PUBLIC
CT-2005-009

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 under 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 Vancouver.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

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

Respondents

**SUBMISSIONS OF THE COMMISSIONER OF COMPETITION
CASE CONFERENCE ON JANUARY 30, 2007**

PART I – COMMISSIONER'S POSITION

1. The following submissions are made pursuant to the direction given by the Tribunal on January 5, 2007.

2. Specifically, the Tribunal has asked that, at a conference call scheduled for January 30, 2007, the parties "address the possibility of a stay of proceedings in CT-2005-009 until a purchaser is approved for the UGG Terminal or the trustee sale period expires". The position of the Commissioner of Competition (the "Commissioner") is that there is no legitimate consideration that would support a stay of proceedings; rather, the matter ought to proceed as expeditiously as possible.

3. In summary, the position of the Commissioner is that the application of the appropriate legal principles do not support a stay or even an adjournment; on the contrary, it militates directly against either such result.

4. Further, s.9(2) of the *Competition Tribunal Act* requires all proceedings before the Tribunal to be dealt with as expeditiously as possible. This has been described as a mandatory provision. A stay or an adjournment of the within matter would be wholly inconsistent with that notion. In addition, the Commissioner respectfully submits that considerations such as substantial issue to be tried, irreparable harm and balance of inconvenience all militate against staying or adjourning the within matter. Finally, there is no prejudice to the respondents in continuing and a strong public interest weighs heavily in favour of continuing with the hearing as soon as possible.

5. Finally, the Commissioner submits that the Tribunal ought not to delay this matter on the basis of whether or when certain events will transpire. There will always be uncertainty as to whether events will take place. Courts and tribunals are routinely called upon to make their best judgment on the likelihood of those events and adjudicate accordingly.

PART II - FACTS

The Industry

6. The within matter arises in the context of the grain industry in Western Canada. The participants in that industry include:

   a. Farmers who produce grain. The vast majority of their grain for export is delivered to primary elevators located within a limited geographical area surrounding their farm;

   b. The Canadian Wheat Board ("CWB") who, by law, is the sole marketer of wheat and barley for export and domestic human consumption. Such grains are referred to as "CWB grains". Wheat and barley sold for non-human consumption in Canada are

traded outside the jurisdiction of the CWB and such grains will be referred to in these submissions as “non-board grain”;

c. Grain companies who purchase grain at primary elevators from farmers. When purchasing CWB grain they act as agents for the CWB and when purchasing non-board grain they do not. The majority of non-board grain is purchased at primary grain elevators from farmers by grain handling companies on their own account at market prices. At primary elevators the grain is elevated, graded and segregated and may also be cleaned, dried, blended and stored. Grain companies with ownership interests in both primary grain elevators and port terminals in Vancouver are referred to as “Integrated Graincos” Grain companies who do not own a port terminal in Vancouver are called “Non-integrated Graincos”. Saskatchewan Wheat Pool (“SWP”) and James Richardson International Limited (“JRI”) are both Integrated Graincos;

d. Railways i.e. Canadian National Railway (“CNR”) and Canadian Pacific Railway (“CPR”) who transport CWB and non-board grain from primary grain elevators to *inter alia* port terminals located in Vancouver;

e. Port terminals which receive grain from the prairies and earn fees for storage, elevation and, on occasion, blending and cleaning; and

f. Ocean going vessels onto which grain is loaded for export.

Statement of Grounds and Material Facts, para. 15

7. Integrated and Non-integrated Graincos compete in purchasing farmers’ CWB and non-CWB grains through their primary grain elevators. They do this through various means including pricing, grade promotions and by bundling trucking services and crop inputs. It is important to understand that Non-integrated Graincos require competitive access to west

coast port terminals owned by Integrated Graincos such as SWP and JRI in order to get their grain to market.

Statement of Grounds and Material Facts, para. 16

8. Integrated Graincos earn revenue for elevation, storing, blending and cleaning wheat and may seek to increase the volume of grain handled at their port terminals by offering financial inducements commonly referred to as diversion premiums paid to Non-integrated Graincos for shipping their grain through the Integrated Graincos port terminal. These diversion premiums are confidential and set out in grain handling contracts.

Statement of Grounds and Material Facts, paras. 17 and 18

Canadian West Coast Port Terminals

9. On the west coast there are five grain handling terminals in the port of Vancouver, and one in Prince Rupert. They are:

   a. SWP terminal with a licensed storage capacity of 237,240 tonnes, which is wholly owned and operated by SWP;

   b. JRI terminal with licensed storage capacity of 108,000 tonnes which is wholly owned and operated by JRI;

   c. Cascadia terminal with 282,830 tonnes of licensed storage capacity. Cargill Limited (“Cargill”) and Agricore United (“AU”) each own 50% of Cascadia;

   d. Pacific Elevators Limited Terminal (“Pacific”) with 199,150 tonnes of licensed storage capacity. AU is the sole shareholder of Pacific; and

e. UGG terminal with licensed storage capacity of 102,070 tonnes; it is presently wholly owned and operated by AU.

Statement of Grounds and Material Facts, para. 36

The UGG Case

10. On November 1, 2001 United Grain Growers ("UGG"), as it was then called, acquired Agricore Cooperative Ltd. pursuant to the terms of a merger agreement previously announced on July 30, 2001 (the "Acquisition"). The merger agreement provided that UGG, already the owner of a grain handling port terminal in Vancouver, would acquire control of all business assets of Agricore including its whole or partial interests in grain handling port terminal facilities in Vancouver. Since the Acquisition, UGG has been carrying on business as AU.

***Untied Grain Growers Limited and The Commissioner of Competition,* CT-2002-001 Reasons for Order dismissing Commissioner's motion for Summary Disposition, para 2**

11. On January 2, 2002, the Commissioner filed an application with the Tribunal alleging that the Acquisition would likely prevent or lessen competition substantially in the market for port terminal grain handling services in the Port of Vancouver.

***Ibid,* para 4**

12. In Findings and Determinations dated September 12, 2002, the Tribunal found that the Acquisition resulted in an SLC as alleged by the Commissioner. The Tribunal also found that a divestiture of the UGG Terminal or AU's interest in the Pacific Terminal was sufficient to address the SLC.

***Ibid,* para 5**

13. On October 17, 2002, the Tribunal registered a Consent Agreement filed by the Commissioner and AU, pursuant to which AU agreed to divest either the UGG Terminal or the Pacific Terminal in the period between October 17, 2002 and October 31, 2004, failing which a trustee would be appointed to implement the sale.

***Ibid,* para 6-7**

14. After having agreed to various extensions of the Initial Sale Period, counsel for the Commissioner advised AU on August 10, 2005 that the Commissioner would not agree to any further extension beyond August 15, 2005.

***Ibid,* para 8**

15. In August 2005, AU brought an application under section 106 of the *Competition Act*, which was withdrawn after two weeks of hearings in April 2006.

16. On May 12, 2006, Grant Thornton LLP (the "Trustee") was appointed as Trustee for the sale of the UGG Terminal. The Trustee sale period therefore commenced on May 12, 2006, and, pursuant to the parties' agreement, was to last for up to four months, ending on September 12, 2006.

17. The Trustee sale period has been extended a number of times. The deadline for offers to be received by the Trustee is February 23, 2007. The current schedule contemplates a completed sale by May 11, 2007.

18. Although the schedule referred to above envisions a sale by May 2007 and the Commissioner supports this schedule, given the history of the UGG file, including the aborted section 106 proceeding, there is no certainty that the sale will take place in such a time frame.

Proposed Joint Venture

19. SWP and JRI, together with affiliates 6362681 Canada Ltd. and 6362699 Canada Ltd. have entered into a series of agreements dated April 6, 2005. Taken in their totality, those agreements create a joint venture (the "J.V.") for the joint operation of their Vancouver port terminals as well as for the marketing of port terminal grain handling services to Non-integrated Graincos.

Statement of Grounds and Material Facts, para. 11

20. Under the J.V., SWP and JRI each continue to own their respective facilities in Vancouver. However, the J.V. agreements provide that a new business corporation owned equally by SWP and JRI is established as the joint operator and agent for the parties. The J.V. operator manages the operation of the parties' Vancouver port terminals as if they were one terminal. The J.V. operator also markets the grain handling services offered at those terminals to Non-integrated Graincos.

Statement of Grounds and Material Facts, para. 12

21. The J.V. agreements contemplate that SWP and JRI, respectively, would continue to own and control their remaining business assets, including their whole or partial interests in primary grain elevator facilities, whole or partial interests in port terminal facilities (including Prince Rupert and Thunder Bay) and their whole or partial agribusiness interests.

Statement of Grounds and Material Facts, para. 13

22. [confidential]

23. JRI and SWP entered into a consent interim agreement with the Commissioner which was registered with the Competition Tribunal on July 5, 2005. The interim agreement required JRI and SWP to implement a hold separate relating to the marketing component of the J.V.

Statement of Grounds and Material Facts, para. 14

Procedural History of Matter Relating to J.V.

24. On November 10, 2005 the Commissioner filed an application challenging the J.V. under section 92 of the Competition Act (the "Act") with the Tribunal and made an application for an Interim Hold Separate Order under section 104 of the Act. Pursuant to the consent interim hold separate agreement and order, SWP and JRI were required to implement a hold separate arrangement relating to the marketing component of the proposed J.V. pending the completion of the merger review by the Commissioner.

25. On December 9, 2005 the time for serving and filing of the Responses was extended on consent to January 20, 2006 and then was further extended on consent to February 3, 2006 on which date SWP and JRI filed their Responses.

26. The Commissioner's Reply was filed on March 3, 2006, following one extension on consent.

27. On February 6, 2006 the Tribunal granted CN, CP and the Canadian Wheat Board ("CWB") leave to intervene; on February 24, 2006 the Tribunal granted leave to intervene to the Vancouver Port Authority ("VPA").

28. On February 15, 2006 the Tribunal ordered that the time for serving and filing affidavits of documents be extended from February 23, 2006 to April 28, 2006.

29. Following a case management teleconference on June 16, 2006, the Tribunal issued a schedule of proceedings with the following timelines:

    a. Service of supplementary affidavits of documents and delivery of documents by all parties by July 14, 2006;

    b. Service of affidavit of documents and delivery of documents by intervenors by July 31, 2006;

    c. Oral Discoveries to be held between the end of October and beginning of December 2006;

d. Filing of all expert reports by March 23, 2007; and

e. 7 weeks of hearings between April 16 and June 15, 2007.

30. The Tribunal was careful to point out at the teleconference that it wished the matter to proceed as quickly as possible.

31. Thereafter, the parties agreed to dates for the examination for discovery of the parties and intervenors.

SWP Announcement of Offer for AU Shares

32. On or around November 7, 2006, SWP announced a potential hostile takeover of the outstanding shares of AU. The Commissioner is making the appropriate inquiries relating to this takeover and does not as yet have a position on the competition implications relating to the transaction. On its face, however, if accepted, the offer would result in SWP increasing its concentration of ownership of port terminals in the port of Vancouver.

33. On November 8, 2006, counsel for SWP and JRI advised counsel for the Commissioner that their clients would not attend their examinations for discovery scheduled to commence on the week of November 13, 2006.

34. Following a case management teleconference held on November 17, 2006, the Tribunal rescinded the scheduling order of June 19, 2006 and ordered another scheduling conference to be held at the end of January 2007.

Competition Concerns

35. The Commissioner respectfully submits, consistent with the application filed in November 2005, that, if SWP and JRI are permitted to enter into their proposed joint venture, the result will substantially lessen the competitive options available to Non-integrated Graincos, to the CWB and to Canadian grain farmers. Accordingly, there will be a

substantial lessening or prevention of competition in the Canadian West Coast port terminal grain handling services market because:

a. the proposed J.V. will have an ability and incentive to increase the tariffs for port terminal grain handling services in Vancouver and Prince Rupert charged to the CWB for the handing of CWB grain and to Non-integrated Graincos for the handling of non-board grain;

b. the proposed J.V. will have an ability and incentive to reduce or eliminate the diversion premiums paid to Non-integrated Graincos to induce shipment of their grain volumes (of both CWB and non-board grain) to the integrated companies competing port grain terminals at Vancouver; and

c. the proposed J.V. will have an incentive to increase the difficulties for Non-integrated Graincos in obtaining terminal authorization and ready access to port terminal grain handling services particularly during periods of high demand for such services.

Statement of Grounds and Material Facts, para. 3

36. The Commissioner further respectfully submits that, because of the vertical relationship between port terminal grain handling service markets and primary grain elevator markets, the prevention or lessening of competition resulting from the proposed J.V. is likely to have anti-competitive effects in many local grain handling markets across the prairies. Greater difficulties in obtaining ready access to port terminal grain handling services and the reduction or elimination of diversion premiums or the increase in port terminal tariffs will increase the cost for Non-integrated Graincos, and limit their ability and incentive to compete for grain originations in country. This will have a deleterious effect on farmers in country.

Statement of Grounds and Material Facts, para. 4

PART III - SUBMISSIONS

A. General

37. Pursuant to subsection 9(2), "[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit."

***Competition Tribunal Act,* s. 9(2)**

38. Subsection 9(2) has been described as a "mandatory provision". It is submitted that Parliament's inclusion of ss. 9(2) in the CTA clearly indicates that one of Parliament's primary objectives in creating the Tribunal was to create an adjudicative body which could deal with certain matters expeditiously, while ensuring fairness.

***Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.*, [1994] F.C.J. No. 1504 (F.C.A.) at para 18.**

39. In respect of matters involving mergers, the desire for expeditious resolution has been recognized by the Tribunal itself:

> In this connection it is also important to note that in the same section of the Competition Tribunal Act which defines the role of potential interveners, the Tribunal in s-s. 9(2) is directed to deal with all proceedings. ... The requirement for expeditious determination of questions under Part VII is particularly significant in relation to mergers. The Tribunal can take notice of the fact that merger negotiations are by their nature frequently of a transitory nature requiring relatively quick decisions and action. If the Tribunal is to be relevant to the control of mergers, as Parliament obviously thought it should be, it must be prepared and able to act as quickly as possible in reaching a decision on the permissibility of any given merger.

***Director of Investigation and Research v. Air Canada et al*., 23 C.P.R. (3d)**

B. Stay or Adjournment

i. Legal Test

40. It is respectfully submitted that an adjournment or a stay would be inconsistent with the Tribunal's obligation to facilitate an expeditious proceeding. The concern that this matter, in particular, proceed expeditiously was previously emphasized by the Tribunal at the case conference in June 2006.

41. As noted above, the Tribunal has asked that the parties address the possibility of a "stay…until a purchaser is approved for the UGG Terminal or the trustee sale period expires". The Commissioner respectfully submits that it is possible to interpret the Tribunal as asking the parties to deal with either the issue of a "stay" or, alternatively, an "adjournment" of the within matter. The Commissioner respectfully submits that, irrespective of the characterization, the test is the same and that the applicable legal principles do not support any hiatus in this matter.

42. It is respectfully submitted that the test the Tribunal should apply in determining whether a stay, or an adjournment *sine die,* should be granted is the three-part test used to determine whether a stay pending appeal should be granted.

***Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.* (F.C.A.), [1994] F.C.J. No. 1504**
***Zundel* (Re) [2004] F.C.J. No. 231, 2004 FC 198**

43. In *The Director of Investigation and Research v. The D & B Companies of Canada Ltd.,* Justice Rothstein (as he then was) held that an adjournment pending appeal has exactly the same result as a stay pending appeal and that, accordingly, the three-part test should be used. One of Rothstein J's concerns was that it was not clear exactly how long the delay would be, and any such prediction would be purely speculative.

***The Director of Investigation and Research v. The D & B Companies of Canada Ltd.*, CT-94/1 (October 5, 1994) at p. 9; (Confirmed on appeal - *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.* (F.C.A.), [1994] F.C.J. No. 1504)**

44. In effect, the Tribunal in the within matter appears to have asked the parties to address the issue of whether the within matter should be held in abeyance until some future date. As indicated above, the speculative period of the delay was one of the concerns raised by Rothstein J. in *D & B*. Here, the uncertainty concerning the duration of the delay is much more speculative, and accordingly, that much more problematic, than that in *D & B*.

The Director of Investigation and Research v. The D & B Companies of Canada Ltd., supra
***Boros v. Canada (Minister of Citizenship and Immigration),* 2002 FCT 835**
***Harkat (Re),* 2003 FCT 520**

45. The Supreme Court of Canada has mandated the following test for a stay:

    a. There is a serious issue to be determined;
    b. The respondents must suffer irreparable harm if the application is refused; and
    c. The balance of convenience, taking into account the public interest, favours the respondents.

    ***RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1S.C.R. 311, para 35 and 43**
    ***A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110**

46. The three part test as set out above is applicable herein.

ii. Serious Issue to be Tried

47. On a motion for an adjournment or stay pending appeal the moving party must establish that there is a serious issue which must be resolved *before* the proceeding below may continue. For example, a threshold issue regarding the admissibility of certain evidence, the admission of which would effect the course of the entire proceeding below, could in appropriate circumstances, form a basis for arguing that there is a "serious issue". Similarly, the ability of a key witness to testify in the proceeding, or the constitutionality of a provision on which a prosecution is based, could constitute serious issues.

    See e.g.*, Re Zundel, supra* and *The Director of Investigation and Research v. The D & B Companies of Canada Ltd., supra*

48. In this case, there is no issue, serious or otherwise, which could possibly form a basis upon which the Tribunal should consider exercising its discretion to stay or adjourn the matter. The Commissioner respectfully submits that the Tribunal need go no further in its analysis of the three-part test.

iii. Irreparable Harm

49. In any event, the Commissioner submits that no irreparable harm has been demonstrated.

50. With respect to the nature of the evidence required to show irreparable harm, the authorities state the applicant must provide "clear and not speculative" evidence that irreparable harm "would" flow from the respondent's actions should the requested relief not issue.

***Imperial Chemical Industries PLC et al. v. Apotex Inc. ("Imperial Chemical")* (1987) 27 CPR (3d) 345 at 351 (FCA)**

51. In *Centre Ice Ltd. v. National Hockey League et al.*, the Federal Court of Appeal held that proof of irreparable harm cannot be inferred, and must be established by "clear evidence".

***Centre Ice Ltd. v. National Hockey League et al.* ("Centre Ice"), (1994), 53 CPR (3d) 34 (FCA) at para 9**

52. Dawson J. also dealt with the question of what constitutes irreparable harm in *The Commissioner of Competition v. Sears Canada Inc.* She stated at paragraph 11:

> [ll] **Irreparable harm requires, as a matter of law, that the applicant must show that the refusal of relief ". . . could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application".** (See: *RJR MacDonald*, supra at paragraph 58.) The applicant is required to show irreparable harm that is clear and non-speculative. **The word "irreparable" refers to the nature of the harm to be suffered.** [emphasis added]

***Commissioner of Competition v. Sears Canada Inc.*, CT-2002-004, Registry Doc No. 0092 (21 October 2003), at para 11**

53. The Supreme Court of Canada has stated that:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

***RJR-MacDonald Inc. v. Canada (Attorney General), supra*, para 59**

54. The Commissioner respectfully submits that *D&B* makes it clear that cost or disruption to the Tribunal process cannot be characterized as irreparable harm:

> The issue of disruption to Tribunal proceedings is not one that, in my view, can be characterized as coming within the category of irreparable harm. It is true that there could be serious inconvenience but that is not of itself tantamount to irreparable harm. It may be that examinations and cross-examinations may change if the respondent is successful on appeal and further information is produced and the matter is reheard. However, again, this is a matter of inconvenience and not irreparable harm. Whenever a case is sent back for rehearing as a result of

> appeal or judicial review, the parties are in the same position. Such rehearings are a regular part of the judicial process; I cannot conclude that this case is in some way unique so as to cause irreparable harm to the respondent if indeed examinations and cross-examinations have to change.

The Commissioner submits that the type of disruption that could be occasioned in this matter is minimal compared to the disruption at issue in D & B.

***The Director of Investigation and Research v. The D & B Companies of Canada Ltd., supra,* p. 7**

55. It is respectfully submitted that there is no reason to believe that the respondents would suffer irreparable harm to the extent that this matter is stood down pending some event and now has been identified. Thus, the Commissioner respectfully submits that the Tribunal need not determine the question of balance of convenience.

iv. Balance of convenience and public interest considerations

56. In any event, the Commissioner submits that, in the circumstances of this case, the balance of convenience lies clearly in favour of the Commissioner.

57. This third part of the test involves a determination of which of the parties will suffer the greater harm from the granting or refusal of the stay, pending a decision on the merits. In addition to the damage each party alleges it will suffer, any alleged harm to the public interest must also be taken into account. Any potential harm to the respondent to a stay application should be dealt with in this stage of the analysis.

***RJR-MacDonald*, supra at 57 to 61**
***D & B Companies*, ibid at page 4**
***Kinderwater*, supra at paras 13 and 14**
***Imperial Chemical*, supra at 351**
***Centre Ice*, supra at para 9**

58. In order to determine the balance of convenience, it is submitted that it is first necessary to determine the parties' respective interests.

59. Justice Rothstein, in dealing with the third part of the test in the context of the Competition Tribunal, had the following to say:

> In view of my findings with respect to irreparable harm, it is unnecessary for me to deal with the balance of convenience. However, I would note, as counsel for the Director pointed out, that in this case there is a question of the public interest to be considered. Counsel cites the decision of the Supreme Court in *RJR - MacDonald Inc*., which, while referring to Charter cases, is, in his view, equally applicable to ordinary stays of proceedings when public authorities, vested with the obligation of protecting the public interest, are involved. Sopinka and Cory, JJ. state:
>
> > In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with a duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. **Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action**.
>
> **In the case at bar, the Director has the responsibility to protect the public interest in respect of competition in Canada in the manner conferred upon him by the relevant legislation. He may bring cases before the Competition Tribunal when he considers it necessary in order to carry out his responsibility of protecting competition. Here, the Director's activity in bringing this case before the Tribunal was undertaken pursuant to that responsibility. A strong case may exist therefore that there is irreparable harm [to the public interest] if the Director is restrained from proceeding with that action.** [emphasis added]

***The Director of Investigation and Research v. The D & B Companies of Canada Ltd., supra,* pp. 8-9 (emphasis added)**

60. While the issue before the Tribunal is somewhat different from that before the Tribunal in *D & B*, it is submitted that Justice Rothstein's words are equally applicable to a situation where the Commissioner seeks in the discharge of her statutory mandate to protect the public interest in respect of competition by trying to deal with legitimate competition issues in a market with the broad range of participants set out in paragraph 3, above.

C. In the Alternative, the Test for Adjournment is Prejudice

61. The Commissioner submits that the respondents, at the very least, must demonstrate that they are severely prejudiced to support an order adjourning this matter.

***Bicz Transport Corp. v. Canada (Minister of National Revenue - M.N.R.)* 2003 FCA 135**
***United Grain Growers v Commissioner of Competition, supra,* at paras. 29 and 32**

62. Further, the Tribunal must take into account the public interest in having matters proceed when they are scheduled to be heard. Even the prejudice of having one's choice of counsel,

a fundamental protection, may not outweigh this important public interest. As Gibson J. stated in *Martin v. Canada (Minister of Employment and Immigration)*:

> ...the right of a plaintiff to counsel of her choice does not override the public interest in the expeditious and effective administration of justice in accordance with the tradition of this Court of commencing trials on days fixed by Court order substantially in advance of the date identified.
>
> ***Martin v. Canada (Minister of Employment and Immigration)*** **[1999]F.C.J. No. 113, at para 19**

D. Submissions of the Commissioner

63. The Commissioner respectfully submits that neither the outstanding case relating to the divestiture of terminals on the south shore of the port of Vancouver, nor the potential acquisition by SWP of AU's shares, should affect this proceeding.

64. With respect to the former, the Commissioner respectfully points out that the UGG terminal currently belonging to AU will either be sold in conformity with the consent agreement or it will not. If it is sold, then evidence will be led on this issue before the Tribunal and the market will be defined accordingly. If it is not, then evidence will be led on this issue and the market will be defined accordingly. It should be noted that other issues could arise in the context of the UGG sale proceedings. For example, AU has certain rights to object to a proposed sale.

65. In this regard, the Commissioner respectfully directs the attention of the Tribunal to *Commissioner of Competition v. Canadian Waste Services Holdings Inc. et al*. (2001 Comp. Trib. 3) (file number CT200002) McKeown J. (March 28, 2001) paras. 183-84, where it was held that, even if there is a future event that is uncertain, the Tribunal may look at the evidence and assess the probability of that event occurring. It is respectfully submitted that it is not appropriate for the Tribunal to adjourn or stay a matter because there may be future events which are uncertain. When a lis is ripe, the Tribunal must adjudicate on it and determine the issues between the parties. This is all the more pressing when one of the parties has a responsibility to protect the public interest.

66. Accordingly, the Commissioner respectfully submits that the matter should proceed and a new schedule should be fixed with discoveries proceeding in March 2007. The Commissioner is prepared to consult with the Respondents and Interveners with respect to the new schedule.

67. The Commissioner respectfully submits that the negative consequences occasioned by the delaying of the within matter far outweigh any legal cost savings which might accrue to the parties by adjourning or staying the matter.

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