



PUBLIC VERSION

Reference: *Commissioner of Competition v. United Grain Growers Limited*, 2006 Comp.Trib.33
File No.: CT-2002-001
Registry Document No. : 0204a

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

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 consent agreement entered into by the Commissioner of Competition and United Grain Growers Limited in relation to the Acquisition, dated October 17, 2002;

AND IN THE MATTER of a motion for a show cause hearing order;

AND IN THE MATTER of a motion for an interpretation of the Consent Agreement.

B E T W E E N:

United Grain Growers Limited
(moving party)

and

The Commissioner of Competition
(responding party)

Hearing: 20060906
Presiding Judicial Member: Simpson J.
Decision delivered orally on September 7, 2006
Reasons and Order issued on September 15, 2006
Order signed by: Madam Justice S. Simpson



**REASONS AND ORDER DELIVERED ORALLY ON THE MOTION OF
UNITED GRAIN GROWERS LTD FOR AN INTERPRETATION OF THE
CONSENT AGREEMENT**

**ORDER DELIVERED ORALLY DISMISSING THE COMMISSIONER'S
MOTION FOR A SHOW CAUSE HEARING**

INTRODUCTION

[1] This is the edited version of the decision delivered orally on September 7th, 2006, during a teleconference with counsel for both parties. These Reasons deal with a motion by Agricore United ("Agricore") dated August 30, 2006 for an interpretation of subparagraph 45(a) of a consent agreement between the Commissioner of Competition (the "Commissioner") and United Grain Growers Limited (the "Consent Agreement"). It was registered with the Competition Tribunal (the "Tribunal") on October 17, 2006. The affidavit of Chris Martin, sworn on September 1, 2006 was filed in support of this motion.

[2] Agricore's motion also asked for directions concerning a new schedule for the trustee's divestiture of the UGG Terminal. That part of the Motion is to be heard in the near future and is not considered here.

[3] These Reasons also deal with the Commissioner's motion of August 29, 2006 for a show cause hearing order. The affidavit of Terence Stechysin sworn on August 29th, 2006 was filed in support of this motion.

BRIEF BACKGROUND

[4] The full background is set out in the affidavit material referred to above. However, the following information is provided for ease of reference:

- (i) On November 1st, 2001, United Grain Growers Ltd acquired Agricore Co-operative Ltd to form Agricore United (the "Merger").
- (ii) On September 12th, 2002, following a hearing in which the Commissioner's case was not opposed, the Tribunal found that the Merger caused a substantial lessening of competition which could be remedied by the divestiture of either the UGG Terminal or the Pacific Complex Terminal ("Pacific Terminal") in the Port of Vancouver.
- (iii) The Consent Agreement provided that Agricore could select which terminal would be divested and, on August 31st, 2004, it elected to divest the UGG Terminal.
- (iv) On August 12th, 2005, Agricore applied under section 106 of the *Competition Act*, R.S.C. 1985, c.C-34, as amended, to vary or rescind the Consent Agreement, but the application was withdrawn during the hearing due to new developments (the "106 Application").
- (v) Agricore's efforts to divest the UGG Terminal were unsuccessful.
- (vi) On May 12th, 2006, the divestiture of the UGG Terminal was put in the hands of a trustee appointed under the Consent Agreement, [CONFIDENTIAL].
- (vii) [CONFIDENTIAL]. After that date, the trustee sale process is expected to continue [CONFIDENTIAL].
- (viii) The Consent Agreement provides that if the trustee is unable to sell the UGG Terminal, [CONFIDENTIAL]. Counsel for the Commissioner

- acknowledged that the Commissioner might, [CONFIDENTIAL].
- (ix) Subparagraph 45(a) of the Consent Agreement provides the Commissioner with a right to inspect Agricore's documents to determine whether Agricore has complied with its obligations under the Consent Agreement. The right to inspect is triggered by giving Agricore two days' notice in writing.
 - (x) Paragraphs 34 and following of the Consent Agreement provide that until the UGG Terminal is sold, Agricore has continuing obligations which include maintaining both UGG and Pacific Terminals and handling contracts in specified ways. The text of these provisions is attached as Annex "A".
 - (xi) Schedule "A" to the Consent Agreement modifies the provisions described above and provides that once the trustee is given the right to divest the UGG Terminal, the Pacific Terminal ceases to be a port terminal for the purposes of the Consent Agreement; a copy of Schedule "A" is attached hereto as Annex "B".
 - (xii) The Commissioner's interpretation of her inspection powers under subparagraph 45(a) of the Consent Agreement is reflected in the form of written notice she provided to Agricore on August 23rd, 2006 (the "Notice"). A copy of the Notice is attached as Annex "C".
 - (xiii) Agricore advised the Commissioner that it felt that the Notice was improper and that it would move under paragraph 50 of the Consent Agreement for an interpretation of subparagraph 45(a). Paragraph 50 states:

In the event of a dispute as to the interpretation or application of this Agreement, the Commissioner, 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.

- (xiv) Agricore did not comply with the Notice, and for that reason the Commissioner moved for a show cause hearing order.

AGRICORE'S MOTION

[5] Agricore seeks an interpretation of subparagraph 45(a). It reads as follows:

For the purpose of determining or securing compliance with this Agreement, subject to any valid claim to a legally recognized privilege, and upon written request, Agricore United shall permit any duly authorized representative of the Commissioner:

- (a) upon a minimum of two (2) business days notice to Agricore United, access during office hours of Agricore United to inspect and copy all relevant books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Agricore United relating to compliance with this Agreement; and

[6] The answers to the following questions will resolve the disputes between Agricore and the Commissioner about the interpretation of subparagraph 45(a) of the Consent Agreement.

QUESTIONS

[7] Question 1: Purpose and justification

Is the Commissioner required to state the purpose of the Notice; i.e. whether it is to "determine" compliance or "secure" compliance? Further, when the Commissioner is determining compliance is a complaint or a particular concern needed to justify the Notice and must the Commissioner describe the justification in the Notice?

[8] Question 2: Timing

Is the Commissioner entitled to inspect documents which reflect compliance during the life of the Consent Agreement (including the entire period of the agreement) or is the inspection limited to documents which reflect compliance at the date of the inspection?

[9] Question 3: Relevant Terminals

Since only the UGG Terminal is for sale by the trustee, is the inspection confined to documents relating to compliance for that terminal only?

[10] Question 4: Documents

Must the Notice specify the documents to be inspected and the compliance issue to which they relate?

[11] Question 5: Process

What does "access" to inspect and copy mean in subparagraph 45(a)? Is Agricore obliged to facilitate the inspection by assembling, organizing and copying documents for inspection or is the Commissioner obliged to search for the documents she wishes to inspect and provide her own facilities for copying?

ANSWERS

1) Question 1

[12] Although Commissioner's counsel acknowledged that the purpose of the notice in this case is to determine compliance and not secure compliance, the Notice refers to both purposes. In my view, the Notice should accurately reflect the objective of the inspection.

[13] Agricore has alleged that, in reality, the Commissioner's purpose is not to determine compliance and that the Notice was served for an improper purpose which is to allow a fishing expedition with two objectives. First, to show that Agricore will be to blame if the trustee fails to sell the UGG Terminal and second, [CONFIDENTIAL].

[14] Agricore says that

- i) since the Commissioner acknowledges that she has received no complaints alleging Agricore's non-compliance with the Consent Agreement, and
- ii) since the trustee sale of the UGG Terminal is underway, and
- iii) since the Commissioner's representatives have made statements about "building a case" and making Agricore "wear it" if the UGG Terminal divestiture fails, and
- iv) since without any suggestion of urgency the Commissioner served the Notice when Agricore's counsel was on holiday and did not give him adequate time to consult counsel on his return, and
- v) since the Commissioner has made vague allegations that Agricore's counsel has been interfering with the trustee's sale, although the trustee has not complained, and
- vi) since the Commissioner wants a broad inspection even though she obtained numerous documents during the 106 Application and even though she has access to documents in the Trustee's data room in Vancouver, and
- vii) since the Commissioner has moved for a show cause order, in spite of Agricore's right to move for an interpretation of subparagraph 45(a) of the Consent Agreement,

it is clear that the Commissioner is behaving unreasonably and it is fair to suggest an improper motive behind the Notice.

[15] While I accept that Agricore has impugned the Commissioner's motives in good faith, I cannot conclude that the evidence is sufficient to satisfy me that when the UGG Terminal is being actively marketed by the trustee to numerous prospective buyers, the Commissioner would misuse her power to investigate to bolster an application regarding the Pacific Terminal which may never be made.

[16] Although it is perhaps surprising that the Commissioner is investigating to determine compliance with respect to both terminals over the life of the Consent Agreement this late in the process, the fact remains that Agricore still has continuing obligations under the Consent Agreement and has given the Commissioner the right to inspect.

[17] There is no requirement in subparagraph 45(a) that the Notice provide justification for an inspection to determine compliance, because the word "determine" is neutral. The Commissioner can simply inspect for audit purposes. She need not have a complaint or a concern.

2) Timing

[18] Agricore submits that because only two days notice is required for an inspection, it is reasonable to infer that the right to inspect covers only current documents. Otherwise Agricore could not assemble the required materials in such a short period.

[19] I do not agree with this submission. Agricore is only required to give access and two days notice is reasonable for that purpose.

[20] In my view, had the parties intended to limit the inspection to current documents, subparagraph 45(a) would provide for an inspection to determine whether Agricore is “in compliance”.

3) Terminals

[21] Agricore says that since it elected to divest the UGG Terminal, it only has continuing obligations with respect to it, to ensure that it is attractive to a prospective purchaser. But the provisions found in Annex “A” hereto show that Agricore has ongoing obligations with respect to both terminals until the UGG Terminal is sold by the trustee, and this interpretation makes sense because, if the trustee's divestiture of the UGG Terminal fails, **[CONFIDENTIAL]**.

[22] However, Schedule “A” to the Consent Agreement, found in Annex “B” hereto, limits Agricore’s obligations with respect to the Pacific Terminal in a small way by saying that, once the trustee has the right to divest the UGG Terminal, the Pacific Terminal ceases to be a port terminal for the purposes of the Agreement.

[23] In my view, this provision means that the Notice cannot provide for an inspection related to the Pacific Terminal after May 12th, 2006, when the trustee acquired the right to divest the UGG Terminal.

4) Documents

[24] The Notice at Annex “C” hereto includes a list of categories of documents to be inspected. The list is preceded by a general reference to many kinds of documents and the phrase “without limiting the generality of the foregoing”. The Commissioner says that the references to categories of documents are not required and that a proper notice could simply say that the Commissioner will inspect to determine compliance two days hence.

[25] In my view, this is not a correct interpretation of subparagraph 45(a). The requirement for a written notice implies that some content will be found in the notice and this means that the Commissioner is obliged to list with specific reference to paragraphs in the Consent Agreement, the obligations which are the object of the inspection to determine compliance and the related documents she wishes to inspect. The list of documents need not be exhaustive because the Commissioner may not know in advance the identity of all the documents which bear on compliance, but those that are known should be listed. This information gives a notice substance and will allow the Tribunal to determine, if need be, whether adequate access was given by Agricore.

5) Process

[26] As mentioned earlier, Agricore's obligation is to give access and the Commissioner's is to inspect and copy. Other arrangements may, of course, be made by agreement.

ORDER

[27] For these reasons, the Tribunal orders that, if the Commissioner wishes to inspect, her Notice of August 23rd, 2006 must be amended in the following manner to create a new notice, with a new date, which must be served on Agricore:

- [i] Specify that the purpose is to determine compliance.
- [ii] Delete the general references to documents in the first four lines of paragraph 2 of the Notice.
- [iii] Show the inspection period as October 17th, 2002 to May 12th, 2006 for the Pacific Terminal and October 17th, 2002 to the date of the inspection for the UGG Terminal.
- [iv] List each obligation with reference to the Consent Agreement and specific categories of documents which are to be inspected to determine whether there has been compliance with the mentioned obligation.

Since there was mixed success on this motion, there is no order as to costs.

THE COMMISSIONER'S SHOW CAUSE MOTION

[28] The provisions of the Consent Agreement provide the Commissioner with a right to inspect in subparagraph 45(a) and in paragraph 50 Agricore is given the right to apply to the Tribunal for an interpretation of subparagraph 45(a). Both these rights are in a document which has the same force and effect as if it were an order of the Tribunal.

[29] The Commissioner submitted that Agricore's motion for interpretation should not be allowed to operate as a stay of the inspection, but it appears that the Commissioner signed an agreement which has exactly that effect, at least in the circumstances of this case in which there are legitimate issues of interpretation. In my view, the right to seek an interpretation of the provision allowing the inspection temporarily relieves Agricore from its obligation to comply with the Notice.

[30] Accordingly, I have followed the Federal Court of Appeal's decision in *R. v. Perry*, [1982] 2 F.C. 519 and concluded that the refusal to comply with the Notice has taken place in circumstances in which it is absolutely certain that Agricore does not deserve to be punished.

ORDER

[31] For these reasons, the Tribunal orders that the motion for a show cause hearing order is dismissed without costs and without prejudice to the Commissioner's right to bring a similar motion if a new notice of inspection is served and not respected

DATED at Ottawa, this 7th day of September 2006.

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

(s) Sandra J. Simpson

APPEARANCES

Counsel for Agricore United (moving party)

Ms. Sandra Forbes

Mr. John Bodrug

Counsel for the Commissioner of Competition (responding party)

Mr. John Syme

Mr. Jonathan Chaplan

Ms. E.C. Yuh

ANNEX "A"

Maintenance of the Port Terminals

34. The Commissioner confirms, that based on all the information currently available to him, that he has no reason to believe that Agricore United has violated any provision of the Interim Consent Order, including those provisions regarding the maintenance of the UGG Terminal and the Pacific Complex. Agricore United agrees that, until the implementation of a Port Terminal Divestiture Option by Agricore United or the Trustee, Agricore United shall take such steps as are necessary to maintain the competitive viability of both the UGG Terminal and the Pacific Complex and shall not dispose of any material assets of the UGG Terminal or the Pacific Complex.

35. Without limiting the generality of the foregoing, until the implementation of a Port Terminal Divestiture Option by Agricore United or the Trustee, Agricore United shall provide such sales, managerial, administrative, operational and financial support as is necessary in the ordinary course of business to promote the continued effective operation of the UGG Terminal and the Pacific Complex in accordance with standards similar to those existing prior to the Closing Date.

36. Except as set out in paragraphs 39 to 43 below, until the implementation of a Port Terminal Divestiture Option by Agricore United or the Trustee, Agricore United shall not, without prior approval from the Commissioner (such approval not to be unreasonably withheld), enter into or withdraw from any material contracts or arrangements relating to the UGG Terminal or the Pacific Complex, make any material changes to such operations, or terminate any current employment, salary or benefit agreements for any management personnel employed in relation to either the UGG Terminal or the Pacific Complex.

37. For greater certainty, notwithstanding paragraphs 34 to 36, Agricore United may temporarily shut down the UGG Terminal or the Pacific Complex and may temporarily lay-off personnel employed in relation to either the UGG Terminal or the Pacific Complex in response to material changes in shipments through the Port of Vancouver caused by drought, poor crop quality, labour disputes, acts of God, action or failure to act of any government or governmental regulatory authority, accident, fire, flood, or other event beyond the control of Agricore United or for the purpose of performing routine maintenance on either the UGG Terminal or the Pacific Complex. Notice of any temporary shut-down or lay-off shall be provided to the Commissioner in writing.

38. Until the implementation of a Port Terminal Divestiture Option by Agricore United or the Trustee, Agricore United shall honour all existing contracts for the handling of grain for Independent Grain Companies. In addition, Agricore United shall offer to handle for Independent Grain Companies in the aggregate a minimum of 125,000 tonnes of grain per month (1.5 million tonnes per year), by way of contracts, through either the UGG Terminal or the Pacific Complex or through terminal arrangements entered into by

Agricore United with other terminals. Where Agricore United enters into a terminal arrangement for the handling of an Independent Grain Company's grain with a third party, there shall be no additional cost to the Independent Grain Company as a result of the use of such third party's facility beyond that contemplated in paragraph 40 below.

39. Until the implementation of a Port Terminal Divestiture Option by Agricore United or the Trustee, new contracts for the handling of Independent Grain Companies' grain shall be based on reasonable commercial terms consistent with past practice, and shall include:

(1) a contract term that ends on a date certain, provided that the Independent Grain Company shall have an option to terminate the contract upon either (1) a Trustee being appointed pursuant to this Agreement to Divest one of the Port Terminals, or (ii) a Divestiture of one of the Port Terminals, (2) a commitment by the Independent Grain Company that Agricore United will handle all of its Vancouver volume for the duration of the contract, and (3) renegotiation or arbitration in the event of major regulatory change. Agricore United may terminate such an agreement if the Independent Grain Company does not ship all of its Vancouver volume during the term of the contract through Agricore United.

40. Until the implementation of a Port Terminal Divestiture Option by Agricore United or the Trustee, prices for the handling of Independent Grain Companies' grain under any new contract shall be based on Agricore United's tariffs as filed with the Canadian Grain Commission under the *Canada Grain Act* (Canada) and Agricore United shall pay a diversion premium of at least \$2 per tonne. Diversion premiums negotiated between Agricore United and an Independent Grain Company shall remain confidential. Any non-CWB tariff increase or any diversion premium decrease (CWB or non-CWB grain) from these initial levels must be commercially reasonable.

41. In the event that bottlenecks, bountiful crop production or other causes create a situation of Full Capacity Operation at a port terminal facility designated to handle Independent Grain Companies' grain in respect of a given period (the "Relevant Period"), a terminal authorization for any given Independent Grain Company's grain will be issued in an amount equal to

(AeB) x C

where:

A = the relevant Independent Grain Company's shipment of grain through the Port of Vancouver for the last three completed months before the Relevant Period;

B = the total shipments of grain through the Port of Vancouver for the last three completed months before the Relevant Period; and

C = the available capacity at the designated port terminal facility for the Relevant Period.

In the event that an Independent Grain Company's terminal authorizations are reduced pursuant to this provision, all shippers to that terminal will have their terminal authorizations reduced on the same basis.

42. Until the implementation of a Port Terminal Divestiture Option by Agricore United or the Trustee, any disputes as to compliance with the commitments in paragraphs 38 to 41 as to price, tariffs, diversion premiums or other terms shall be settled by way of an arbitration procedure as outlined in Schedule "C" that is consistent with existing commercial practice and with terms of reference that have regard to market conditions and structure, capacity utilization, costs of operation, reasonable rate of return on investment and regulatory framework. During any arbitration procedure, Agricore United shall continue to provide port terminal services to the Independent Grain Company that initiated the arbitration.

43. Notwithstanding any other provision of this Agreement, Agricore United shall have no obligation to deal with an Independent Grain Company that defaults in payment or breaches other material terms of its contract with Agricore United.

44. Agricore United shall provide a copy of this Agreement to the Manager of Vancouver Operations and Agricore United shall direct such manager and any servants or agents of the parties operating and managing the UGG Terminal and the Pacific Complex to do so in accordance with the terms of this Agreement.

ANNEX "B"

SCHEDULE "A"

Port Terminal Divestiture Option: means, at Agricore United's option, the Divestiture of **one** of the following:

Option 1: all of the issued and outstanding shares of Pacific Elevators Limited ("PEL") and all of the issued and outstanding shares in Western Pool Terminals Ltd. ("WPTL") **or** all of the assets owned by PEL and WPTL; **or**

Option 2: the UGG Terminal.

If Agricore United has not implemented one of the Port Terminal Divestiture Options before the expiry of the Port Terminal Initial Sale Period, the Trustee may choose to Divest either Option 1 or Option 2 unless, prior to the expiry of the Port Terminal Initial Sale Period, Agricore United gives notice, at least 90 days before the expiry of the Port Terminal Initial Sale Period, that it elects that the Port Terminal in Option 1 or 2 as the case may be, be Divested by the Trustee, in which case the Trustee shall Divest the Port Terminal selected by Agricore United. If Agricore United selects Option 1, Agricore United can specify whether the Divestiture will occur by way of a share or asset sale.

Once a Divestiture is implemented, or the Trustee has obtained the right to Divest a Port Terminal in accordance with paragraph 14 of this Agreement, the remaining Port Terminal ceases to be a "Port Terminal" for the purposes of this Agreement.

ANNEX "C"

NOTICE PURSUANT TO PARAGRAPH 45 OF CONSENT AGREEMENT BETWEEN COMMISSIONER OF COMPETITION AND UNITED GRAIN GROWERS LIMITED REGISTERED BY THE TRIBUNAL ON OCTOBER 17, 2002 (THE "CONSENT AGREEMENT")

The Commissioner of Competition ("Commissioner") hereby notifies United Grain Growers Limited ("Agricore") that on Monday, August 28, 2006 at 9:00 A.M., representatives of the Commissioner will attend at the offices of Agricore located at 201 Portage Avenue in Winnipeg, Manitoba pursuant to subparagraph 45(a) of the Consent Agreement for the purpose of determining and/or securing compliance with the Consent Agreement.

Agricore is required to make available for inspection and copying at that time all relevant books, ledgers, accounts, correspondence, memoranda and other records and documents, including electronic documents or records (hereinafter collectively referred to as "Records") in the possession and control of Agricore and relating to compliance with the Consent Agreement. Without limiting the generality of the foregoing, in respect of both the UGG Terminal and the Pacific Complex (as defined in the Consent Agreement) (collectively the "Terminals") for the period between October 17, 2002 and August 28, 2006, the Commissioner will inspect and/or copy Records relating to some or all of the following matters:

- Terminal grain receipts and shipments;
- plans, proposals, discussion papers or analysis relating to capital improvements and/or maintenance of the Terminals, including equipment and other assets used in connection with the operation of the Terminals;
- expenditures or planned expenditures relating to capital improvements and for maintenance of the Terminals, including equipment and other assets used in connection with the operation of the Terminals;
- plans, proposals, discussion papers or analysis relating to the sales, managerial, administrative, operational and financial support Agricore has provided to promote the continued effective operation of the Terminals;
- expenditures or planned expenditures relating to the sales, managerial, administrative, operational and financial support Agricore has provided to promote the continued effective operation of the Terminals;
- plans, proposals, discussion papers or analysis relating to the reduction of capacity at the Pacific Terminal, including capacity to receive, elevate, dry, blend, store or ship grain;

- handling agreements between Agricore and third parties relating to the Terminals, whether or not currently in force;
- all material contracts or arrangements, including leases, relating to the Terminals, whether or not currently in force;
- such Records as are necessary to substantiate Agricore's compliance with paragraph 38 of the Consent Agreement; and
- employment agreements relating to management personnel employed in relation to either Terminal, whether or not currently in force.