

THE COMPETITION TRIBUNAL

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

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:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

**SASKATCHEWAN WHEAT POOL INC.
JAMES RICHARDSON INTERNATIONAL LIMITED
6362681 CANADA LTD. AND 6362699 CANADA LTD.**

Respondents

- and -

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT January 26, 2007 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 0098

**CANADIAN PACIFIC RAILWAY COMPANY,
CANADIAN NATIONAL RAILWAY COMPANY,
CANADIAN WHEAT BOARD AND
VANCOUVER PORT AUTHORITY**

Intervenors

**MEMORANDUM OF ARGUMENT OF
JAMES RICHARDSON INTERNATIONAL LIMITED
(Case Management Teleconference on January 30, 2007)**

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PART I – OVERVIEW

1. These are the submissions of James Richardson International Limited (“JRI”) regarding the issues to be determined at the Case Management Teleconference scheduled for January 30, 2007.
2. Pursuant to a Direction from the Chairperson of the Tribunal received on January 5, 2007, the parties were invited to address the possibility of a stay of proceedings in the within matter. As outlined in greater detail below, JRI submits that a stay of this proceeding is warranted due to the following:
 - (a) The time period for the divestiture of the United Grain Growers (“UGG”) Terminal owned by Agricore United (“AU”) has been extended on the consent of the Commissioner of Competition (the “Commissioner”) and remains ongoing; and
 - (b) Saskatchewan Wheat Pool Inc. (“SWP”) has made a formal offer to purchase all of the outstanding common shares of AU, which transaction is currently being reviewed by the Commissioner.
3. Given the significant implications of these developments, JRI submits that the within proceedings should be stayed pending the approval of a purchaser for the UGG Terminal or expiry of the Trustee Sale period and the resolution of the AU/SWP transaction. Continuing the within proceedings at this time is not in the interests of justice or judicial economy.
4. Staying the within proceedings will not result in any prejudice to the Commissioner and, in fact, may allow the Commissioner to avoid incurring unnecessary costs. Throughout the period of any stay, the parties will continue to be governed by the terms of the Interim Hold Separate Order implemented on December 16, 2005.

PART II - BACKGROUND

A. THE JOINT VENTURE

5. JRI is a corporation incorporated under the laws of Canada with its head office in Winnipeg, Manitoba. Through its various subsidiaries and affiliates, JRI is engaged in the supply of grain handling services; the supply of crop inputs and crop input services; and the processing of agricultural products.

6. JRI supplies grain handling services to various customers from port terminal facilities located in Vancouver, Thunder Bay, Hamilton, Port Stanley and Sorel. In addition, JRI holds an interest in a port terminal facility located in Prince Rupert, British Columbia.

7. The Respondent, Saskatchewan Wheat Pool Inc. (previously defined as "SWP"), supplies grain handling and other services to various customers. SWP's grain handling assets include wholly-owned port terminals in Vancouver and Thunder Bay. In addition, SWP holds an interest in a port terminal facility located in Prince Rupert, British Columbia.

8. On April 6, 2005, SWP and JRI publicly announced the creation of a joint venture (the "Joint Venture") for the joint operation of their adjacent grain handling facilities located on the North Shore of Vancouver's Burrard Inlet (the "Joint Venture").

9. On April 19, 2005, the Commissioner commenced an inquiry pursuant to paragraph 10(1)(b)(ii) of the *Competition Act* in respect of the Joint Venture.

10. On November 10, 2005, the Commissioner filed an Application seeking a remedy under section 92 of the *Competition Act* in respect of the Joint Venture.

11. On December 16, 2005, an Interim Hold Separate Order was issued by the Tribunal on the consent of the parties.

B. THE AU/UGG MATTER

12. Pursuant to a Registered Consent Agreement dated October 17, 2002, AU agreed to divest of either the UGG Terminal or Pacific Complex operating at the Port of Vancouver.

13. On June 16, 2006, the parties participated in a Case Management Teleconference for the purpose of scheduling examinations for discovery and other steps in this proceeding. Among the matters discussed by the parties during the course of the Case Management Teleconference was the potential impact of the ongoing divestiture of the UGG Terminal by AU.

14. These discussions are reflected in the recitals to a Scheduling Order in this matter issued by the Tribunal on June 19, 2006 (the "June 19 Order"), which state, in part:

AND WHEREAS counsel for the parties and intervenors have consented to the Schedule **subject only to the possibility that developments in the UGG case may have a direct impact on this application which could cause them to seek an order amending the Schedule;** [emphasis added]

Scheduling Order Following a Case Management Teleconference on June 16, 2006, (19 June 2006), CT-2005-009, at para. 11.

15. In addition, the Tribunal stated as follows in the Scheduling Order:

Any motion to amend the Schedule based on developments in the UGG case shall be brought without delay.

Scheduling Order Following a Case Management Teleconference on June 16, 2006, (19 June 2006), CT-2005-009, at para. 15.

16. At the time of the June 16, 2006 Case Management Teleconference, the divestiture process in the AU/UGG matter was scheduled to expire on September 12, 2006. Notwithstanding the anticipated prejudice to the existing schedule and the express understanding regarding the impact of the divestiture process in the AU/UGG matter on the within proceedings, the Commissioner subsequently agreed to extend the divestiture process to October 16, 2006.

Commissioner of Competition's Memorandum of Argument, Motion for Show Cause Hearing and Relief, (30 August 2006), CT-2002-001, at para. 22.

17. On or about September 5, 2006, the Commissioner agreed to a further extension of the divestiture process in the AU/UGG matter to a date that was not publicly disclosed.

18. As at the present date, no public announcement has been made by AU/UGG or the Commissioner regarding the current state of the divestiture process. However, it appears that the divestiture process is currently ongoing.

C. THE SWP/AU TRANSACTION

19. On November 7, 2006, SWP announced that it would make a formal offer for all of AU's outstanding common shares. As a result of this transaction, SWP would acquire, among other things, the AU/UGG grain handling facilities at the Port of Vancouver.

Press Release of Saskatchewan Wheat Pool Inc. dated November 7, 2006.

20. On November 24, 2006, SWP made a formal offer to purchase all of AU's outstanding shares. SWP's offer was to remain open for acceptance until January 24, 2007.

Press Release of Saskatchewan Wheat Pool Inc. dated November 7, 2006.

21. AU's board of directors has initially recommended that shareholders reject SWP's offer on the basis of insufficient consideration. The public statements by representatives of AU have been widely interpreted as indicating that AU's principal shareholder and board are receptive to either a higher bid by SWP or offers from other potential purchasers. In this regard, it is notable that although AU has a "poison pill" defence, it has not exercised this defence against SWP's offer. Therefore at this stage no legal means has been exercised to prevent the acquisition. Further, AU has indicated that there is potential for an alternative purchaser, which may or may not constitute new entry in the relevant market or markets.

22. In an article dated December 13, 2006, the following comments were attributed to Jon Grant, the Vice-Chairman of AU's board of directors, and head of a special committee examining the SWP offer:

Agricore said it is exploring alternatives to the offer, including remaining independent, and said ADM is open to considering higher bids, including from Saskpool.

Grant would not comment on what the board would see as a fair offer for the company, nor on the level of interest in the company from other potential buyers.

He said the company wasn't considering using a poison pill defense against Saskpool's offer, but wanted as much time as possible to examine all the alternatives.

"It is always there for us to use if necessary," Grant said.

Roberta Rampton, "Agricore, ADM say Saskpool takeover bid too low" *Reuters* (13 December 2006).

23. On January 23, 2007, SWP announced that the proposed acquisition of AU was subject to review by the Commissioner and that this review would not be completed until February 2007. In addition, following discussions with officials of the Antitrust Division of the U.S Department of Justice, SWP decided to withdraw and re-file its notice under the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* to allow for an additional 30-day review period. Accordingly, SWP announced that it had extended its offer to purchase AU's shares until March 7, 2007.

Press Release of Saskatchewan Wheat Pool Inc. dated January 23, 2007.

PART III – SUBMISSIONS

24. Section 9(2) of the *Competition Tribunal Act* provides the Tribunal with a broad authority to conduct proceedings in a manner and according to a schedule that is appropriate to the individual circumstances of each case:

All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), s. 9(2)

25. In *Canada (Commissioner of Competition) v. P.V.I. International Inc.*, the Federal Court of Appeal confirmed that the Tribunal has a broad discretion regarding the manner in which its proceedings are conducted:

Moreover, like other administrative tribunals, the Tribunal has considerable discretion over its procedure. Subsection 9(2) of the

Competition Tribunal Act, R.S.C. 1985 (2nd Supp.), c. 19, requires the Tribunal to conduct its proceedings as informally and expeditiously as the circumstances and considerations of fairness permit. The Court will only interfere with the procedural balances struck by the Tribunal in the exercise of its discretion if, in the view of the Court, the Tribunal erred in principle or breached the duty of fairness.

Canada (Commissioner of Competition) v. P.V.I. International Inc. (2004), 31 C.P.R. (4th) 331 at para. 11.

26. Courts have exercised the discretion to stay or adjourn a proceeding where the matters at issue may be impacted by developments in other proceedings, such as where another proceeding will determine closely related issues. For example, in *Alberta v. Canada (Minister of the Environment)*, the respondent sought a stay of an application pending a decision by the Supreme Court on a closely related issue. The Federal Court held that granting a stay was in the interests of justice and promoted efficiency in the judicial system. In this regard, MacKay J. stated as follows:

In my view the interests of justice, and the efficacy of the judicial system, are best served by adjourning consideration of the Province's application because:

a) the constitutional validity of the Guidelines Order upon which the processes of the Panel depend, may be expected to be commented upon in the near future by the Supreme Court. **Virtually any decision on the merits of the application for final relief now before this Court is likely to be affected by the Supreme Court decision, which can be expected to influence the determination here sought by the Province.**

b) Even if the Supreme Court's decision does not deal directly with the issue raised here, I have no doubt that issue may be more readily resolved, and perhaps more definitively argued, in light of the decision of the Supreme Court, now awaited. ... If [the] decision of a motions judge were reserved until after it is clear what effect the Supreme Court's decision may have, then the Province would be in the same position as if an adjournment were granted, no better but clearly no worse. ... [emphasis added]

Alberta v. Canada (Minister of the Environment), [1991] 3 F.C. 114 at para. 39.

27. Similarly, in the present matter, the interests of justice and the efficacy of the judicial process are best served by staying the within proceedings. As discussed in greater detail below, the outcome of the divestiture process for the UGG Terminal and the resolution of the AU/SWP transaction will each have significant implications for the matters at issue in the within proceedings.

28. For example, the Commissioner has alleged in the Statement of Grounds and Material Facts in this proceeding that the relevant market for assessing the Joint Venture is limited to grain handling services at the Port of Vancouver. Given the Commissioner's position on the appropriate definition of the relevant market, the ongoing divestiture process for the UGG Terminal in the Port of Vancouver will have a significant impact on this matter. In fact, the Commissioner expressly recognized the potential impact of the UGG Terminal divestiture in paragraph 45 of the Statement of Grounds and Material Facts filed in this matter:

Entry of a new competitor in the market for port terminal grain handling services in Vancouver would likely, in the short term, only be possible through the acquisition of an existing terminal. Pursuant to a Consent Agreement between the Commissioner and UGG filed with the Competition Tribunal on October 17, 2002, AU was required to divest either the Pacific or the UGG port terminal to an arm's length purchaser. AU subsequently elected to divest the UGG port terminal. However, on August 12, 2005, AU filed an application to the Competition Tribunal seeking to rescind this obligation. If successful, this would relieve AU of the obligation to divest the terminal to a third party. The Commissioner is opposing this application. Until the Competition Tribunal disposes of the matter, it is not possible to know whether there is likely to be a sale of the UGG port terminal.

Statement of Grounds and Material Facts (Amended), (24 February 2006), CT-2005-009, at para. 45.

29. JRI has also recognized the potential impact of the divestiture process for the UGG Terminal upon the issues in the within proceedings. Specifically, paragraph 184 of the Response of JRI states as follows:

First, as admitted at paragraph 45 of the Commissioner's Statement of Grounds and Material Facts, Agricore United was required pursuant to the terms of a Consent Agreement filed with the Competition Tribunal on October 17, 2002, to divest either one of

two port terminal facilities at the Port of Vancouver. As such, if Agricore United is required to comply with the Consent Agreement, a new competitor could enter at the Port of Vancouver through the acquisition of Agricore United's facility.

Response of James Richardson International Limited, (10 February 2006), CT-2005-009, at para. 184.

30. Given the position taken by the Commissioner with respect to market definition, the outcome of the divestiture process for the UGG Terminal and the SWP/AU transaction will have significant implications for numerous matters at issue in this proceeding, including the following:

- (a) effective competition remaining to the Joint Venture;
- (b) opportunities for entry at the Port of Vancouver;
- (c) the scope and nature of efficiencies that may be generated by the Joint Venture;
- (d) the alleged unilateral anti-competitive effects for port terminal grain handling services resulting from the Joint Venture;
- (e) whether the Joint Venture will result in coordinated effects at the Port of Vancouver;
- (f) the impact of the Joint Venture on primary grain elevator markets and the alternative provided by those grain elevators to the services provided by the Joint Venture; and
- (g) potentially, the structure and operation of the Joint Venture.

31. The outcome of the divestiture process for the UGG Terminal and the SWP/AU transaction will also impact the examinations for discovery of the parties in this matter. Parties would be required to answer questions based either on the current circumstances at the Port of Vancouver (which could be subject to significant changes) or based on speculation regarding the outcome of these recent events. In either case, it will not be possible for the parties to conduct a proper examination or even to fully complete their examinations.

32. Examinations for discovery of the intervenors will be similarly impacted. For example:
- Canadian National Railway is to be examined for discovery on, among other things, “the efficiencies relating to rail operations anticipated to result from the Joint Venture”. The developments described above may have significant implications for the scope and nature of the efficiencies that may be generated by the Joint Venture and potentially, other facilities at the Port of Vancouver.
 - The Vancouver Port Authority (“VPA”) is to be examined for discovery on the “effects anticipated to result from the Joint Venture on the VPA including any effects on rail traffic into and out of the grain handling facilities at the Port”. The developments described above may have significant implications on the allocation of railcars between facilities, the volume of grain handled at various facilities and the originations of such grain.
 - The Canadian Wheat Board (“CWB”) is to be examined on alleged adverse effects anticipated to result from the Joint Venture on the CWB or its members. The CWB’s evidence with respect to such alleged adverse effects may be impacted by the developments described above.

33. In addition, as part of its ongoing review of the SWP/AU transaction, the Commissioner has initiated a formal inquiry and has obtained orders pursuant to section 11 of the *Competition Act* compelling industry participants to produce documents and attend oral examinations. For example, the Commissioner obtained an Order pursuant to section 11 against JRI on December 13, 2006, compelling JRI to produce documents and to compel an officer of JRI to attend an oral examination.

Order dated 13 December 2006, Court File No: T-2162-06.

34. The Affidavit of Denis Corriveau filed in support of the issuance of the section 11 Order against JRI clearly linked this proceeding with the SWP/AU transaction in describing the ongoing inquiry by the Commissioner:

The Commissioner is conducting a review of the likely competitive impact of the Proposed Acquisition [by SWP of AU] with respect to grain handling services and the retail sale of agri-products. Bureau officers are continuing to examine the likely impact of the Proposed Acquisition on competition in geographic markets where there is direct overlap of grain handling services and/or the retail sale of agri-products between AU and SWP. The Commissioner has received expressions of concern with respect to the Proposed Acquisition's effect on competition in the provision of grain handling services and the retail sale of agri-products.

On the basis of information and records received in the context of the examination of the Proposed Acquisition, **as well as the Bureau's knowledge of the grain handling industry obtained through the other two grain merger matters referred to in paragraphs 7 and 9 above [the JRI/SWP Joint Venture and AU/UGG transaction]**, the Commissioner has concluded that she has reason to believe that grounds exist for the making of an order under section 92 of the Competition Act. Accordingly, an inquiry into the Proposed Acquisition was commenced by the Commissioner on November 27, 2006, pursuant to section 10 of the Competition Act. [emphasis added]

Affidavit of Denis Corriveau, dated December 7, 2006, paras. 10 and 11.

35. Although there is no impediment to the Commissioner pursuing such an inquiry in these circumstances, the information sought and obtained through the inquiry relates to grain handling services at the Port of Vancouver and other issues that are relevant to the within proceedings. As such, the Commissioner will be obligated to provide both documentary and oral discovery of the information obtained through the ongoing inquiry relating to the SWP/AU transaction. Therefore, the discovery process for the Commissioner cannot be completed pending the completion of the inquiry in the SWP/AU transaction.

36. Accounting for the AU/UGG divestiture process, the SWP/AU offer, and the Joint Venture contemplated by the parties hereto, there are now three separate transactions relevant to the matters at issue in this proceeding before the Tribunal. JRI submits that in light of the significant developments described above, continuing the within proceedings would not be in the interests of justice, but would only lead to undue expense and prejudice to the parties. In addition, continuing with a proceeding where there is no reasonable potential for assessing the

impact of these other relevant transactions would also constitute an inefficient use of the Tribunal's resources.

37. Further, it should be noted that the state of competition in the relevant market as alleged by the Commissioner will be determined, in large part, by the exercise of the Commissioner's discretion. For example, a decision by the Commissioner to not seek a remedy in respect of the SWP/AU transaction or to agree to divestitures as part of a consensual resolution of the SWP/AU transaction or to refuse to approve a purchaser of the UGG Terminal, will all materially impact upon the state of competition in the relevant market alleged by the Commissioner. JRI submits that, given the significant implications arising therefrom, the Commissioner's discretion in respect of the AU/UGG and SWP/AU transactions should be exercised prior to requiring the parties to continue with the within proceedings.


38. The Commissioner will not suffer any prejudice as a result of staying the within proceedings pending the completion of the divestiture process for the UGG Terminal and resolution of the SWP/AU transaction. Throughout the period of any stay, the parties will continue to be governed by the terms of the Interim Hold Separate Order implemented on December 16, 2005.


39. In fact, continuing the within proceedings at this time will entail additional costs for the Commissioner which may ultimately prove to be unnecessary and will be at the public expense.

40. In light of the potential implications arising from the ongoing divestiture process for the UGG Terminal and the SWP/AU transaction, and given the absence of any prejudice to the Commissioner, JRI submits that continuing the within proceedings would not be in the interests of justice nor would it constitute an effective use of the Tribunal's resources. Accordingly, JRI requests that the Tribunal stay the within proceedings pending resolution of the divestiture process for the UGG Terminal and the resolution of the SWP/AU transaction described above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 26th day of January, 2007.


for **Robert S. Russell**


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