

Competition Tribunal



Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Saskatchewan Wheat Pool Inc.*, 2005 Comp. Trib.51
File No.: CT2005009
Registry Document No.: 0010

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 92 of the *Competition Act*;

AND IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 104 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 of Vancouver.

B E T W E E N :

Commissioner of Competition
(applicant)

and

Saskatchewan Wheat Pool Inc.
James Richardson International Limited
6362681 Canada Ltd. and 6362699 Canada Ltd.
(respondents)

Decided on the basis of the written record.
Presiding Judicial Member: Lemieux J.
Date of Order: December 16, 2005
Order signed by: Mr. Justice F. Lemieux



INTERIM HOLD SEPARATE ORDER

[1] WHEREAS Saskatchewan Wheat Pool Inc. and James Richardson International Limited, 6362681 Canada Ltd. and 6362699 Canada Ltd. (collectively, the "Respondents") have entered into a series of agreements dated April 6, 2005 creating a joint venture in connection with grain handling services and the operation of their respective port terminal grain handling terminals in the Port of Vancouver;

[2] AND WHEREAS the Commissioner of Competition has made an application pursuant to sections 92 and 104 of the *Competition Act*, R.S.C. 1985, c. C-34;

[3] AND UPON READING the Notice of Application filed on November 10, 2005, the Applicant's Memorandum of Argument on Interim Relief, the Draft Interim Consent Order, the Affidavit of Denis Corriveau dated November 10, 2005, and the Consent of the parties, filed herein;

[4] AND UPON DETERMINING that this is an appropriate case for the issuance of an interim hold separate order pursuant to section 104 of the *Competition Act*;

[5] AND UPON CONSIDERING that the Commissioner of Competition and the Respondents have reached an agreement which is reflected in this interim order;

[6] AND IT BEING UNDERSTOOD that the Commissioner of Competition has alleged certain material facts, and that, although the Respondents do not agree with all the facts alleged by the Commissioner, the Respondents do not contest the facts as stated in the Affidavit of Denis Corriveau for the purpose of this application for a consent interim order only.

THE TRIBUNAL ORDERS THAT:

I. DEFINITIONS

[7] For the purposes of this Order, the following capitalized terms have the following meaning:

- (a) "Act" means the Competition Act, R.S.C. 1985, c. C-34;
- (b) "Affiliate" has the meaning given to it in subsection 2(2) of the Act;
- (c) "Commissioner" means the Commissioner of Competition appointed pursuant to section 7 of the Act;
- (d) "Hold Separate Monitor" means the Person appointed pursuant to Part IV of the Order, and any employees, agents or other persons acting for or on behalf of the Hold Separate Monitor;
- (e) "JRI" means James Richardson International Limited, a corporation existing under the laws of Canada, its directors, officers, employees, agents, representatives, successors, assigns, subsidiaries, divisions, groups, and affiliates;

- (f) "Joint Venture" means the joint venture between the Respondents as reflected in their agreements dated April 6, 2005, for the joint operation and marketing of their Vancouver port terminal facilities;
- (g) "JV Operator" means 6362699 Canada Ltd. and 6362681 Canada Ltd.;
- (g) "Restricted Marketing Activities" means setting, quoting, negotiating or agreeing to prices, rates, rebates, allowances, diversion premiums, tariffs and terms for grain handling services, but does not include other sales, promotional or marketing activities;
- (h) "Restricted Marketing Information" includes information with respect to pricing, rates, rebates, allowances, diversion premiums, and tariffs for grain handling services, but does not include information with respect to other sales, promotional or marketing activities, or any information which is required to be publicly disclosed pursuant to regulatory requirements;
- (i) "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity;
- (j) "SWP" means Saskatchewan Wheat Pool Inc., a corporation existing under the laws of Canada, its directors, officers, employees, agents, representatives, successors, assigns, subsidiaries, divisions, groups and affiliates;
- (1) "Tribunal" means the Competition Tribunal established by the *Competition Tribunal Act*, R.S. 1985, c. 19 (2nd Supp.).

II. APPLICATION

[8] The provisions of this Order apply to:

- (a) JRI;
- (b) SWP;
- (c) 636268 1 Canada Ltd.;
- (d) 6362699 Canada Ltd.;
- (e) all other Persons acting in concert or participating with (a) to (d), above with respect to the matters referred to in this Order, who shall have received actual notice of this Order;
- (f) the Commissioner; and
- (g) the Hold Separate Monitor.

III. HOLD SEPARATE

[9] SWP, JRI and the JV Operator shall not, during the term of this Order jointly engage in Restricted Marketing Activities in respect of grain handling services at the Port of Vancouver.

[10] The Respondents shall not disclose any Restricted Marketing Information to any other Respondent during the term of this Order.

[11] SWP and JRI shall, during the term of this Order:

(a) maintain and hold such physical assets, including computer systems and databases used in connection with any Restricted Marketing Activities in good condition and repair, normal wear and tear excepted, and to standards at least equal to those maintained prior to the date of this Order; and

(b) take all commercially reasonable steps to maintain quality and service standards for the supply of grain handling services at the Port of Vancouver at the level that existed prior to the date of this Order, save as required by prudent management of such;

[12] SWP shall not offer employment to employees of JRI employed, directly or indirectly in Restricted Marketing Activities. The foregoing shall apply *mutatis mutandis* to JRI.

IV. MONITOR

[13] Following the issuance of this Order, the Commissioner shall appoint a Hold Separate Monitor. The choice of Hold Separate Monitor shall be subject to the consent of JRI and SWP, which consent shall not be unreasonably withheld. The Hold Separate Monitor shall be responsible for monitoring the compliance of the Respondents with this Order, pending the Tribunal's final determination on the merits of the Commissioner's Application pursuant to section 92 of the Act.

[14] If the Hold Separate Monitor ceases to act or fails to act diligently and consistent with the purposes of this Order or if he/she is unable to perform his/her duties under the terms of this Order because of death, disability, termination for cause or any other reasons, the Commissioner may appoint a new Hold Separate Monitor within 15 days, subject to the consent of JRI and SWP, which consent shall not be unreasonably withheld. This Order shall apply to any substitute Hold Separate Monitor appointed pursuant to this paragraph.

[15] SWP and JRI shall be jointly responsible for all fees or expenses reasonably and properly charged or incurred by the Hold Separate Monitor, or any substitute thereof appointed pursuant to this Order, in connection with the execution or performance of the Hold Separate Monitor's duties under this Order.

[16] The Hold Separate Monitor shall have full and complete access to all personnel, books, records, documents and facilities of the Respondents that pertain, directly or indirectly to the negotiation of agreements for the supply of port terminal grain handling services at the Port of Vancouver. The Respondents shall cooperate with any reasonable request of the Hold Separate

Monitor. The Respondents shall not take any action to interfere with or impede the Hold Separate Monitor's ability to discharge his/her duties and responsibilities.

[17] The Hold Separate Monitor shall serve without bond or other security, on such reasonable and customary terms and conditions as are agreed, with the approval of the Commissioner. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of SWP and JRI such persons as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities under this Order. The Hold Separate Monitor shall account for all expenses incurred, including fees for his/her services, and such account shall be subject to the approval of the Commissioner.

[18] SWP and JRI shall indemnify the Hold Separate Monitor and hold him/her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the duties of the Hold Separate Monitor, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, wilful or wanton acts, or bad faith by the Hold Separate Monitor.

[19] The Hold Separate Monitor shall report in writing to the Commissioner: (i) every 60 days after being appointed until this Order is terminated; and (ii) at any other time as requested by the Commissioner or her staff, concerning the Respondents' compliance with this Order.

[20] The Respondents shall not exert or attempt to exert any influence, direction or control over the Hold Separate Monitor, which may adversely affect the discharge of the Hold Separate Monitor's duties under the terms of this Order.

[21] This Order shall not be construed as providing the Hold Separate Monitor with ownership, management, possession, charge or control of the Respondents.

[22] The Hold Separate Monitor shall execute a confidentiality agreement with the Respondents in which the Hold Separate Monitor will undertake not to disclose any competitively sensitive or proprietary information acquired in the performance of the Hold Separate Monitor's duties to any person except to the Commissioner.

[23] If the Hold Separate Monitor considers that SWP, JRI and/or the JV Operator are in default of any of the terms of this Order, he shall immediately notify the Commissioner of the breach, who shall forthwith give notice to SWP and JRI setting out the particulars of such default.

[24] If the Hold Separate Monitor advises the Commissioner that SWP, JRI and/or the JV Operator are in default of any of the terms of this Order, or if the Commissioner otherwise believes such to be the case, then for the purpose of determining or securing compliance with this Order, subject to any valid claim to a legally recognized privilege, and upon written request, SWP, JRI and/or the JV Operator shall permit any duly authorized representative of the Commissioner:

(a) upon a minimum of 7 days notice to SWP, JRI and/or the JV Operator, access during office hours of SWP and/or JRI, to inspect and copy all books, ledgers, accounts, correspondence, memorandum, and other records in the possession or under the control of SWP, JRI and/or the JV Operator relating to compliance with this Order; and

(b) upon a minimum of 10 days notice of SWP, JRI and/or the JV Operator, and without restraint or interference from SWP, JRI and/or the JV Operator, to interview directors, officers or employees of SWP, JRI and/or the JV Operator on matters in the possession or under the control of SWP, JRI and/or the JV Operator relating to compliance with this Order.

V. NOTIFICATION

[25] Each of SWP, JRI, 6362681 Canada Ltd. and 6362699 Canada Ltd. shall provide a copy of this Order to each of their officers, employees, or agents having managerial responsibility for any obligations under this Order, no later than 5 days from the date of this Order.

[26] Notices, reports and other communications required or permitted pursuant to any of the terms of this Order, shall be in writing and shall be considered to be given if dispatched by personal delivery, registered mail or facsimile transmission to the parties:

(a) If to the Commissioner:

Mr. Jonathan Chaplan
Mr. André Brantz
Ms. Valérie Chénard
Competition Law Division
Department of Justice
Place du Portage, 22nd floor
50 Victoria Street, Phase I
Gatineau, Québec KIA OC9

Fax: (819) 953-9267

(b) If to SWP, 6362681 Canada Ltd. or 6362699 Canada Ltd.:

Mr. Glen S. Lekach
Mr. Peter T. Bergbusch
Balfour Moss
700-2103 11th Ave
Regina, Saskatchewan
S4P 4G1

Fax: (306) 347-8350

(c) If to JRI:

Mr. Robert S. Russell
Mr. Adam Fanaki
Borden Ladner Gervais LLP
Scotia Plaza
40 King Street West
Toronto, Ontario
M5G 3Y4

Fax: (41 6) 361 -7060

VI. GENERAL

[27] SWP and JRI agree that they will take such steps as are necessary to ensure that 6362681 Canada Ltd. and 6362699 Canada Ltd., which are wholly-owned by SWP and JRI, take such measures, including adopting any necessary resolutions or obtaining any necessary authorizations, to ensure they are bound by the terms of this Order.

[28] This Order shall remain in effect until the Tribunal's final determination on the merits of the Commissioner's Application pursuant to section 92 of the Act.

[29] In the event of a dispute as to the interpretation or application of this Order, including any decision by the Commissioner pursuant to this Order or breach of this Order by the Respondents, the Commissioner, SWP, JRI and/or the JV Operator shall be at liberty to apply to the Tribunal for an interpretation of the provisions of this Order or to address any issue concerning this Order.

[30] This Order does not prohibit anyone from providing confidential information to the Commissioner for purposes of the administration or enforcement of the Act, including for the purposes of this proceeding.

[31] For greater certainty, nothing in this Order shall prevent the disclosure of confidential information to counsel for the Respondents in connection with the defence of any application that may be made by the Commissioner under the Act or any matters at issue by reason of this Order.

DATED at Ottawa, this 16th day of December 2005.

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

(s) François Lemieux

COUNSEL:

For the applicant:

Commissioner of Competition

André Brantz
Jonathan Chaplan
Valérie Chénard

For the respondents:

Saskatchewan Wheat Pool Inc.
6362681 Canada Ltd. and
6362699 Canada Ltd.

Peter Bergbusch
Glen Lekach

James Richardson International Limited

Adam F. Fanaki
Robert Russell