



Reference: *United Grain Growers Limited v. The Commissioner of Competition* 2005  
Comp. Trib. 36  
File No. CT-2002-001  
Registry Document No.: 0143

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

AND 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;

AND IN THE MATTER OF a request under section 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19, as amended, for leave to intervene.

B E T W E E N

**United Grain Growers Limited**  
(applicant)

and

**The Commissioner of Competition**  
(respondent)

and

**Mission Terminal Inc.**  
(applicant for leave to intervene)



Decided on the basis of the written record.  
Presiding Judicial Member: Simpson J. (Chairperson)  
Date of Order: November 4, 2005  
Order signed by: Madam Justice Sandra J. Simpson

**REASONS AND ORDER GRANTING REQUEST FOR LEAVE TO INTERVENE**

[1] On September 26<sup>th</sup>, 2005, Mission Terminal Inc. ("Mission") filed a request for leave to intervene in the proceedings before the Tribunal involving Agricore United ("AU") and the Commissioner of Competition (the "Commissioner").

## **BACKGROUND**

[2] On November 1, 2001, United Grain Growers Limited ("UGG") acquired Agricore Cooperative Limited ("Agricore"). Since the closing of the acquisition, UGG and Agricore have been carrying on business as Agricore United.

[3] On January 2, 2002, the Commissioner of Competition (the "Commissioner") filed an application with the Competition Tribunal (the "Tribunal") alleging that the acquisition of Agricore by UGG would likely prevent or lessen competition substantially in the market for the provision of port terminal grain handling services in the Port of Vancouver (the "Merger Case").

[4] On September 12, 2002, the Tribunal made a finding that the acquisition caused a substantial lessening of competition as alleged by the Commissioner; this allegation was not contested by UGG for the purposes of the proceeding before the Tribunal. On October 17, 2002, the Commissioner and AU registered a consent agreement (the "Consent Agreement") whereby AU was to divest either the UGG Terminal or its interest in the Pacific Complex, another Port Terminal in Vancouver (the "Port Terminals").

[5] AU subsequently decided to divest the UGG Terminal (the "Terminal"). The Consent Agreement provided that if the Terminal was not divested by a certain date (the "Date"), a Trustee would be appointed to sell the Terminal.

[6] The Date was extended eleven times until it became August 15, 2005. When AU sought a twelfth extension, the Commissioner refused. AU then applied to the Tribunal (the "Application"), under subsection 106(1) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), for an order rescinding the Consent Agreement, on the grounds that circumstances have changed and that divestiture of the Terminal is no longer feasible.

[7] AU's main allegation involves the dwindling supply of independent grain. Because of it, the prospects of an effective divestiture are much diminished. Moreover, the reduced volume of uncommitted independent grain demonstrates that the divestiture is no longer needed, as independent grain companies have been able, apparently, to secure port terminal grain handling services at the Port of Vancouver at competitive rates.

[8] The Commissioner opposes the application, mainly on the grounds that the circumstances leading to the signing of the Consent Agreement have not changed: the Commissioner is still concerned with the SLC in the port terminal grain handling services in the Port of Vancouver flowing from the merger of United Grain Growers and Agricore. The Commissioner also submits that the levels of uncommitted grain have not substantially changed since the signing of the Consent Agreement.

## **MISSION'S REQUEST FOR LEAVE TO INTERVENE**

- [9] Mission is a corporation incorporated under the *Canada Business Corporations Act*, R.S., 1985, c. C-44. It owns and operates a grain handling terminal in Thunder Bay, Ontario, and carries on business as a non-integrated port terminal grain handling operator.
- [10] Mission claims that in reliance on the Consent Agreement, it has invested considerable time and money investigating the feasibility of purchasing and operating one of the Port Terminals. Mission claims to be ready, willing and able to purchase one of the Port Terminals, and submits that both AU and the Commissioner are fully aware of the steps which have been taken in that regard.
- [11] Mission submits that as a prospective purchaser of a Port Terminal in the context of the divestiture contemplated in the Consent Agreement, it is directly affected by the Application. Mission also submits that as an Independent Port Terminal Operator and as a potential competitor in the Port of Vancouver, and having completed an extensive analysis of a purchase of a Port Terminal, it has a unique perspective on the issue raised by AU as to the business viability of operating an independent port terminal in the Port of Vancouver. Subject to confidentiality considerations, Mission proposes to adduce evidence regarding the commercial viability of an independent grain handling terminal in the Port of Vancouver.
- [12] AU opposes the request to intervene, arguing that Mission has failed to establish that it has relevant submissions to make on the Application which are unique or distinct from the position of the Commissioner. Moreover, AU submits that Mission cannot speak to the intention of AU or of the Commissioner in signing the Consent Agreement, so that Mission cannot contribute to answering the question at issue in the Application – whether in the new circumstances, the parties would have signed the Consent Agreement.
- [13] If leave is granted, AU submits that it should be granted only for attendance and submissions, as provided in section 32 of the *Competition Tribunal Rules*, SOR/94-290 (the "Tribunal Rules").
- [14] The test for an intervention has been stated by Justice McKeown, then Chairman of the Tribunal. See *The Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp. Trib. 20. The test is comprised of four conditions: (a) the matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate; (b) the person seeking leave to intervene must be directly affected; (c) all representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the applicant; (d) finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it.

[15] Given AU's allegations about the significantly reduced volume of uncommitted grain shipped through the Port of Vancouver, and Mission's statement that the independent operation of a Port Terminal could be a viable business proposition, the Tribunal believes that Mission, as a prospective buyer, does have a unique perspective on the alleged change of circumstances which lie at the heart of the Application. The matter of the viability of the divestiture is certainly within the scope of the Application, since it has been raised by the applicant as the basis of the change in circumstances. As well, Mission is directly affected by the decision to maintain or rescind the Consent Agreement, since its proposed purchase of a Port Terminal is contingent on the divestiture.

[16] The Tribunal believes that for an effective intervention, Mission needs to do more than simply appear before the Tribunal and make submissions.

**FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:**

[17] Mission Terminal Inc. is granted leave to intervene on the following substantive issues in this Application:

Whether the circumstances that led to the making of the agreement have changed and whether, in the circumstances that exist at the time the application is made, the agreement would not have been made or would have been ineffective in achieving its intended purpose.

[18] In the course of its intervention, Mission may

[i] review any cross-examination transcripts and, subject to confidentiality orders, access any documents produced by parties to the Application, on written request;

[ii] call *viva voce* evidence if Mission provides: (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 Commissioner has been asked to adduce such evidence and has refused;

[iii] cross-examine witnesses at the hearing of the Application to the extent that it is not repetitive of the cross-examinations of the parties to the Application;

[iv] submit legal arguments, at the hearing of the Application and at any pre-hearing motions or case management conferences, that are non-repetitive in nature;

[v] 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.

DATED at Ottawa this 4<sup>th</sup> day of November, 2005.

SIGNED on behalf of the Tribunal by the Chairperson of the Tribunal.

(s) Sandra J. Simpson

COUNSEL

For Agricore United:

Mr. Kent Thomson

Ms. Sandra Forbes

For Mission Terminal Inc.:

Mr. Jeffrey S. Leon

Mr. C. William Hourigan