

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:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT CT-2005-009 January 16, 2006	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 0025

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 REQUEST FOR LEAVE TO INTERVENE FILED BY THE VANCOUVER PORT AUTHORITY

I. INTRODUCTION

1. The Vancouver Port Authority ("VPA") has requested leave to intervene in this matter by Application dated December 30, 2005. In its Application, the VPA requested to be

allowed to participate in the proceedings on the following terms:

- a) that the VPA be allowed to participate in the proceedings and be permitted:
 - i) to review any discovery transcripts and access any discovery documents of the parties to the application but not to have direct participation in the discovery process, subject to confidentiality orders;
 - ii) 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 Commissioner (emphasis added) had been asked to adduce such evidence and had refused;
 - iii) 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;
 - iv) 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

v) to introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the Competition Tribunal Rules, SOR/94-290, and case management.

b) and that the Respondents not be permitted to seek documentary or oral discovery of the VPA.

II THE COMMISSIONER OF COMPETITION'S POSITION

2. The Commissioner of Competition (the "Commissioner") does not oppose the intervention of the VPA but submits that the VPA should be granted the following rights of intervention:

The VPA be granted leave to intervene in these proceedings on the following substantive issues in this application:

Issues related to the alteration of the grain handling terminal capacity or the process for handling the grain at the Port of Vancouver.

In the course of its intervention, the VPA be permitted to:

a. review any discover transcripts and access any discovery documents of the parties to

the application subject to confidentiality orders, but not to participate in the discovery process;

- b. call *viva voce* evidence in respect of those matters which directly affect the alteration of the grain handling terminal capacity or the process for handling grain at the Port of Vancouver. if the VPA provides: (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 have refused; (5) the Commissioner will have the right of documentary and oral discovery on the issues to which the evidence relates;

- c. cross-examine witnesses at the hearing of the Application in respect of those matters which directly affect the alteration of the grain handling terminal capacity or the process for handling the grain at the Port of Vancouver. to the extent that it is not repetitive of the cross-examinations of the parties to the Application;

- d. introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the Tribunal Rules and case management decisions.

- e. 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.

III. SCOPE OF INTERVENTION RIGHTS

- 3. The Commissioner accepts that the Vancouver Port Authority has met the four-part test to qualify for leave to intervene.

Canada (Commissioner of Competition) v. United Grain Growers Ltd. (2002), 19 C.P.R. (4th) 157 etc. per McKeown at para 12

- 4. If granted leave to intervene, the Tribunal must determine the scope of the intervention, both respect to the issues that the Intervenor can address and the manner of intervening.

A. Areas of Intervention

- 5. In accordance with Rule 27(2)(c) of the Tribunal Rules, the VPA was required to set out a concise statement of the matters that affect it. After setting out its mandate and the fact that Port Terminal grain handling services are a significant factor in its operations, the VPA goes on to say:

The VPA is concerned that any alteration of the grain handling terminal capacity or the process for grain handling at the Port may adversely impact the VPA's ability to maintain its operations, and as a result its ability to provide prices, levels and quality of service in

other areas of its operations at levels competitive with other ports on the west coast of North America.

Application of the Vancouver Port Authority (“UPA application”) para. 2 F

6. It is thus submitted that the VPA be limited to interventions related to the alteration of the grain handling terminal capacity or the process for handling the grain at the Port of Vancouver.

B. Scope of intervention

7. If granted leave to intervene, the intervenor is automatically granted the right to present argument. Any further rights must be expressly granted by the Tribunal in the exercise of its discretion.

Rule 32., Canada (Director of Investigation and Research) v. Canadian Pacific Ltd. (1997), 74 C.P.R. (3d) 37 at p.38.

8. The VPA states in its Request for Leave to Intervene that it cannot say, as of the date of the request, which party it generally intends to support. However at paragraph 14 of the affidavit of M. Scott Galloway, in support of its application Mr. Galloway states:

If the Tribunal allows the SWP and JRIL joint venture to proceed and if, as suggested to VPA by SWP AND JRIL, the proposed joint venture results in improved rail time efficiency and shortened ship moorages prior to berthing, the

Port will be directly positively affected as these improved efficiencies would generally provide a more reliable and efficient supply of grain and loading of ships with grain which would, in turn, allow all users of the Port to benefit...

Application of the Vancouver Port Authority, para 3. Affidavit in support of VPA Application of Mr. S. Galloway par. 14.

9 At paragraph 15 of his affidavit Mr. Galloway states:

If the Tribunal does not allow the SWP AND JRIL joint venture to proceed, the Port will be directly affected both because the above possible benefits will be much less likely to accrue to the Port, but also for the following reasons...

10. Thus, notwithstanding the statement that the VPA does not know which party it intends to support, it would appear likely that the VPA would support the Respondents. The Commissioner notes that Canadian National Railway Company ("CN") and Canadian Pacific Railway Company ("CP"), who have also applied to be intervenors, on the grounds of likely efficiencies of the JV, have both stated that they intend to support the Respondents in this Application.

Application of Canadian Pacific Railway, para. 3, Application of Canadian National Railway, para. 3.

11. In *The Director of Investigation and Research and Canadian Pacific et al. ((1997), 74 C.P.R. (3d) 37)*, the Port of Montreal was granted leave to intervene. There as well, the Port was concerned about the efficiency and competitiveness of the Port.

Canada (Director of Investigation and Research) v. Canadian Pacific Ltd. (1997), 74 C.P.R. (3d) 37 at p.38.

12. In the result, the Tribunal Ordered that the Port of Montreal be permitted to intervene as follows:

In addition, the Port shall be permitted:

- a. To adduce factual evidence at the hearing, provided that it first demonstrates to the satisfaction of the Tribunal that such evidence is relevant and within the scope of the intervention, is not repetitive, that the respondents have been asked to adduce the evidence and have refused and that the Port has provided documentary and oral discovery to the Director on the issues to which the evidence relates;
- b. To introduce relevant expert evidence which is within the scope of its intervention in accordance with the procedure set out in the Rules;
- c. To cross-examine witnesses after the respondents have conducted their cross-examination of witnesses, provided that it first demonstrates to the satisfaction of the Tribunal that it has questions pertinent to their intervention which the respondents were not willing to ask;

- d. To have access to the transcripts of the examinations for discovery conducted by the parties, and its counsel may attend the examinations for discovery, subject to any order that may be issued by the Tribunal regarding confidentiality;
- e. To inspect and make copies of the documents listed in the affidavits of documents of the parties, other than those documents subject to a claim for privilege or which are not within the party's possession, control or power, subject to the same restriction regarding confidentiality.

13. As stated at the outset, the Commissioner submits that the VPA's rights of intervention should be:

In the course of its intervention, the VPA be permitted to:

- a. review any discover transcripts and access any discovery documents of the parties to the application subject to confidentiality orders, but not to participate in the discovery process;
- b. call *viva voce* evidence in respect of those matters which directly affect the alteration of the grain handling terminal capacity or the process for handling the grain at the Port of Vancouver. if the VPA provides: (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 have refused; (5) the Commissioner will have the right of documentary and oral discovery on the issues to which the evidence relates;

- c. cross-examine witnesses at the hearing of the Application in respect of those matters which directly affect the alteration of the grain handling terminal capacity or the process for handling the grain at the Port of Vancouver. to the extent that it is not repetitive of the cross-examinations of the parties to the Application;
 - d. introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the Tribunal Rules and case management decisions.
 - e. 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.
14. While the Commissioner has yet to make representations with respect to the intervention applications of CN, CP and the Canadian Wheat Board, it is submitted that the Tribunal should be cognizant of the scheduling issues and other complications that arise the as the

number of intervenors grows and their scope of participation expands.

15. Given that the Commissioner is submitting that the VPA have access to discovery transcripts and documents, subject to confidentiality, it is submitted that there is no need for it to attend at discovery, as ordered in CAST, nor have they requested such a right.

16. It is suggested that the Commissioner should have the right to discover the VPA with respect to evidence that it intends to lead. Mr. Justice Noel stated, in respect of the Port of Montreal:

Discovery of a representative of the Port is granted to the Director to avoid surprises at the hearing and the consequent delays and disruptions. In this case, 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.
The Port may cross-examine witnesses called by the Director

It is submitted that such argument applies equally to the matter before the Tribunal.

IV. ORDER SOUGHT

The VPA be granted leave to intervene in these proceedings on the following substantive issues in this application:

Related to the alteration of the grain handling terminal capacity or the process for handling the grain at the Port of Vancouver.

In the course of its intervention, the VPA be permitted to:


- a. review any discover transcripts and access any discovery documents of the parties to the application subject to confidentiality orders, but not to participate in the discovery process;
- b. call *viva voce* evidence in respect of those matters which directly affect the alteration of the grain handling terminal capacity or the process for handling the grain at the Port of Vancouver. if the VPA provides: (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 have refused; (5) the Commissioner will have the right of documentary and oral discovery on the issues to which the evidence relates;
- c. cross-examine witnesses at the hearing of the Application in respect of those matters which directly affect the alteration of the grain handling terminal capacity or

the process for handling the grain at the Port of Vancouver. to the extent that it is not repetitive of the cross-examinations of the parties to the Application;

- d. introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the Tribunal Rules and case management decisions.

- e. 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.

All of which is respectfully submitted this 13th day of January, 2006



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