



PUBLIC VERSION

Reference: *Commissioner of Competition v. United Grain Growers Limited*, 2006 Comp.Trib.37
File No.: CT-2002-001
Registry Document No.: 0214a

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

AND IN THE MATTER OF the acquisition of Agricore Cooperative Ltd. by United Grain Growers Limited which now carries on business as Agricore United;

AND IN THE MATTER OF a consent agreement entered into by the Commissioner of Competition and United Grain Growers Limited in relation to the acquisition, dated October 17, 2002.

B E T W E E N:

The Commissioner of Competition
(applicant/responding party)

and

Agricore United
(respondent/moving party)

Date of conference call: 20060921
Presiding Judicial Member: Simpson J. (Chairperson)
Date of reasons: September 27, 2006
Reasons signed by: Madam Justice S. Simpson



REASONS FOR ORDER OF SEPTEMBER 26, 2006 ON MOTION BY AGRICORE UNITED FOR AN INTERPRETATION OF THE CONSENT AGREEMENT

INTRODUCTION

[1] These reasons follow a motion by Agricore United (“Agricore”) for an interpretation of a consent agreement signed by the Commissioner of Competition (the “Commissioner”) and United Grain Growers Limited and registered with the Tribunal on October 17, 2002 (the “Agreement”). Counsel for both parties agreed that this motion would be treated as one under paragraph 50 of the Agreement to determine whether Agricore has a right thereunder to seek directions from the Tribunal if, following its review of a lease which the Vancouver Port Authority (“VPA”) is prepared to offer a prospective purchaser of Agricore’s UGG terminal (the “Lease”), Agricore concludes that the Lease is inconsistent with the Agreement. On September 26, 2006, I ruled that the Agreement does not grant Agricore such a right and indicated that these reasons would follow.

BACKGROUND

[2] The Agreement provides for the divestiture of one of Agricore’s terminal grain handling facilities in the Port of Vancouver. It gave Agricore an opportunity to choose the terminal to be divested and to sell it within a specified period of time. Agricore elected to divest its UGG terminal but was unable to complete the divestiture in the time allowed. Accordingly, the UGG terminal was put in the hands of a trustee on May 12, 2006.

[3] However, the trustee sale process stalled while the VPA considered whether and on what terms it would offer a purchaser of the UGG terminal a lease of the land on which the terminal is situated. **[CONFIDENTIAL]**

[4] The Commissioner and Agricore are working to develop a new schedule for the trustee’s divestiture of the UGG terminal. However, they have failed to agree on one issue: whether Agricore has the right to seek directions from the Tribunal if, after reviewing the Lease, it concludes that it does not allow for a divestiture in accordance with the Agreement (in particular, paragraph 5 of the Agreement). Agricore says that it has such a right under the Agreement but the Commissioner takes the opposite view. This dispute has meant that, for the time being, Agricore has not agreed to an extension of the trustee sale period beyond October 6, 2006.

[5] For the following reasons, Agricore submits that it has a right to seek directions from the Tribunal **[CONFIDENTIAL]**:

- (i) **[CONFIDENTIAL]**;
- (ii) Paragraph 50 of the Agreement allows Agricore to seek an interpretation about the application of the Agreement and such a motion is tantamount to a request for directions.

I will deal with each submission in turn.

DISCUSSION

[6] **[CONFIDENTIAL]**

[7] **[CONFIDENTIAL]**

[8] Paragraph 50 of the Agreement provides that:

In the event of a dispute as to the interpretation or application of this Agreement, the Commissioner, the Trustee or Agricore United shall be at liberty to apply to the Competition Tribunal for an order interpreting any of the provisions of this Agreement.

[9] In my view, Agricore's submission is not persuasive. It cannot be that an interpretation of the provisions of the Agreement extends to a determination about whether the Lease frustrates the Agreement.

[10] Agricore's right to object to the Lease does not crystallize until the trustee proposes a divestiture. In this regard, paragraphs 17, 30(b) and 32 of the Agreement provide that:

17. Agricore United shall not object to a Divestiture proposed by the Trustee on any grounds other than the Trustee's malfeasance, gross negligence, bad faith or breach of this Agreement.

30. Within fifteen (15) days after receipt of the notice pursuant to paragraph 28 of this agreement or, if the Commissioner and/or Agricore United have requested additional information pursuant to paragraph 29 above, within fifteen (15) days after receipt of the said information:

• • •

(b) in the case of a Divestiture proposed by the Trustee, Agricore United shall notify, in writing, the Commissioner and the Trustee if Agricore United objects to the proposed Divestiture on one or more of the grounds set out in paragraph 17 of this Agreement.

32. Where the Commissioner or Agricore United has objected to a proposed Divestiture, that Divestiture shall not be completed without the approval of the Competition Tribunal.

[11] If Agricore concludes that a divestiture by the trustee under the Lease will breach the Agreement, its only recourse under the Agreement, is to make an objection under these provisions once a divestiture has been proposed. Only then is Agricore entitled to bring the matter before the Tribunal.

CONCLUSION

[12] For these reasons, I have concluded that Agricore is attempting to accelerate its rights under the Agreement and that, at this time, it has no right under the Agreement to seek directions from the Tribunal about the Lease.

DATED at Ottawa, this 27th day of September 2006.

SIGNED on behalf of the Tribunal by the Chair of the Tribunal

(s) Sandra J. Simpson

APPEARANCES:

For the moving party:

Agricore United

John Bodrug

For the responding party:

Commissioner of Competition

Jonathan Chaplan

John Syme

E.C. Yuh