1978, c. 8 (R.S.Q., c. R-2.1), as amended by S.Q. 1982, c. 37, arts. 20-25. The Act forms part of the *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, arts. 999-1051. See H.P. Glenn, "Class Actions in Ontario and Quebec" (1984), 62 Can. Bar Rev. 247.

[47] Welch, *loc. cit.*, footnote 14, at pp. 226-7; Bryden, *loc. cit.*, footnote 8, at pp. 507-8; Oakley, *loc. cit.*, footnote 8, at p. 211.

[48] *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 112 D.L.R. (3d) 132 at p. 139, 28 O.R. (2d) 764, 19 C.P.C. 245 (C.A.).

TAB 10

The Conduct of an Appeal

Second Edition

John Sopinka
Late Justice of the Supreme Court of Canada

Mark A. Gelowitz, B.A., LL.B., B.C.L. (Oxon.)
Osler, Hoskin & Harcourt LLP

Butterworths

Toronto and Vancouver

Chapter 8

Intervention on Appeal

A. INTRODUCTION

As a general rule, only persons who have a direct interest in the subject matter in dispute or who have a *lis inter partes* are permitted to participate in litigation proceedings. These litigants participate in the proceedings as parties. A non-party may intervene in certain circumstances, either as an "added party" or as a "friend of the court".[1] Intervention supplies the court with an enhanced perspective on the questions at issue in the proceedings, thus promoting better, more informed, decision-making and increased public acceptance of court decisions. Intervention also allows broader participation in litigation, particularly from non-traditional interests who may otherwise find it difficult to gain access to the judicial system. Through a flexible approach to intervention, access to the courts by third parties can be balanced against concerns regarding potential prejudice and unfairness to the original parties to the proceeding.

Intervention as an added party is permitted in circumstances in which the applicant has a significant interest in the litigation and its participation will not unduly delay or prejudice the determination of the rights of the original parties. In considering intervention of this type, courts will consider: (1) whether the applicant has "an interest in the subject matter of the proceeding"[2] (either legal, proprietary, representative, equitable or commercial); (2) whether the applicant will be "adversely affected by a judgment in the proceeding"[3] (either directly or by way of *stare decisis*); (3) whether the applicant is involved in proceedings

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[1] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 13; see, generally: P.R. Muldoon, *Law of Intervention* (Aurora: Canada Law Book, 1989); Andrew J. Roman and Mark R. Hemingway, "Standing to Intervene" (1988), 26 Admin. L.R. 49; Eugene Meehan, "Intervening in the Supreme Court of Canada" (1994), 16 Advocates' Q. 137; Lara Friedlander, "Costs and the Public Interest Litigant" (1995), 40 McGill L. J. 55; June M. Ross, "Standing in Charter Declaratory Actions" (1995), 33 Osgoode Hall L.J. 151; Elizabeth J. Shilton, "Charter Litigation and the Policy Processes of Government: A Public Interest Perspective" (1995), 30 Osgoode Hall L.J. 653; Patrick Bendin, "Governmental Interventions in Constitutional Litigation: An Analysis of Section 25 of the Judicature Act" (1991), 29 Alberta L. Rev. 450; Justice John Major, "Interveners and the Supreme Court of Canada", *National*, May 1999, at 27.

[2] *Ibid.*, subr. 13.01(a).

[3] *Ibid.*, subr. 13.01(b).

with common questions of law or fact; and (4) whether the applicant has the right to intervene under a statute or rule.[4]

The purpose of intervention as an added party is to permit a person to protect an interest that might be adversely affected by a judgment in the proceedings. While these additional "parties" are generally accorded the rights, and accept the obligations, of traditional parties, not all rights of parties are necessarily accorded to them. It is for the court to delineate the rights that will be accorded to such persons. For example, in *General Dynamics Corp. v. Veliotis*,[5] the court ruled that the addition of a person as an intervener, even as an "added party" intervener, does not give that person the right to make claims over against existing parties.

However, in *Ontario (A.G.) v. Ballard Estate*,[6] the court held that once leave to intervene is granted, the person has the status of a party for all purposes of the action, including pleadings, production, discovery, calling of witnesses, cross-examination of other parties' witnesses, and argument. Justice Ground indicated that the application of the Court's conclusion in *General Dynamics v. Veliotis*, namely that the addition of a person as an intervenor does not give that person the right to make claims over existing parties, is unclear. Justice Ground stated that the Court did not explain what it meant by "claim over" and exercised its discretion primarily on the basis that to allow such an intervention would necessarily result in a lengthy delay in the proceedings.

Intervention as a friend of the court, or *amicus curiae*, is permitted to assist the court by way of additional argument. As the parties may have more limited resources than the intervener, and often seek only to support their own narrow interests, interveners of this type present the court with a chance to obtain a wider perspective on the issues in question. Unlike intervention as an added party, intervention as a friend of the court accords an intervener narrow rights, such as the right to file a factum or present oral argument. As with added party intervention, the rights of "friend of the court" interveners are set by the court and are usually particularized in the order allowing the intervention.

The purpose of intervention is threefold: (1) to protect the interests of non-parties; (2) to ensure that the court is well informed of the arguments in regard to the issues raised in the proceeding and the ramifications of the decision to be made by the court; and (3) to support and help legitimatize the court's decision.[7] One commentator has discussed the purpose of *amicus curiae* intervention in this manner:[8]

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4 See Muldoon, *op. cit. supra*, note 1, at 39-61.

5 (1987), 61 O.R. (2d) 111, 21 C.P.C. (2d) 169 (Div. Ct.), leave to appeal to C.A. refused (1987), 21 C.P.C. (2d) 169*n*.

6 (1994) 36 C.P.C. (3d) 213 (Ont. Gen. Div.) (Commercial List).

7 Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: The Commission, 1989), Chapter 5, "Intervention", at 112; Muldoon, *op. cit. supra*, note 1, at 14-19.

8 A. Levy, "The Amicus Curiae (An Offer of Assistance to the Court)" (1972), 20 Chitty's L.J. 94, at 94.

File No. CT-2011-003

THE COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

REPLY BRIEF OF AUTHORITIES OF THE CANADIAN REAL ESTATE ASSOCIATION

(Re: Request For Leave To Intervene)

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