Competition Tribunal | Tribunal de la Concurrence

Reference: *United Grain Growers Limited v. Commissioner of Competition*, 2006 Comp.Trib.24
File No.: CT-2002-001
Registry Document No.: 0187

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 an application by United Grain Growers Limited under section 106 of the *Competition Act.*

B E T W E E N:

United Grain Growers Limited
(Applicant)

and

The Commissioner of Competition
(respondent)

and

The Canadian Wheat Board and Mission Terminal Inc.
(intervenors)

Date of hearing: 20060421
Presiding Judicial Member: Lemieux J.
Date of reasons and order: May 10, 2006
Reasons and order signed by: Mr. Justice F. Lemieux

REASONS AND ORDER REGARDING UGG'S MOTION TO ADJOURN ITS APPLICATION AND, IN THE ALTERNATIVE, FOR LEAVE TO DISCONTINUE WITHOUT COSTS

[1] On August 12, 2005, United Grain Growers Limited (the "Applicant" or "Agricore United" or "UGG") filed an application pursuant to section 106 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended, seeking the rescission of the consent agreement (the "Consent Agreement") it had entered into with the Commissioner of Competition (the "Commissioner") on October 17, 2002, and registered that same day with the Tribunal.

[2] A stated purpose of the Consent Agreement is to provide the mechanism governing the divestiture of one of the Applicant's port terminal grain-handling elevators in the Port of Vancouver after it acquired in November, 2001, Agricore Cooperative Ltd. thus creating a merged entity known as Agricore United.

[3] Prior to the acquisition's implementation, the Commissioner and the Applicant entered into a letter agreement dated October 31, 2001, which permitted the merger to go forward subject, *inter alia*, to the following:

- The Commissioner would file with the Competition Tribunal a section 92 application alleging the acquisition would likely result in a substantial lessening of competition ("SLC") in the provision of port terminal grain-handling services at the Port of Vancouver;

- The Applicant agreed not to contest the Commissioner's allegations the merger was likely to result in an SLC in the provision of port terminal grain-handling services at the Port of Vancouver.

[4] The matter proceeded before the Tribunal on September 10, 2002. The Tribunal, after hearing non-challenged evidence from two witnesses tendered on behalf of the Commissioner, made certain findings and determinations on September 12, 2002, including that: (a) the acquisition caused an SLC as alleged by the Commissioner and, for the purpose of the proceeding, not contested by UGG, without the need for further evidence to establish an SLC or elements of an SLC; and (b) the divestiture of either the UGG Terminal or its interest in the Pacific Complex, as requested by the Commissioner in the notice of application, was sufficient to address the SLC (see *The Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp. Trib. 33).

[5] The Consent Agreement gave the Applicant an opportunity to sell the port terminal facility within a certain specified period of time (subject to agreed to extensions of which there were several), failing which the selected port terminal facility (the UGG Terminal) would be sold by a Trustee appointed by the Commissioner.

[6] Subsection 106(1) of the *Competition Act* provides the Tribunal may rescind a consent agreement if it finds the circumstances that led to the making of the consent agreement have changed and the circumstances that exist at the time of the application for rescission are such that the agreement would not have been made or would have been ineffective in achieving its intended purpose.

[7] In its application to rescind, UGG argues that since October 17, 2002, the circumstances that led to the making of the Consent Agreement have changed significantly because the amount of uncommitted grain shipped to the Port of Vancouver by independent grain companies ("IGCs") in

Western Canada (those with primary grain elevators on the Prairies but without ownership of a port terminal) that would be available to a prospective purchaser of the UGG Terminal has diminished dramatically such that the purchaser could not secure enough independent grain to operate the Terminal on a sustainable basis. Furthermore, UGG submits that IGCs have been able to obtain access to the Port of Vancouver through long-term handling agreements with Port Terminal operators.

[8] The Applicant also alleges the only realistic prospect for the UGG Terminal to be used for grain handling would be for the prospective purchaser to enter into a handling agreement with the Canadian Wheat Board (the "CWB") but such an agreement would adversely affect the Western Canadian grain handling industry and would be inconsistent with and undermine the objectives of the Consent Agreement.

[9] UGG adds the competitive mix of operators offering grain handling services in the Port of Vancouver has changed because freight rates to the Prince Rupert Grain Terminal in Prince Rupert are now equalized with rates to Vancouver. This adds another terminal operator to the relevant geographic market.

[10] A three-person panel of the Tribunal commenced hearing the Applicant's section 106 application in Ottawa on March 27, 2006. The hearing was scheduled for completion on April 21, 2006.

[11] On April 6, 2006, after the Tribunal had heard several witnesses called by the Applicant, including two expert witnesses, counsel for the Applicant asked for a meeting in the Tribunal's chambers. He advised the panel he had just been informed by his client, while preparing a scheduled witness to be called by the Applicant, a problem had been disclosed by that proposed witness which, if not resolved over the weekend, could materially affect the proceeding.

[12] On Monday April 10, 2006, counsel for the Applicant advised the Tribunal the matter had not been resolved. He stated he had received instructions from his client not to call any further evidence and not to proceed with the hearing as presently constituted but rather to bring a motion adjourning the hearing to a later date. If such motion for adjournment failed, an order granting the Applicant leave to discontinue its application without costs would be sought (see Tribunal transcript, April 10, 2006, page 2813). The Tribunal scheduled the hearing of the Applicant's motions which were ultimately heard on April 21, 2006.

[13] On April 18, 2006, the Applicant formally filed motions to this effect with the Tribunal. The Applicant's motion was, as noted, double-barrelled consisting of an application to adjourn *sine die* and, in the alternative, for leave to discontinue without costs.

[14] I will deal with the adjournment motion separately from the cost motion.

The adjournment motion

[15] The Applicant's motion is to adjourn its section 106 application pending the earlier either of the expiry of the Trustee sale period for the Trustee's sale of the UGG Terminal specified in the Consent Agreement or the reconvening of the section 106 application which would mandatorily occur at the request of the Applicant but only in three defined circumstances:
(a) as provided for in the Consent Agreement, in the event that Agricore United objects to any sale that the Trustee proposes to proceed with;
(b) as provided for in the Consent Agreement, in the event the Trustee has no buyer of the UGG Terminal within the sale period provided for in the Consent Agreement; and
(c) in the event the Applicant takes issue with the conduct of the Trustee during the sale process.

[16] The Applicant's motion also requests that the relief sought in its motion to adjourn be implemented, through an amendment to its Notice of Application of August 12, 2005, as well as an additional prayer for relief, if needed, which would permit the Tribunal to prohibit the Trustee from completing a sale "which does not comply with the purpose or express terms of the Consent Agreement, as alleged by Agricore United and the witnesses called to date in this proceeding, and from otherwise acting contrary to its obligations under the Consent Agreement."

[17] The Applicant's motion to adjourn was strenuously opposed by the Commissioner who was supported in her position by the two intervenors, namely the CWB and Mission Terminal Inc. ("Mission") (collectively the "Intervenors").

[18] The Applicant's motion to adjourn was supported by the affidavit of Christopher W. Martin, the Applicant's Vice President of Corporate Affairs and General Counsel. With leave of the Tribunal, granted pursuant to Rule 41 of the *Competition Tribunal Rules*, SOR/94-290, as amended, Mr. Martin was cross-examined before me on April 21, 2006, prior to hearing argument.

[19] It is clear from reading Mr. Martin's affidavit and the transcript of his cross-examination that it was he who instructed his counsel appearing before the Tribunal "to pull the pin on a hearing that I believe in and I believe we had a good case"(Tribunal transcript, April 21, 2006, page 3085).

[20] Mr. Martin decided to so instruct his counsel sometime after he first learned on April 6, 2006, from a scheduled witness that support for what previous AU witnesses had described as an ideal industry solution to the divestiture of the UGG Terminal was in danger of collapse. The industry solution, according to Mr. Martin, was the support of IGCs, through their industry association, to a two-year option agreement to purchase the UGG Terminal without a CWB deal pursuant to which the CWB would enter into a grain-handling agreement for the supply of CWB grain to the purchaser of the terminal.

[21] At page 3059 of the April 21 transcript, Mr. Martin testified as follows:

> That's what to me was a tipping point that caused me to say "I don't feel comfortable at this point allowing this hearing to go forward on the basis it has", because we've put a lot of stock in the Option Agreement and if that's not going to be supported by […] at this point then I don't know how we could argue, particularly with the discretion, on the second part of the test as articulated by counsel to me that the Tribunal had. How we could argue that things shouldn't go to the Trustee" [emphasis mine]

[22] At paragraph 16 of his affidavit, Mr. Martin had expressed the opinion "Agricore United remains of the view that it meets the changed circumstances test under section 106". On cross-examination, he was asked by counsel for the Commissioner why he did not instruct his counsel to proceed with the hearing so that "we can all know what the answer to that question is." (Tribunal transcript, April 21, 2006, page 3083). Mr. Martin reiterated he gave the instructions he did to his counsel because Agricore United had relied on the option agreement up to that point in the hearing. He indicated if Agricore United had not relied on the option agreement, he "probably would not have pulled the pin. I would have let this play out, but because we had heavily relied on it, I did not feel that it was appropriate to continue and then to switch gears and to say to the Tribunal members 'Well, sorry about that, we were on the wrong track here, but there's still a changed circumstance and you should exercise your discretion'. I just did not feel that was appropriate." (Tribunal transcript, April 21, pages 3086 and 3087)

[23] There are two legislative provisions which guide the Tribunal in its determination of whether the motion to adjourn should be granted.

[24] First, and of most importance, subsection 9(2) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended, where Parliament emphasized that "[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit."

[25] Second, via section 72 of the *Competition Tribunal Rules*, which references the *Federal Courts Rules*, SOR/98-106, as amended, on practice matters not covered by the *Competition Tribunal Rules*, subsection 36(1) of the *Federal Courts Rules* under the heading "adjournment" provides that "a hearing may be adjourned by the Court from time to time on such terms as the Court considers just."

[26] On February 17, 1993, the then Trial Division of the Federal Court issued a Practice Direction advising parties that scheduled trials and hearings would only be adjourned in exceptional cases.

[27] It is clear that the grant of an adjournment involves the exercise of discretion which must be exercised upon proper principles. The general principle flowing from the application of subsection 36(1) of the *Federal Courts Rules* may be summarized as saying if it is expedient and in the interest of justice to do so, the Court may adjourn a trial from time to time on such terms as are just.

[28] This is the test urged upon me by counsel for the Applicant as illustrated in Justice Dawson's decision in *Harkat (Re)*, (2003) 238 F.T.R. 201, 2003 FCT 520, where, in the presence of a legislative mandate similar to subsection 9(2) of the *Competition Tribunal Act* (paragraph 78(c) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27, provided that "the judge shall deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit"), she granted an adjournment of a scheduled trial involving the reasonableness of a security certificate because the applicant's proposed expert witness was no longer available.

[29] Factors to be considered in granting or refusing an adjournment of a trial are the interests of the plaintiff and the defendants, including the prejudice suffered which plays a pivotal role, balanced with the interests of the proper administration of justice in the orderly processing of civil trials to ensure disputes are resolved on their merits (see *Garden v. Canada*, [1999] F.C.J. No. 1591 (F.C.A.) (QL), *Bicz Transport Corp. v. Canada (Minister of National Revenue - M.N.R.)*, [2003] F.C.J. No. 426 (F.C.A.) (QL), 2003 FCA 135, *Ismail v. Canada (Attorney General)*, (1999) 177 F.T.R. 156, [1999] F.C.J. 1479 (T.D.) (QL) and *Martin v. Canada (Minister of Employment and Immigration)*, (1999) 162 F.T.R. 127, [1999] F.C.J. No. 113 (QL)).

[30] In *Canada (Director of Investigation and Research) v. D&B Companies of Canada Ltd.* (1994) 58 C.P.R. (3d) 342, [1994] F.C.J. No. 1504 (F.C.A.) (QL), then Chief Justice Isaac attached considerable importance to what Parliament provided for in subsection 9(2) of the *Competition Tribunal Act* in a case before the Tribunal involving an adjournment request pending appeal. He dismissed the appeal of a decision by Justice Rothstein, the presiding Tribunal judicial member who had applied the three-part test described by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R 311. Chief Justice Isaac stated at paragraph 18 the appellant had not satisfied him that the balance of convenience was in its favour. He stated "in this respect, I was influenced to a great extent by the mandatory provision in subsection 9(2) of the *Competition Tribunal Act* that the hearing of the application should be held informally and expeditiously as circumstances and conditions of fairness would allow."

[31] It is the three-part test applied in *RJR-MacDonald*, *supra*, and *D&B Companies of Canada Ltd.*, *supra*, that counsel for the Commissioner urged that I should apply in the particular circumstances of the nature of the adjournment request before me. He submitted the adjournment sought does not fit in the standard mould of adjournments seen in the jurisprudence. In the end, during argument, counsel for the Commissioner submitted it did not make any difference which test was applied, because, in this case, the Applicant failed to meet either test, namely, the three-part test of *RJR-MacDonald*, *supra*, or the interests of justice test.

[32] In the circumstances, I will assess the merits of the Applicant's motion to adjourn based on the factors identified in paragraph 29 of these reasons.

[33] Counsel for the Applicant's request for an adjournment is premised upon the following propositions:

(a) the sale process of the UGG Terminal will necessarily be engaged either as a result of the grant of an adjournment by this Tribunal or upon the discontinuance by the Applicant of the current section 106 application;

(b) the Applicant has an absolute right to discontinue its current section 106 application without need of leave from this Tribunal (except for an order relating to costs) which will, upon filing, terminate the current proceeding but does not bar the Applicant from launching another section 106 application in matters related to the Consent Agreement of October 17, 2002;

(c) in the context of the sale process by the Trustee of the UGG Terminal, the Consent Agreement contains certain rights for the Applicant in the event the Trustee finds a buyer. In this circumstance, the Applicant has the right to object to that sale on grounds defined in the Consent Agreement. The Applicant may have further rights under the Consent Agreement if the Trustee does not act properly during the sale process;

(d) in this unique context, in the event the Applicant did challenge the Trustee's sale, it is in the interest of efficiency and the allocation of scarce judicial resources that the evidence garnered by the Tribunal to date be available for use in a Trustee sale proceeding and that the current panel, which is "up the learning-curve", adjudicate the matter. This can only be done if the matter is adjourned. It cannot be done if the current section 106 application is discontinued because such discontinuance terminates this case. If the Applicant launched a new section 106 application, the current evidence and panel would be lost.

[34] Applying the proper principles related to the grant of adjournments of a trial, I am of the view the Applicant's request for an adjournment must be dismissed with costs because the Applicant has not established the existence of any proper basis upon which an adjournment could be granted at law. I say this for the following reasons.

[35] First, after the Tribunal had heard all of the evidence the Applicant wished to put forward in its section 106 application, thus closing its case, the Applicant effectively brought the proceedings to a halt by making its motion to either adjourn or withdraw without costs. The next phase of the proceeding would have involved the tendering of evidence by the Commissioner who was ready to do so. This would have been followed by argument from the parties and Intervenors, deliberation by the Tribunal and a decision by the Tribunal whether the test outlined in section 106 of the *Competition Act* had been met and whether the Consent Agreement should be rescinded or not. The Applicant's choice not to further proceed in the hearing thwarted the Tribunal's process and its mandate under subsection 9(2) of the *Competition Tribunal Act* to resolve disputes on the merits as efficiently as possible. In the circumstances, the grant of an adjournment of the proceeding makes no sense and would not be proper. The Applicant has not provided any case where an adjournment of a trial was granted in circumstances similar to those present here.

[36] Second, I find no merit in the Applicant's argument about the need to preserve the current evidence and the current panel for an adjourned section 106 proceeding. This is the only prejudice advanced by the Applicant. In my view, the argument put forward is purely speculative because it is not known whether the Tribunal would be seized with the adjourned section 106 proceeding arising out of the Trustee sale process of the UGG Terminal, what the nature of the adjourned proceeding would be, what role the current section 106 application would play, what issues would arise, whether new issues and new evidence would be needed, whether the current pleadings would require amendment and whether the Applicant would request to re-open its case. All to say that the extent the current evidence is relevant and useful is very much debatable and unknown. The Applicant has failed to demonstrate any prejudice to it warranting an adjournment.

[37] Third, in any event, if the current section 106 application is not adjourned and is terminated by discontinuance, and if a new proceeding is launched, the Chairperson of the Tribunal could, if appropriate, name the current panel as the new panel to that proceeding. The Tribunal in that proceeding would require the cooperation of the parties to facilitate the admission of portions of evidence taken by the current panel or make appropriate rulings with respect to such evidence.

[38] Fourth, adjourning the current section 106 application so that it may be held in reserve for the benefit only of the Applicant should the Applicant elect to challenge the Trustee's sale of the UGG Terminal would have a chilling effect on the effectiveness of the Trustee's efforts to sell the UGG Terminal and would harm the integrity of the Trustee sale process under the Consent Agreement.

[39] Fifth, granting the adjournment on the terms sought by the Applicant would not be rights-neutral as argued by the Applicant. Such an adjournment, if granted, coupled with the right of the Applicant to reconvene the hearing of the section 106 application, would, in the event a new section 106 was launched, preclude the making of an objection that such a proceeding is an abuse of process. Moreover, the amendments to the Notice of Application sought by the Applicant would likely expand the Applicant's rights to object to a Trustee sale under the Consent Agreement. Also, the amendments have little to do with section 106 itself, thus going beyond its remedial scope.

[40] Just as important, if not more so, is the prejudice to the Commissioner if the adjournment is granted and the section 106 hearing was reconvened upon the terms sought by the Applicant. An adjournment would deprive the Commissioner from a timely decision by the Tribunal as to whether the Consent Agreement should be rescinded because of changed circumstances. In addition, the Tribunal, in connection with that decision, would have made determinations on issues of grain availability to the purchaser of the UGG Terminal and, as important, on the issue whether a handling agreement between the new purchaser and the CWB was appropriate. The adjournment, if granted in these circumstances, defers the Tribunal's determinations to a later stage and renders uncertain elements that are intrinsic to the Trustee sale under the Consent Agreement, thus diminishing its effectiveness and putting that process under a prejudicial cloud. The public interest would not be served.

[41] For all of these reasons, I find the Applicant's motion to adjourn *sine die* must be dismissed.

Discontinuance without costs

[42] The power of the Tribunal to award costs was given to it by Parliament in 2002 when Parliament amended the *Competition Tribunal Act* for several purposes including authorizing the Tribunal to hear and determine applications by way of summary dispositions.

[43] The Tribunal's cost power is found in section 8.1 of the *Competition Tribunal Act* which reads:

8.1 (1) The Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the Competition Act on a final or interim basis, in accordance with the provisions governing costs in the Federal Court Rules, 1998.	**8.1** (1) Le Tribunal, saisi d'une demande prévue aux parties VII.1 ou VIII de la Loi sur la concurrence, peut, à son appréciation, déterminer, en conformité avec les Règles de la Cour fédérale (1998) applicables à la détermination des frais, les frais — même provisionnels — relatifs aux procédures dont il est saisi.
Payment (2) The Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.	Détermination (2) Le Tribunal peut désigner les créanciers et les débiteurs des frais, ainsi que les responsables de leur taxation ou autorisation.
Award against the Crown (3) The Tribunal may award costs against Her Majesty in right of Canada.	Couronne (3) Le Tribunal peut ordonner à Sa Majesté du chef du Canada de payer des frais.
Costs adjudged to Her Majesty in right of Canada (4) Costs adjudged to Her Majesty in right of Canada shall not be disallowed or reduced on taxation by reason only that counsel who earned the costs, or in respect of whose services the costs are charged, was a salaried officer of Her Majesty in right of Canada performing those services in the discharge of that counsel's duty and remunerated for those services by salary, or for that or any other reason was not entitled to recover any costs from Her Majesty in right of Canada in respect of the services so rendered.	Frais adjugés à Sa Majesté du chef du Canada (4) Les frais qui sont adjugés à Sa Majesté du chef du Canada ne peuvent être refusés ni réduits lors de la taxation au seul motif que l'avocat pour les services duquel les frais sont justifiés ou réclamés était un fonctionnaire salarié de Sa Majesté du chef du Canada et, à ce titre, rémunéré pour les services qu'il fournissait dans le cadre de ses fonctions, ou bien n'était pas, de par son statut ou pour toute autre raison, admis à recouvrer de Sa Majesté du chef du Canada les frais pour les services ainsi rendus.
Amounts to Receiver General (5) Any money or costs awarded to Her Majesty in right of Canada in a proceeding in respect of which this section applies shall be paid to the Receiver General.	Versement au receveur général (5) Les sommes d'argent ou frais accordés à Sa Majesté du chef du Canada sont versés au receveur général.

[44] Subsection 8.1(1) provides that the Tribunal may award costs of proceedings before it in accordance with the provisions governing costs in the *Federal Courts Rules*.

[45] The cost provisions in the *Federal Courts Rules* are covered in Part 11. Rule 402 of the *Federal Courts Rules* deals directly with costs of discontinuance and reads:

Costs of discontinuance or abandonment	Dépens lors d'un désistement ou abandon
402. Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been	**402**. Sauf ordonnance contraire de la Cour ou entente entre les parties, lorsqu'une action, une demande ou un appel fait l'objet

discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.	d'un désistement ou qu'une requête est abandonnée, la partie contre laquelle l'action, la demande ou l'appel a été engagé ou la requête présentée a droit aux dépens sans délai. Les dépens peuvent être taxés et le paiement peut en être poursuivi par exécution forcée comme s'ils avaient été adjugés par jugement rendu en faveur de la partie.

[emphasis mine]

[46] In the event of discontinuance, the Commissioner and both Intervenors have asked for an award of costs. The Commissioner seeks party/party costs in accordance with Tariff B of the *Federal Courts Rules* but increased to column V rather than column III. Mission seeks its costs of intervention on a party/party basis. As an intervenor, the CWB seeks its costs of intervention but on a solicitor-client basis.

[47] The Applicant opposes any cost awards either to the Commissioner or to the Intervenors in regard to entitlement and scale. During the hearing, it was agreed the Tribunal would decide the question of entitlement but would leave the question of scale after directions pursuant to the *Federal Courts Rules* are issued providing all participants an opportunity to make appropriate submissions.

[48] Counsel for the Applicant relied upon Prothonotary Lafrenière's decision in *Dark Zone Technologies Inc. v. 1133150 Ontario Ltd.*, (2002) 16 C.P.R.(4th) 453, 2002 FCT 1, in support of his argument the Commissioner should not be awarded costs. The case is one where the plaintiff sought leave to discontinue his action without costs under Rule 402 of the *Federal Courts Rules*.

[49] Prothonotary Lafrenière, at paragraph 5 of his reasons, expressed the view that the general rule is a party against whom an action has been discontinued is entitled to costs forthwith referring to Rule 402. He added notwithstanding, "the Court has the discretion to decline costs to a party where it is in the interests of justice to do so."

[50] Prothonotary Lafrenière found Dark Zone had properly launched its action against the defendants alleging violations by them of its intellectual property rights but the defendants, by not disclosing certain information until discovery, unnecessarily lengthened the proceedings and their failure to cooperate with the plaintiff was "clearly unreasonable and resulted in a waste of time and resources for both parties" (par.10). He found "that the plaintiff acted reasonably in bringing this action and in moving promptly to offer to discontinue once provided with the defendants' exculpatory information" (par.11). He concluded in the circumstances he would exercise his discretion in refusing to grant the defendants their cost of the action.

[51] In my view, the Dark Zone case does not assist the Applicant. It is not disputed the Applicant acted promptly when it found out changes concerning the option agreement. This is insufficient. The Applicant needs to show more to disentitle the Commissioner to her costs such as her acting unreasonably or her unnecessarily prolonging the trial. The Applicant has made no such allegations nor were any proven.

[52] In my view, in these circumstances, the Commissioner is entitled to her costs in accordance with Rule 402 of the *Federal Courts Rules*. I agree with counsel for the Commissioner costs normally follow the event and I am unable to find any circumstance of disentitlement.

[53] Counsel for the Applicant then argued neither Intervenor is entitled to costs upon discontinuance. Counsel submits there is a well-established rule that an intervenor should bear its own costs absent special circumstances and, for this proposition, he relies upon Orkin's *The Law of Costs*, looseleaf (Aurora, Canada Law Book Inc., 2005), at par. 202, page 2-28, where it is said, "[i]n general, an intervenor should bear its own costs unless there is reason to depart from the rule". Counsel further argues the general rule is not displaced in this case pointing to Justice Reed's decision in *Grant v. Canada (Attorney General)*, [1995] 1 F.C. 158, a case involving the *Canadian Charter of Rights and Freedoms*, where she held no costs would be awarded to the intervenors in the case before her since they had joined the litigation voluntarily.

[54] Counsel for the CWB submits the Applicant's argument is misplaced in that the statement relied in Orkin, *supra*, relates to the Ontario Rules of Practice and not to costs in the Federal Court which are more flexible insofar as cost awards to intervenors are concerned. He points to subsection 109(3) of the *Federal Courts Rules* dealing with interventions where paragraph (b) of that subsection specifically refers to intervenor costs. Furthermore, he dismisses the Applicant's argument that the CWB, the largest purchaser of grain-handling services in the Port of Vancouver, could have stayed out of this case. I agree with his submissions.

[55] In terms of Federal Court practice dealing with intervenor costs, the proper passage in Orkin, *supra*, is found at paragraph 1102.10, page 11-8 which states that "an intervenor is entitled to recover costs and is liable to pay costs, in the discretion of the trial judge" citing as authority for this proposition the Federal Court of Appeal's decision in *Governors of University of Calgary et al v. Her Majesty the Queen*, [1986] 72 N.R. 249.

[56] Counsel for the Applicant also relied on two Supreme Court of Canada judgments cited in the Ontario Court of Appeal's judgment in *Daly v. Ontario (Attorney General)*, (1999) 124 O.A.C. 152, [1999] O.J. No. 3405 (QL), for the proposition that ordinarily intervenors are neither awarded costs nor have costs awarded against them.

[57] As I understand those cases, they were limited to a ruling on intervenor costs on interventions related to constitutional issues before the Supreme Court of Canada itself. In any event, the Supreme Court of Canada in appropriate cases has itself awarded intervenor costs on an unsuccessful appeal and maintained such cost awards below (see *Lavigne v. Ontario Public Service Employees Union et al*., [1991] 2 S.C.R. 211).

[58] The CWB could not reasonably stay out of the proceedings. It had obtained intervenor status in the Tribunal proceeding involving the section 92 application in 2002 leading to a finding of an SLC and the making of the Consent Agreement dealing with the divestiture of one of the Applicant's port terminals. It is the largest purchaser of grain-handling services in the Port of Vancouver and was directly affected by the current section 106 proceeding where the Applicant alleged the Consent Agreement should be rescinded in part because the purpose of the

Consent Agreement did not extend to the CWB and that a grain handling agreement between it and a potential purchaser of the UGG Terminal would adversely affect the Western Canadian grain-handling industry and would be inconsistent with, and undermine, the objectives of the Consent Agreement. I am of the view, given these allegations, the CWB was forced to defend its interests. See *Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare et al.)*, (1988) 19 C.P.R. (3d) 374, where Justice Rouleau awarded intervenor costs in analogous circumstances. The CWB is therefore entitled to intervenor costs.

[59] The same logic applies to Mission's intervention. Mission sought to purchase the UGG Terminal from the Applicant. In this section 106 proceeding, it was faced with the same allegation the CWB faced namely, Mission's entering into a handling agreement with the CWB would be detrimental to the Western Canadian grain-handling industry and would be inconsistent with and undermine the objectives of the Consent Agreement. Mission had to participate in the section 106 proceeding to counter this fundamental allegation which, if not rebutted successfully, would exclude Mission from any further attempt to purchase the UGG Terminal. Mission is entitled to intervenor costs.

[60] I close these reasons on the issue of solicitor-client costs sought by the CWB. The rule is clear that solicitor-client costs are generally awarded where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties (see *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134).

[61] Counsel for the CWB, relying upon the Ontario Court of Appeal's decision in *Twaits v. Monk*, (2000) 132 O.A.C. 180, [2000] O.J. No. 1699 (QL), argues the Applicant made allegations against his client which were tantamount to fraud and dishonest conduct. I am not persuaded by counsel's argument. Except for one instance, I would not characterize the Applicant's allegations as allegations tantamount to fraud and dishonest conduct. They were made in the context of the Applicant's allegation that the CWB could and did exercise countervailing power or monopsonistic power.

[62] The Applicant did make one serious allegation that several years ago the CWB took one action which could be characterized as reprehensible. That allegation was contained in a footnote to a report proposed to be submitted by an expert. The Tribunal struck out that report on the grounds that it was improper expert evidence. The allegation was not repeated in testimony by that person as a lay witness. I consider the Applicant abandoned the allegation. In the circumstances, I see no basis for an award of solicitor-client costs to the CWB.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[63] The Applicant's motion to adjourn is dismissed and the Applicant's alternative motion that no costs be awarded on its discontinuance of its section 106 application is refused. The Commissioner and both Intervenors are entitled to costs of the Applicant's motions.

[64] The parties may seek directions from the Tribunal on the procedure to be followed for the determination by the Tribunal of the scale of costs to be awarded to the Commissioner and both Intervenors.

DATED at Ottawa, this 10th day of May, 2006.

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

(s) François Lemieux

APPEARANCES:

For the applicant:

United Grain Growers Limited

Sandra Forbes
Davit Akman

For the respondent:

The Commissioner of Competition

John L. Syme
Jonathan Chaplan
E.C. Yuh
Leslie Milton

For the intervenors:

Canadian Wheat Board

Donald Houston
Jeanne L. Pratt

Mission Terminal Inc.

Jeffrey S. Leon
William Hourigan