

THE COMPETITION TRIBUNAL

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

IN THE MATTER OF an Application by United Grain Growers Limited under section 106 of the *Competition Act*;

AND IN THE MATTER OF the acquisition by United Grain Growers Limited of Agricore Cooperative Ltd., a company engaged in the grain handling business.

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT CT-2002-001 October 24, 2005 Public version of 0128a Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	#0128d

THE COMMISSIONER OF COMPETITION

Applicant

~~and~~

UNITED GRAIN GROWERS LIMITED

Respondent

COMMISSIONER'S RESPONDING MEMORANDUM OF ARGUMENT:
 APPLICANT'S MOTION FOR INTERIM RELIEF

1. This is the Commissioner of Competition's ("Commissioner's") Response to United Grain Growers Limited's ("Agricore United's") motion for interim relief, filed with the Tribunal on August 12, 2005.
2. With its motion Agricore United seeks, among other things, the Tribunal's approval, under paragraph 49 of the consent agreement between the Commissioner and Agricore United dated October 17, 2002 (the "Consent Agreement" or the "Agreement"), to extend the Port Terminal Initial Sale Period ("Port Terminal ISP" or "ISP") from 12:00 noon (Winnipeg time) on August 15, 2005 to a date after the final disposition of Agricore United's s. 106 application.

Summary of Commissioner's Position

3. Agricore United has brought its motion under paragraph 49 of the Consent Agreement. That paragraph permits Agricore United to seek the approval of the Tribunal in circumstances where the Commissioner's approval has been sought, but not provided. The Consent Agreement does not make provision for the Commissioner to "approve" an extension of time periods provided for in the Agreement. With regard to extensions, the Consent Agreement provides that time periods may be extended by "by way of mutual agreement". On that basis, the Commissioner submits that the Consent Agreement does not provide Agricore United with the ability to seek the Tribunal's approval to extend the Port Terminal ISP.
4. Agricore United also seeks to impugn the Commissioner's failure to agree to an extension as unreasonable, unfair and not in good faith. The Commissioner submits that Agricore United's position in this regard is patently wrong. The Commissioner submits that the evidentiary record demonstrates that the Commissioner acted reasonably, fairly and with good faith in not agreeing to extend the Port Terminal ISP. In the Commissioner's submission, in all of the circumstances, it would have been unreasonable for the Commissioner to further extend the ISP.
5. This Response is divided into the following three parts:
 - I. Facts;
 - II. The Consent Agreement does not enable Agricore United to bring its interim motion; and
 - III. Extension of the Port Terminal ISP and good faith.

I. FACTS

6. On January 2, 2002, the Commissioner filed an application pursuant to section 92 of the Act alleging that United Grains Growers Limited's acquisition of Agricore Cooperative Ltd. on November 1, 2001 was likely to prevent or lessen competition substantially in the market for port terminal grain handling services in the Port of Vancouver. With his application, the Commissioner sought an order directing the divestiture of certain assets to remedy the SLC.
7. On September 10, the Tribunal convened a hearing, further to a Joint Submission of the Commissioner and Agricore United, requesting certain findings and determinations pursuant to section 92 of the Act. At that hearing the Tribunal heard the expert testimony of Dr. William Wilson and the evidence of David Ouellet, a senior competition law officer at the Competition Bureau who was involved with the investigation of the case.
8. In Findings and Determinations dated September 12, 2002, the Tribunal stated that, based on the evidentiary record before it, it should make certain findings. Among the findings made by the Tribunal was that United Grains Growers Limited's acquisition of Agricore Cooperative Ltd. "causes an SLC as alleged by the Commissioner, and for the purposes of this proceeding, not contested by the Respondent, without the need for further evidence to establish an SLC or elements of an SLC."
9. On October 17, 2002, the Commissioner and Agricore United filed a Consent Agreement with the Tribunal pursuant to which Agricore United was required to divest either the UGG Terminal or the PEL Terminal at the Port of Vancouver. The Port Terminal ISP is defined in the Consent Agreement as the period between the closing date and October 31, 2004.
10. The Consent Agreement provides that if the Port Terminal is not sold during the ISP, a

Trustee will be appointed to sell the Port Terminal selected by Agricore United at the price and on the terms and conditions most favourable to Agricore United then reasonably available [CONFIDENTIAL].

11. Paragraph 48 of the Agreement allows the Commissioner and Agricore United, by way of mutual agreement, to extend time periods contained within the Consent Agreement. [CONFIDENTIAL].
12. The Port Terminal was not sold by October 31, 2004. Rather, Agricore United repeatedly requested extensions, which were agreed to by the Commissioner [CONFIDENTIAL]. By August 10, 2005, when counsel for the Commissioner indicated that the Commissioner was not prepared to agree to yet another extension, there had been at least 10 extensions, totalling 10 ½ months, added to what was already a lengthy ISP of over two years. By August 15, 2005, approximately 34 months of opportunity to sell the Port Terminal had passed.
13. The history of the extensions demonstrates that Agricore United has repeatedly claimed to be close to completing a deal each time the ISP was about to end. This can be seen as follows.
14. On October 27, 2004, four days before the deadline of the ISP, Agricore United [CONFIDENTIAL] regarding the sale of the Agricore United terminal. The indication was that the deal would close on January 14, 2004. The Commissioner agreed to an extension of 14 days, [CONFIDENTIAL]
15. On January 12, 2005, two days before the end of the new ISP termination date, Agricore United provided the Commissioner with an asset purchase agreement dated January 7, 2005, signed by both Agricore United and [CONFIDENTIAL]. The letter to Commissioner's counsel indicated, among other things, that what remained to be

finalized were financing of the transaction and board approval which were expected to be completed within the following two or three weeks. The letter also confirmed that Agricore United had agreed not to deal with any other entity regarding the sale of the Agricore United terminal prior to January 28, 2005. The Commissioner instructed the Trustee the trustee sale period would not commence as there was a possibility that Agricore United would be able to sell the terminal.

16. Although a sale had not been effected between Agricore United and [CONFIDENTIAL] by January 31, 2004, the Commissioner instructed the Trustee to “hold off” as there was still a possibility of a sale.
17. On February 28, 2005, Agricore United contacted the Commissioner to indicate that the deal with [CONFIDENTIAL] was very close to being finalized and that Agricore United expected that such a divestiture could be completed by March 18, 2005. The Commissioner subsequently agreed to a one week extension of the ISP to March 18, 2005.
18. On March 15, 2005, three days before the then expiration date of the ISP, Agricore United indicated that the [CONFIDENTIAL] deal would not be completed by the end of the week and that [CONFIDENTIAL] with money and a willingness to meet a tight time line were interested in buying the Agricore United terminal. This was [CONFIDENTIAL] the purpose of acquiring the UGG terminal in Vancouver.
19. Further extensions to March 18, 2005, March 31, 2005 and April 5, 2005 were agreed to in order to allow Agricore United to reach an agreement of sale for the Agricore United terminal with [CONFIDENTIAL] .
20. The agreement was not in place by April 5, 2005 and a further extension was sought and agreed to, this time to April 27, 2005, again for the purpose of entering into an agreement

with [CONFIDENTIAL] .

21. Eventually a conditional agreement was entered into between Agricore United and [CONFIDENTIAL] with the latest closing date being August 1, 2005. The Commissioner effectively agreed to continue the ISP, by allowing Agricore United to continue its efforts to sell, rather than commencing the sale by the Trustee during this period.
22. On July 18, having been told that the conditions of the agreement between Agricore United and [CONFIDENTIAL] could not be met by August 1, 2005, but would likely be met soon after, the Commissioner agreed to yet another extension of the ISP, to August 15, 2005.
23. On August 10, 2005, having received a further request for an agreement to another extension to August 29, 2005, the Commissioner refused to agree to the extension. The request for the extension to August 29, 2005 was based on a number of contingencies occurring within the two weeks following August 15, 2005 all of which would have to occur for a final agreement to be in place by August 29.
24. On August 11, 2005, Agricore United filed its application under section 106 to the effect that it should not be required to divest a Port Terminal, and this motion to extend the ISP.

II. The Consent Agreement does not enable Agricore United to bring its interim motion

i. The Consent Agreement Process

25. On June 21, 2002 the *Competition Act* (the “Act”) was amended so as to create a new consent agreement scheme.

26. Prior to the amendment of the Act, where parties arrived at a settlement in respect of a matter under Part VIII of the Act, to obtain a consent order, they were required to file a notice of application; a consent order impact statement; a draft consent order; and a consent form signed by the parties. While s. 105 of the Act provided that the Tribunal was not required to hear such detailed evidence as it would ordinarily hear in respect of a contested application, it nonetheless had to be satisfied that the terms and conditions of the parties' agreement were adequate to eliminate the substantial lessening of competition ("SLC").

Former s. 105 *Competition Act*, former s. 77 *Competition Tribunal Rules*

Rona Inc. et La Commissaire de la Concurrence et Ernst & Young Orenda Finance Inc.
("Rona") 2005, Trib Concurr 18, at 72-73.

27. Under the "new" consent scheme, parties may now simply file their consent agreements for registration with the Tribunal. Upon registration, consent agreements have the same force and effect as if they were orders of the Tribunal.

Competition Act, s. 105
Rona, *supra* at para 74

28. As noted by the Tribunal in *Rona*, with the new scheme, Parliament sought to give parties greater flexibility in negotiating consent agreements as a means of expeditiously resolving matters. Consent agreements are the products of the parties' negotiations and, ultimately, reflect the parties' wishes regarding the resolution in a given case.

Rona, *supra* at paras 77 and 86

ii. The Consent Agreement Between the Commissioner and Agricore United

29. As noted above, on September 12, 2002, the Tribunal found that the merger between

United Grain Growers Limited and Agricore Cooperative Ltd. was likely to result in an SLC in the provision of port terminal grain handling services at Vancouver. The Consent Agreement was subsequently entered into by the parties to resolve the issue of remedy. The resolution agreed to by the parties was the divestiture, at Agricore United's option, of either the UGG Terminal or Agricore United's interest in the Pacific Terminal (the "Pacific Terminal").

Consent Agreement, para 3 and Confidential Schedule "A"

30. The Consent Agreement established a process by which the divestiture would be implemented, either by Agricore United during the Port Terminal ISP or a trustee (paras 5-33, 45, 46 and Confidential Schedules "A" and "B"). It also created certain obligations governing Agricore United's conduct in the period prior to the implementation of a divestiture (paras 34-44).
31. In addition, the Consent Agreement contains certain "general" provisions (paras 48-53), three of which are relevant to the disposition of Agricore United's motion. These provisions are set out below.
32. The Commissioner submits that the Consent Agreement is the manifestation of the Commissioner's and Agricore United's wishes. In considering Agricore United's motion for interim relief, the Commissioner submits that the Tribunal must do so in view of those wishes. The Commissioner submits that in respect of the matters at issue in Agricore United's motion, the Consent Agreement is clear and unambiguous.

Bauer v. Bank of Montreal (1980), 110 D.L.R. (3d) 600;

Carman Construction Ltd. V. Canadian Pacific Railway Co. (1982), 136 D.L.R. (3d) 193

33. The Commissioner submits that paragraph 50 of the Consent Agreement is instructive. It provides as follows:

50. This Agreement constitutes the entire agreement between the Commissioner and Agricore United with respect to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral. Registration of this Agreement, in accordance with section 105 of the Act, terminates the Interim Consent Order.

34. With its motion, Agricore United seeks the Tribunal's "approval" pursuant to paragraph 49 of the Consent Agreement to an extension of the Port Terminal ISP. The Commissioner respectfully submits that the Consent Agreement does not provide Agricore United with the ability or right to seek that approval.
35. As set out in greater detail below, the Consent Agreement provides that with respect to various matters, Agricore United must seek and obtain the Commissioner's "approval". The Agreement expressly provides that, in respect of those matters, if the Commissioner's approval is not granted, Agricore United "may apply to the Tribunal for approval". However, the Consent Agreement does not make provision for the Commissioner to "approve" the extension of time periods. In respect of that matter, the parties agreed to a different approach; that is, that the parties may, "by way of mutual agreement" extend any such periods. Given that fact, the Commissioner submits that the Consent Agreement simply does not provide Agricore United with the ability to seek the Tribunal's approval to extend the Port Terminal ISP.

Approvals under the Consent Agreement

36. There are four provisions in the Consent Agreement which provide for the Commissioner's approval. They are as follows:

1(k)"Divestiture" means the sale, transfer, assignment, redemption or other disposition (including, **with the approval of the Commissioner**, an asset swap arrangement), necessary to ensure that Agricore United does not retain, directly or indirectly, except as permitted herein or upon the consent of the Commissioner, any right, title, control, interest, liability or obligation in respect of any of the assets to be Divested inconsistent with the intent of this Agreement, other than obligations in respect of any representations, warranties and covenants included in any agreement between Agricore United and the Purchaser of the relevant Port Terminal as permitted by this Agreement;

26. The implementation of a Port Terminal Divestiture Option is **subject to the approval of the Commissioner** in writing, which shall be based on the criteria outlined in paragraph 5 of this Agreement and shall be obtained in accordance with the notification procedure set out in paragraphs 28 to 31 of this Agreement.

27. The Commissioner may, in addition to the criteria set out in paragraph 5 of this Agreement, also take into account the likely impact of the Divestiture on competition in that market in deciding whether or not to **approve** the Divestiture.

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. [emphasis added]

Consent Agreement paras 1(k), 26, 27 and 36

37. It is submitted that the common thread running through each of the “approval” paragraphs is that they all relate specifically to matters pertaining to remedying the SLC. These approvals go to the *substance* of the remedy. In contrast, the provision relating to the extension of time pertains to the *process* by which a divestiture will be effected.

38. Agricore United has brought its motion for interim relief under paragraph 49 of the Consent Agreement. It provides as follows:

49. If the Commissioner’s approval is sought pursuant to this Agreement and such approval is not granted, or if a decision of the Commissioner is unreasonably delayed or withheld, Agricore United may apply to the Competition Tribunal for approval.

39. The Consent Agreement represents the fruits of the negotiation between Agricore United and the Commissioner. Agricore United secured the right under the terms of the Consent Agreement to seek the Tribunal’s approval where the Commissioner refused, delayed or withheld her approval. If, for example, the Commissioner withheld her approval of a purchaser and Agricore United sought to exercise that right of application to the Tribunal under paragraph 49, the Commissioner could make no objection.

40. It is submitted that the word *approval* is used in the Consent Agreement in a very particular manner and its use in the Agreement results in the right to apply to the Tribunal only in certain defined circumstances. Where those circumstances do not exist, Agricore United cannot seek relief from the Tribunal.

Extending Time Periods under the Consent Agreement

41. With respect to the extension of time periods under the Consent Agreement, the parties wishes are expressed in paragraph 48 of the Agreement. It provides that, “The Commissioner and Agricore United may, by way of mutual agreement, extend any of the time periods applicable herein.” The word *approval* is not used with respect to extension of time periods. In this way, the Consent Agreement provides Agricore United with the ability to seek recourse to the Tribunal in respect of certain issues (such as approval of a purchaser), which it does not bestow in respect of other matters (such as extension of time periods).
42. Whereas by operation of, for example, paragraphs 26 and 49 of the Consent Agreement, Agricore United *does* have the right to seek the Tribunal’s approval with respect to the implementation of a Port Terminal Divestiture Option, it does not have that same right with respect to the extension of time periods under paragraph 48. Paragraph 48 simply does not provide for the approval of the Commissioner. Consequently, Agricore United does not have the right to seek recourse to the Tribunal under paragraph 49 of the Consent Agreement.
43. The Commissioner respectfully submits that to read the right to seek the Commissioner’s approval for the extension into paragraph 48 and then, on that basis, permit Agricore United to bring its motion under paragraph 49 of the Consent Agreement, would be no less than to re-write the bargain struck by the parties and depart from their wishes as

manifested in the Consent Agreement. It is respectfully submitted that such a decision would be contrary to the Tribunal's decision in *Rona*.

44. In addition to the foregoing, the Commissioner submits that it is noteworthy that in the "Grounds for Motion" section of its Notice of Motion, nowhere does Agricore United refer to the Commissioner's "approval" to an extension being sought or withheld.

Agricore United states that:

4. on August 9, the Applicant requested that the Commissioner extend the Port Terminal Initial Sale Period pursuant to paragraph 48 of the Consent Agreement ...;
5. on August 10, 2005, the Commissioner's counsel indicated that the Commissioner would not agree to any further extension of the Port Terminal Initial Sale Period beyond 12:00 noon (Winnipeg time) on August 15, 2005;
7. on August 11, 2005, the Applicant requested, pursuant to paragraph 48 of the Consent Agreement, that the Commissioner agree to extend the Port Terminal Initial Sale Period pending disposition of the Section 106 Application;
8. the Commissioner has not provided the requested consent or agreement;
9. in the circumstances the Commissioner has unreasonably withheld her agreement to the requested extension.

45. The Commissioner submits that the word "approval" does not appear in Agricore United's grounds because the Commissioner's approval was never sought (and could not have been sought). A review of the course of communications between the parties confirms this fact. Agricore United clearly understood the extension process that it had agreed to and was acting in accordance with that process.

Ouellet Affidavit

46. The Commissioner respectfully submits that because Agricore United lacks the ability to bring its motion for interim relief under the Consent Agreement, its motion for interim relief should be dismissed with costs.

II. Extension of the Port Terminal ISP and Good Faith

47. If the Tribunal concludes that Agricore United has the right to bring its motion under paragraph 49, which is not admitted, the Commissioner submits that the Tribunal should nonetheless dismiss Agricore United’s motion for interim relief.

i. Agricore United’s Position

48. Agricore United submits that “the Commissioner acted unreasonably, unfairly and contrary to her obligations when she withheld her consent to the request to extend the Port Terminal ISP pending the determination of the ISP.”

Agricore United, Memorandum of Argument, para 51

49. Agricore United also submits that “the Commissioner has a common law duty to act reasonably, fairly and in good faith in making any decision or exercising authority under the Consent Agreement or in response to the Section 106 Application. Agricore United maintains that, “This duty includes the obligation to not act in a way that eviscerates or defeats the very objectives of the Consent Agreement.”

Agricore United, Memorandum of Argument, para 50

50. Finally, Agricore United submits that, “The considerable merits of Agricore United’s Section 106 application should be considered when assessing this motion for interim relief. The facts set out in the SGMF clearly satisfy the test for rescinding a consent agreement established recently by the Tribunal in [*Rona*].”

Agricore United, Memorandum of Argument, para 52

ii. Commissioner's Response

51. Addressing these arguments in turn, the Commissioner submits that:

- in not agreeing to an extension to the Port Terminal ISP, the Commissioner acted in a way which is both consistent with the Consent Agreement and which is fair and reasonable;
- the authorities cited by Agricore United in support of its argument regarding the Commissioner's alleged duties are of little assistance; and
- the merits of Agricore United's s. 106 application played no part (and could have played no part) in the Commissioner's decision not to agree to an extension.

The Commissioner's Decision not to Extend

52. The Commissioner is appointed pursuant to s. 7 of the Act and is responsible for, among other things, the administration and enforcement of the Act.

53. In discharging her duties under the Act, the Commissioner is bound to act in the public interest. Moreover, as found by the Tribunal in *Canada Pipe*, there is a presumption that the Commissioner acts in good faith.

Canada Pipe, 29 C.P.R. (4th) 530 at 61.

54. It is submitted that credible and compelling evidence of substantial wrong-doing or impropriety on the part of the Commissioner must be adduced and accepted by the Tribunal before that presumption can be unseated. The Commissioner submits that no such evidence has been adduced by Agricore United in this case.

55. To the contrary, the Commissioner submits that the record demonstrates that the Commissioner went to great lengths to accommodate Agricore United's attempts to sell the UGG Terminal. The refusal to agree to an extension to the Port Terminal ISP, yet again, must be viewed in the context of the numerous extensions that had earlier been agreed to. It must be recalled that the Commissioner had already agreed to extend that period 10 times over the period from October 31, 2004 to August 15, 2005 .

Ouellet Affidavit

56. Those extensions were agreed to on the basis of repeated representations by Agricore United to the Commissioner that it was on the cusp of a deal with several different purchasers – that it only needed a few more days or weeks. Notwithstanding those representations, none of the deals ever came to fruition. Even the sale to T1, which Agricore United indicated in its letter of August 9, 2005 would require only two more weeks to finalize, has not come to fruition, notwithstanding the fact some four weeks have elapsed since that date.

Ouellet Affidavit, para 57

57. The Consent Agreement provides for a divestiture of one of the Agricore United Terminals. In the nearly three years that Agricore United has had to implement a divestiture, it has not done so.
58. The Consent Agreement provides that, in the event Agricore United is unable to implement a divestiture during the Port Terminal ISP, a trustee will be appointed. It states:

The Trustee shall implement a Port terminal Divestiture Option at the price and on the terms and conditions most favourable to Agricore United then reasonably available,

[CONFIDENTIAL]

[CONFIDENTIAL]

59. Whether a trustee would be able to implement a divestiture is a matter of pure speculation. The Consent Agreement provides for that eventuality. It states that, once the Trustee is appointed, they will have [CONFIDENTIAL] to complete a divestiture. [CONFIDENTIAL].
60. It is submitted that by refusing to further extend the Port Terminal ISP, the Commissioner was giving effect to the terms of the Consent Agreement. For the Commissioner to continue to agree to extensions in the face of the evidence that, notwithstanding Agricore United's repeated representation to the contrary, it was not going to be successful in implementing a divestiture, would have been to frustrate the objects of the Consent Agreement. By refusing to agree to an extension, the Commissioner sought to bring an end to the Port Terminal ISP, have a trustee appointed and effect a divestiture. This is the process provided for in the Consent Agreement and agreed to by Agricore United.
61. It is further submitted that, in considering the Commissioner's actions, it is important to recall that this is not a dispute between two private litigants, where only the interests of the parties to the litigation are at play. As stated above, the Commissioner is appointed under s. 7 of the Act and is bound to act in the public interest. It is not only the interests of Agricore United that are at stake in this matter. The interests of farmers, independent grain companies, as well as the public interest generally, are all at stake. On September 12, 2002, the Tribunal made an SLC finding in this matter in respect of the provision of port terminal grain handling services at Vancouver.
62. It is submitted that in view of the interests at stake, the Tribunal's SLC finding, the time that Agricore United has had to divest a terminal and the repeated extensions already agreed to by the Commissioner, it would have been unreasonable for the Commissioner

to agree to a further extension.

Authorities Cited by Agricore United

63. In support of its argument that the Commissioner has a common law duty to act reasonably, fairly and in good faith, Agricore United cites several authorities. The Commissioner submits that they do not assist Agricore United.
64. The Commissioner notes that all of the cases deal with commercial disputes between private parties. None involve the exercise of discretion by a public office holder, whether under a contract or otherwise.
65. In terms of a contractual duty to act in good faith, the learned paper cited by Agricore United at paragraph 50 of its Memorandum, which refers to each of the cases cited by Agricore United, concludes that such a duty does not exist in Canadian law. In the Conclusion section of the paper, Professor McCamus states as follows:

One of the principal objects of this article has been to attempt to discern the current mood of the Canadian common law judiciary with respect to the recognition of a generalized duty of good faith performance in contract law. As the analysis in the third and fourth sections of this article suggests, it would be premature to announce the occurrence of this – much anticipated in some quarters – event. Although it is fair to suggest that there is some movement in the direction of recognition evident in the case law, the speed of that movement, though not merely glacial, is considerably short of lightning fast. In particular, there is little or no evidence of a willingness on the part of the Supreme Court of Canada to embrace the doctrine, in a generalized form at least, at the present time.

Abuse of Discretion, Failure to Co-operate and Evasion of Duty, McCamus J. at 100

66. In terms of the an express duty to act reasonably and fairly in the discharge of one's contractual obligations, the decision in *Gateway*, the Honourable Kelly J. stated as follows:

The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. "Good faith" conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in "bad faith" - a conduct that is contrary to community standards of honesty, reasonableness or fairness.

Gateway, [1991] N.S.J. No. 362 Nova Scotia Supreme Court - Trial Division at 191.

67. Kelly J., after a thorough review of the evidence, concluded that the defendants had acted in "bad faith". He found that they did not want to sub-lease the shopping centre space to a department store because they did not want the competition for a shopping mall they owned. He further held that the defendants' best efforts to find new tenants were so insignificant as to constitute bad faith.
68. Courts have defined bad faith in a commercial context as "dishonesty, ill will, improper motive or other intentional conduct which is equivalent to fraud." [*Zurich, Crawford*]; failing to meet "objective legitimate expectations and community standards of honesty, reasonableness and fairness"[*TSP*]; and "when one party, without reasonable justification, acts in relation to the contracts in a manner where the result would be to substantially nullify the bargained objective or benefit contracted for by the other, or to cause significant harm to the other, contrary to the original purpose and expectation of the parties [*Gateway*]. The Commissioner's actions clearly do not meet this test. To the contrary, the Commissioner has consistently acted reasonably, fairly and in the utmost good faith. The clearest indicator of this is the 10 extensions she has granted Agricore. As discussed above, the Commissioner did not agree to a further extension because to do so would frustrate the objects of the agreement and be contrary to the public interest.

Zurich Insurance Co. v. Modern Marine Industries Ltd., [1993] N.J. No. 264 (QL) ("*Zurich*");
Crawford v. New Brunswick (Agricultural Development Board) [1997] N.B.J. No. 7 ("*Crawford*");
TSP-Intl Limited et al. v. Mills et al [2005] O.J. No. 616 ("*TSP*");
Granite Tile Inc. v. Canada [1998] O.J. No.5028 ("*Granite Tile*");
Gateway Realty v. Arton Holdings Ltd. & LeHave Development Ltd., 106 N.S.R. (2d) 180.

iii. The Merits of Agricore United's s. 106 Application and the Commissioner's Decision not to Agree to an Extension

69. As noted above, Agricore United submits that, the “considerable merits” of its s. 106 application should be considered when assessing its motion for interim relief. The Commissioner submits that it is important to recall the sequence of events surrounding the Commissioner's refusal and the filing of Agricore United's s. 106 Application. That sequence is set out above.

70. It is submitted, with respect, that Agricore United's motion is ill-conceived. With its motion, Agricore United seeks to impugn the Commissioner's refusal to agree to an extension on August 10 and 11. It then asks the Tribunal to consider the merits of its s. 106 application as a basis for why the motion should be granted. That application was served on the Commissioner on August 12, after the Commissioner had made and communicated her decision that she would not agree to a further extension.

71. More fundamentally, the fact that the Commissioner did not agree to an extension is not dispositive of Agricore United's rights in terms of a sale of the UGG Terminal. It is true that the end of the Port Terminal ISP would necessarily result in the appointment of a trustee. Whether a sale of the UGG Terminal would then follow and, if so, in what time frame, is not clear. However, it is submitted that what is important is that the appointment of a trustee in no way would preclude Agricore United from pursuing its s. 106 application. Moreover, if a trustee were to be appointed and the trustee were to come forward with a proposed sale while the s. 106 proceeding is extant, Agricore United would receive notice of the proposed sale under paragraph 28 of the Consent Agreement and could, if it saw fit, pursue such remedies as it considered necessary to protect its interests.

72. For all of the foregoing reasons, the Commissioner submits that Agricore United's

motion for interim relief should be dismissed with costs.

RELIEF SOUGHT

FOR ALL OF THE ABOVE REASONS, the Commissioner requests as follows:

- (a) that Agricore United's motion be dismissed;
- (b) the costs of this motion; and
- (c) such other relief as this Honourable Tribunal may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Gatineau, Quebec, September 9th, 2005.

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