

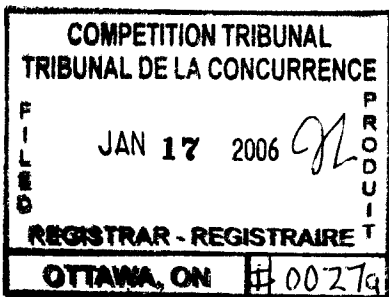
THE COMPETITION TRIBUNAL

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

**RESPONSE OF THE COMMISSIONER OF COMPETITION
TO THE REQUESTS FOR LEAVE TO INTERVENE FILED BY
THE CANADIAN NATIONAL RAILWAY COMPANY
AND THE CANADIAN PACIFIC RAILWAY COMPANY**

I. INTRODUCTION

1. By materials served upon the Commissioner of Competition (the “Commissioner”) on January 3, 2006, the Canadian Pacific Railway Company (“CPR”) and on January 6, 2006, the Canadian National Railway Company (“CN”) requested leave of the Competition Tribunal pursuant to s.9(3) of the *Competition Tribunal Act* R.S.C. 1985 c.19 (2nd supp.), as amended, to intervene in the within matter. CN also served and filed materials requesting an extension of time for service and filing of its leave application. The Commissioner consented to the request for the extension of time.

2. CN has requested that it be allowed to participate in the matter by being permitted:
 - a. to review any discovery transcripts and access any discovery documents of the parties to the application but not direct participation in the discovery process, subject to confidentiality orders;
 - b. to call *viva voce* evidence on the following conditions and containing the following information: (1) the names of the witnesses sought to be called; (2) the nature of the evidence to be provided and an explanation as to what issue within the scope of the intervention such evidence would be relevant; (3) a demonstration that such evidence is not repetitive, that the facts to be proven have not been adequately dealt with in the evidence so far; and (4) a statement that the respondents have been asked to adduce such evidence and had refused;
 - c. to cross-examine witnesses at the hearing of the application to the extent that it is not repetitive of the cross-examination of the parties to the application;
 - d. to submit legal arguments at the hearing of the application that are non-repetitive in nature and at any pre-hearing motions or pre-hearing conferences; and,
 - e. to introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the Competition Tribunal Rules, Can. Reg. SOR/94 290, and case management;

Request for Leave to Intervene on Behalf of CN, para. 5(a)

3. CN has further requested that the parties to the proceeding not be allowed to seek documentary or oral discovery of CN.

Request for Leave to Intervene on Behalf of CN, para. 5(b)

4. For its part, CPR has asked that it be permitted:
- a. to review any discovery transcripts and access any discovery documents of the parties to the application but not direct participation in the discovery process, subject to confidentiality orders;
 - b. to call *viva voce* evidence on the condition that CPR provide: (1) the names of the witnesses sought to be called; (2) a will-say statement for each witness, with an explanation as to what issue within the scope of the intervention such evidence would be relevant; (3) a demonstration that such evidence is not repetitive, that the facts to be proven have not been adequately dealt with in the evidence so far; and (4) a statement that the respondents have been asked to adduce such evidence and have refused;
 - c. to cross-examine witnesses at the hearing of the application to the extent that it is not repetitive of the cross-examination of the parties to the application;
 - d. to submit legal arguments at the hearing of the application that are non-repetitive in nature and at any pre-hearing motions or pre-hearing conferences; and,
 - e. to introduce expert evidence which is within the scope of this intervention in accordance with the procedure set out in the Competition Tribunal Rules, Can. Reg. SOR/94-290, and case management.

Request for Leave to Intervene on Behalf of CPR, para. 5(a)

5. CPR also requests that the parties to the proceeding not be allowed to seek documentary or oral discovery of CPR.

Request for Leave to Intervene on Behalf of CPR, para. 5(b)

II. THE POSITION OF THE COMMISSIONER OF COMPETITION

6. The Commissioner does not oppose the intervention requests of CN or CPR as such, but submits that both CN and CPR should be limited to intervening in this proceeding only with respect to issues related to the transportation of grain by rail to the Port of Vancouver and the receipt and unloading of railway cars of grain at the Port of Vancouver.
7. The Commissioner submits therefore, that in the course of their intervention and only with respect to the issue as framed in the previous paragraph, CN and CPR should be permitted to:
 - a. review any discovery transcripts and access any discovery documents of the parties to the within application subject to confidentiality orders but shall not be allowed to participate in the discovery process;
 - b. call *viva voce* evidence in respect of the issue as framed in the previous paragraph subject to providing: (1) the names of the witnesses sought to be called; (2) the nature of the evidence to be provided and an explanation as to what issue within the scope of the intervention such evidence would be relevant; (3) a demonstration that such evidence is not repetitive and that the facts to be proven have not adequately been dealt with in the evidence so far; (4) a statement that the respondents have been asked to adduce such evidence and have refused; and (5) the Commissioner will have the right of documentary discovery and oral discovery on the issues to which the evidence relate ;
 - c. cross-examine witnesses at the hearing of the application only in respect of the issue set out in the previous paragraph and only to the extent that such cross-examination is not repetitive of the cross-examinations of the parties to the application;

- d. introduce expert evidence only with respect to the issue as framed in the previous paragraph and in accordance with the procedures set out in the Competition Tribunal Rules and case management decisions; and,
- e. submit legal arguments at the hearing of the application and at any pre-hearing motions or pre-hearing conferences which are not repetitive in nature.

III. INTERVENTION OF CN AND CPR

- 8. The Tribunal's authority for granting leave to intervene is contained in s.9(3) of the *Competition Tribunal Act* and allows any person, with leave, to intervene in any proceeding before the Tribunal (other than proceedings under Part VII.1) and to make representations relevant to those proceedings in respect of any matter that affects the person.

Competition Tribunal Act, R.S.C. 1985, c. C-19 (2nd supp.) s.9(3)

- 9. S.30 of the *Competition Tribunal Rules* allows the Tribunal to grant the request for leave to intervene, refuse it or grant it on such terms and conditions as are deemed appropriate.

Competition Tribunal Rules, S.C.R. 194-290 s.30

- 10. In order to be granted intervenor status, the Tribunal must be satisfied:
 - a. the person seeking leave to intervene is directly affected;
 - b. the matter alleged to affect the person seeking leave to intervene is legitimately within the scope of the Tribunal's consideration or is a matter sufficiently relevant to the Tribunal's mandate;

- c. all representations made by the person seeking leave to intervene are relevant to an issue specifically raised in the proceeding; and,
- d. the person seeking leave to intervene brings to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it.

Canada (Commissioner of Competition) v. United Grain Growers Ltd., [2002] C.C.T.D. No. 18 (Q.L.) at para.12ff.

- 11. The Commissioner accepts that CN and CPR have both met the four part test as set out in paragraph 10, above, and should be granted leave to intervene. However, the Commissioner also respectfully submits that the scope of matters upon which CN and CPR should be granted leave to intervene should not be unfettered and should relate to the areas in which both have a distinct perspective.
- 12. In accordance with R.27(2)(c) of the *Competition Tribunal Rules* CN and CPR were required to set out a concise statement of the matter affecting them.

Competition Tribunal Rules, supra.

- 13. In its materials, CN has submitted to the Tribunal that *inter alia*:
 - a. each year, CN carries millions of tonnes of western Canadian grain to the grain terminal facilities on Vancouver's North Shore for export;
 - b. importantly, CN is the only railway company that directly serves the grain terminal elevators at Vancouver's North Shore. As a result, in addition to the movement of its own traffic, as the sole service provider for Vancouver's North Shore facilities, CN is required to interchange railway cars belonging to other carriers, such as CPR, for ultimate delivery to the terminal located on the North Shore. This means that all the traffic, including grain, that moves via CPR to the North Shore must be interchanged between CN and CPR at these busy interchanges in the Vancouver area;

- c. this situation is exacerbated by the significant increase in total rail volumes handled by CN to Vancouver's North Shore over the past three years and, in particular, the substantial increase in the handling of bulk commodity shipments by CN originating on CPR lines. This increased volume, combined with the finite rail infrastructure available to CN on the North Shore, renders it critically important for CN that the rail-receiving terminals on the North Shore operate at maximum efficiency and capacity at all times;
- d. a terminal's failure to efficiently receive, handle, unload and release rail cars can have a crippling effect on CN's operations, not only on the North Shore but extending further to CN's line operations leading into Vancouver as well; and,
- e. it is for this reason that CN is directly impacted by any move that would adversely affect grain throughput and system capacity in and out of the Port of Vancouver.

Request for Leave to Intervene on Behalf of CN, para. 2(a)-(f)

- 14. CN has also submitted that, if granted leave to intervene, it will be able to adduce evidence regarding numerous issues relevant to the Application, including the transportation by rail of grain from prairie origins to port terminals located in Vancouver, the challenges relating to the movement of grain and other traffic from both CN origins and from other rail ways received in interchange at Vancouver for delivery to port terminal on the North Shore of Vancouver, and the efficiencies relating to rail operations generally, and to CN specifically, anticipated to result from the joint venture.

Request for Leave to Intervene on Behalf of CN, para. 2(k)

15. CPR's submissions on the issue of how it is affected by this matter are similar. It advises *inter alia*:

- a. CPR carries millions of tonnes of grain on its railway from country elevators in Western Canada to the Port Terminal elevators at Vancouver for export to other countries;
- b. unlike CN, CPR serves only one of the two major western Canadian ports. While CN serves the port of Prince Rupert, CPR serves only Vancouver and, at Vancouver, serves only the South Shore. The millions of tonnes of grain that move via CPR to the North Shore must be interchanged between CN and CPR at busy and difficult interchanges. CPR, therefore, has a particular and direct interest in ensuring that the transportation of grain to Vancouver and the receipt of an unloading of its railway cars of grain by Vancouver grain terminal elevators is as prompt and efficient as is possible;
- c. CPR capacity through the mountains to and from the Port of Vancouver is limited and the capacity, despite recent significant investments by CPR, is strained. As a result, efficient grain transportation and handling is of great importance to CPR and, given the growing demands of shippers of all rail freight traffic should be of importance to shippers generally; and,
- d. failure to achieve efficiency improvements, especially in respect of railway operations to and from Vancouver through the Rocky Mountains will further strain CPR railway operating capacity, at a time when shipper demands for rail transportation exceed available capacity.

Request for Leave to Intervene on Behalf of CPR, para. 2 (b)-(e)

16. With respect to the evidentiary assistance that CPR will be able to provide to the Tribunal, it advises that it will be able to adduce evidence regarding numerous issues relevant to the Application, including the transportation by rail of grains from primary grain elevators to, among other places, port terminals located in Vancouver and the logistics relating to the allocation and delivery by rail of grain at the Port of Vancouver and elsewhere.

Request for Leave to Intervene on Behalf of CPR, para. 2(j)

17. Both CN and CPR intend to support the Respondents in this matter. The Commissioner observes that, while the Vancouver Port Authority deposed in its materials that it did not yet know which party it intended to support, it appeared likely from the materials that it would support the Respondents as well.

Request for Leave to Intervene on Behalf of CN, para. 3

Request for Leave to Intervene on Behalf of CPR, para. 3

Request for Leave to Intervene on Behalf of the Vancouver Port Authority, para. 3

18. The Federal Court of Appeal has made it clear that the specific role of intervenors must be determined as a function of fairness and justice and subject to the requirements of s.9(3) of the *Competition Tribunal Act* and that “the intervenors’ representations must be relevant to the proceedings in respect of any matter affecting those intervenors”.

American Airlines Inc. v. Canada Competition Tribunal, [1989] 2 F.C.88 at para.32; *aff’d* [1989] 1 S.C.R. 236.

19. In *Canada (Director of Investigation and Research) v. Canadian Pacific* (1997), 74 C.P.R. (3d) 37 (C.T.D.), the Tribunal held that the Port of Montreal met the test for intervenor status but restricted the scope of such status to matters “affecting the Port”.

Canada (Director of Investigation and Research) v. Canadian Pacific [1997] C.C.T.D. No. 14 (Q.L.), at p. 6

20. The Commissioner of Competition respectfully submits that, similarly, CN and CPR should be restricted in their intervention to the matters which are before the Tribunal and which directly affect them as set out in their requests for leave to intervene. For that reason, the Commissioner of Competition respectfully requests that such intervention be limited to issues related to the transportation of grain by rail to the Port of Vancouver and the receipt and unloading of railway cars of grain by the Vancouver Grain Terminal Elevators.

IV. ORDER SOUGHT

21. As pointed out in her submissions relating to the Request for Leave to Intervene filed by the Vancouver Port Authority in the context of the within matter, the Commissioner submits that the Tribunal should be cognisant of scheduling issues and other complications that arise as intervenors are given status and wide rights relating to their participation. Again, the Commissioner submits that there is no need for CN or CPR to attend at examination for discovery nor have they requested such a right. However, the Commissioner submits that she should have the right to discover both CN and CPR with respect to the evidence that they intend to lead in conformity with the decision of Noel J. in *Canada (Director of Investigation and Research) v. Canadian Pacific, supra*. As Noel J. pointed out:

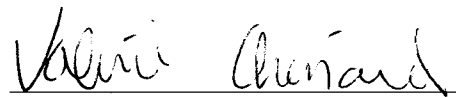
Given the centrality and fundamental nature of the issues on which the Port has been permitted to intervene, there would be a strong potential for disruption if the Director was not allowed to discover the Port. The Port as an intervenor is in a different position and, for the reasons set out above, its entitlement to discovery has not been demonstrated.

Canada (Director of Investigation and Research) v. Canadian Pacific, supra, at p.47

22. Subject then to those concerns therefore, but only with respect to issues related to the transportation of grain by rail to the port of Vancouver and the receipt and unloading of railway cars of grain at the Port of Vancouver, the Commissioner submits that CN and CPR should be permitted to:

- a. review any discovery transcripts and access any discovery documents or the parties to the within application subject to confidentiality orders but shall not be allowed to participate in the discovery process;
- b. call *viva voce* evidence in respect of the issue as framed in the previous paragraph subject to providing: (1) the names of the witnesses sought to called; (2) the nature of the evidence to be provided and an explanation as to what issue within the scope of the intervention such evidence would be relevant; (3) a demonstration that such evidence is not repetitive and that the facts to be proven have not adequately been dealt with in the evidence so far; (4) a statement that the respondents have been asked to adduce such evidence and have refused; and (5) the Commissioner will have the right of discovery and oral discovery on the issues to which the evidence relates;
- c. cross-examine witnesses at the hearing of the application only in respect of the issue set out in the previous paragraph and only to the extent that such cross-examination is not repetitive of the cross-examinations of the parties to the application;
- d. introduce expert evidence only with respect to the issue as framed in the previous paragraph and in accordance with the procedures set out in the Competition Tribunal Rules and case management decisions; and,
- e. submit legal arguments at the hearing of the application and at any pre-hearing motions or pre-hearing conferences which are not repetitive in nature.

All of which is respectfully submitted this 17th day of January, 2006



Jonathan Chaplan
André Brantz
Valérie Chénard
Competition Law Division
Department of Justice
Place du Portage, Phase I, 22nd Floor

50 Victoria Street, Gatineau,
QC K1A 0C9
Fax: (819) 953-9267