

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 for an Order pursuant to section 92 of the *Competition Act*;

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;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

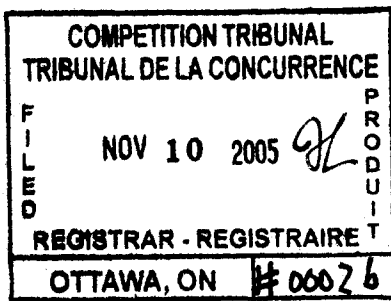
- AND -

SASKATCHEWAN WHEAT POOL INC.,

JAMES RICHARDSON INTERNATIONAL LIMITED,

6362681 CANADA LTD. AND 6362699 CANADA LTD.

Respondents



MEMORANDUM OF ARGUMENT

Interim Relief

Introduction

1. This is an application by the Commissioner of Competition (the "Commissioner"), for an Interim Order under s. 104 of the *Competition Act* (the "Act") requiring that the marketing of the Respondents' Vancouver port grain terminal services be held separately from each

other and from the JV operator and management, by prohibiting joint marketing of the Parties' Vancouver port grain terminals to non-integrated grain companies (the "Non-Integrated Graincos") (meaning a grain company which may own a primary elevator but does not own a port terminal on the Canadian west coast) pending determination of the Commissioner's application for an order pursuant to section 92 of the *Act* (the "Application"). The interim order is needed to preserve the Competition Tribunal's (the "Tribunal") ability to remedy the substantial lessening or prevention of competition which the Commissioner alleges will likely occur if the Respondents are permitted to continue their joint operations.

Facts

2. On April 6, 2005, SWP and JRI, together with their Affiliates, 6362681 Canada Ltd. and 6362699 Canada Ltd. (collectively, the "Parties") entered into a series of agreements setting out the terms and conditions under which a proposed joint venture (the "proposed JV") relating to the operation and marketing of their two Vancouver port grain terminals was to operate.

*Affidavit of Denis Corriveau sworn November, 2005 ("Corriveau Affidavit"),
paras. 4-5.*

3. On July 5, 2005, the Commissioner filed a Consent Interim Agreement with the Tribunal under s. 105 of the *Act* seeking to hold separate the marketing of the Parties' respective port terminal grain handling services to Non-Integrated Graincos (the "Consent Interim

Agreement”), until such time the Commissioner has completed her inquiry in respect of the proposed JV.

Consent Interim Agreement CT-2005-008

4. The Consent Interim Agreement has been extended three times. The initial agreement was to expire on September 3, 2005. Shortly before that date the Commissioner’s representatives and representatives of SWP and JRI agreed to extend the agreement. This agreement was to expire on September 16, 2005 unless the Commissioner advised the Parties of her intention to file an application under section 92 of the *Act*, in which case the Hold Separate would expire on September 26. On September the Commissioner advised the Parties, through counsel, of her intention to file an application under section 92 of the *Act*.

Corriveau Affidavit, para.10.

5. On September 26, 2005, the Parties and the Commissioner again extended the Consent Agreement, this time to October 17, unless the Commissioner advised she intended to file an application under section 92, in which case the Hold Separate would continue until October 27, 2005.

Corriveau Affidavit, para.11.

6. After being advised of the Commissioner’s intention a third extension to the Hold Separate was entered into which was to October 31, 2005, or if the Commissioner advised

of her intention to file an application under section 92 of the *Act*, to November 10, 2005.

As the Commissioner, through counsel, has advised the Parties of her intention to file an application under section 92 of the *Act* the Hold Separate expires on November 10.

Corriveau Affidavit, para.12.

7. As noted above, the Commissioner has made an Application for an order pursuant to section 92 of the *Act*.
8. The Commissioner believes that the proposed JV of SWP and JRI will likely prevent or lessen competition substantially in the provision of port terminal grain handling services at Canadian west coast ports.

Corriveau Affidavit, para.13.

9. This conclusion is set out in the Competitive Analysis (Part VII) outlined in the Statement of Grounds and Material Facts.

Corriveau Affidavit, para.14.

10. The Commissioner requests that an Interim Order be issued requiring that the marketing of the Parties' Vancouver port terminal services be held separately from each other and from the JV operator and management, by prohibiting joint marketing of the Parties' Vancouver port grain terminals to Non-Integrated Graincos, pending the Tribunal's determination of the Application. The proposed Interim Order provides for a Hold

Separate Monitor who shall be responsible for monitoring the compliance of the Parties with the proposed Interim Order.

11. Richard L.M. Dawson of Fulcrum Associates, has been acting as the Hold Separate Monitor pursuant to the Consent Interim Agreement and extensions thereof. If Mr. Dawson is prepared to continue acting as Hold Separate Monitor we would recommend his appointment. In the case that he is unwilling or unable to act, the choice of Hold Separate Monitor shall be subject to the consent of JRI and SWP, which consent shall not be unreasonably withheld.

Corriveau Affidavit, para.25.

Issues and Law

(A) Statutory Provisions

12. Section 92 of the *Act* provides:

92. (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(a) in a trade, industry or profession,

(b) among the sources from which a trade, industry or profession obtains a product,

(c) among the outlets through which a trade, industry or profession disposes of a product, or

(d) otherwise than as described in paragraphs (a) to (c), the Tribunal may, subject to sections 94 to 96,

(e) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs,
or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

13. Section 104(1) of the *Act* provides:

104. (1) Where an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75 or 77, may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

(B) Interlocutory or Injunctive Relief (Three Part Test)

14. Section 104 of the *Act* empowers the Tribunal to issue an interim order pending the determination of an application under section 92. In exercising this power, the Tribunal must have regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief. The Tribunal must thus consider three issues: (i) whether there is a serious issue, (ii) whether irreparable harm would ensue if the interim relief is not granted, and (iii) where the balance of convenience lies.

Competition Act, R.S.C. 1985, c. C-34, s. 104

Canada (Director of Investigation and Research) v. Superior Propane Inc. Reasons for Order released December 6 th , 1998 at para. 5. (“Superior Propane”)

RJR-MacDonald v. A.G. Canada, [1994] 1 S.C.R. 311 at 334 (“RJR-MacDonald”)

(i) Serious issue

15. It is submitted that the serious issue threshold is a low one. The Supreme Court has held that it is only necessary to determine that “the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried”. The Tribunal has applied this statement of the law to section 104 of the *Act*.

RJR MacDonald, supra, at 335.

Superior Propane, supra, at para. 7

Canada (Director of Investigation and Research) v. Southam Inc. (1991), 36 C.P.R. (3d) 22 (C.T.) at 25 (“Southam”)

16. The Applicant has conducted a thorough review of the proposed JV.

Corriveau Affidavit, para. 6, 7,8, 16.

17. As noted in paragraph 8 above, the Commissioner believes that the proposed JV will likely prevent or lessen competition substantially in the provision of port terminal grain handling services at Canadian west coast ports.

18. It is submitted that the issues raised in the Application are neither frivolous nor vexatious and meet the first part of the test for the issuance of an interim order.

(ii) Irreparable harm

19. “Irreparable harm” refers to the nature of the harm rather than its magnitude. Harm is irreparable if it cannot be compensated for by money or be cured.

RJR-MacDonald, supra, at 340

20. Irreparable harm to competition will likely ensue in the absence of the proposed Interim Order. The likely harm to competition includes the following:
- a. allowing SWP and JRI to share confidential and commercially sensitive information on marketing strategies used to attract to their respective port terminals grain volume from Non-Integrated Graincos;
 - b. enabling SWP and JRI to exchange confidential and commercially sensitive information on diversion premiums that a particular customer received in recent transactions. Each company will know the terms of these transactions and the circumstances that led to the determination of these terms; and
 - c. enabling SWP and JRI to share information relating to private discussions between either of them and the CWB prior to and after the filing of rates for port grain terminal services.

Corriveau Affidavit, para. 21-22

21. The activities described in paragraph 20 would harm competition by distorting the market for grain handling contracts between integrated graincos (meaning a grain company which owns both primary elevators and a port terminal elevator on the west coast) and Non-Integrated Graincos, where two of the principal companies know each others marketing techniques and the amounts of the diversion premiums offered by the other.

This would cause irreparable harm to competition for port terminal grain handling services at the Port of Vancouver.

22. The Commissioner submits that the proposed Interim Order is necessary to protect the Tribunal's ability to dissolve the proposed JV in the event it has proceeded at the port grain terminals and to prevent any other aspects of the proposed JV from proceeding, as a valid remedial option in the event the Commissioner is successful in its Application. As Justice Teitlebaum stated in *Southam*:

[T]he more integrated and coordinated are the operations of the various publishers, the less they are actively competing in their markets.

The futility of attempting to “unscramble the eggs” upon a later finding that the merger will indeed likely lessen competition substantially is apparent. The legislative scheme attempts to guard against this eventuality by, for example, instituting a regime for pre-notification of some mergers and allowing the Director to apply for interim relief under ss. 100 and 104.

Southam, supra, at 26.

(iii) Balance of convenience

23. In determining where the balance of convenience lies, the Tribunal must “balance the equities between the parties” with a view to ensuring that the interim order is “adequate to its purpose but not any more intrusive or restrictive than is absolutely necessary”.

Southam, supra, at 26.

24. The purpose of the interim order is to preserve the Tribunal's ability to remedy the substantial lessening or prevention of competition that the Commissioner believes is

likely to result from the proposed JV. This is in the public interest. Courts and the Tribunal have recognized the importance of the public interest in competition when assessing the balance of convenience.

RJR-MacDonald, supra, at 343-347.

D&B Companies of Canada Ltd. v. Director of Investigation and Research (1994), 58 C.P.R. (3d) 342 (F.C.A.), aff'g C.T. decision, appended, at 352

25. The Commissioner understands, that the Parties claim that the principal purpose of the proposed JV is to enhance efficiencies of their respective port grain terminals at the Port of Vancouver. It is submitted that the proposed Interim Order as requested will not prejudice the Parties' ability to achieve these efficiencies.

(C) Conclusion

26. The Commissioner submits that the terms of the proposed Interim Order are adequate to preserve blocking the proposed JV as a valid remedy. They do so by requiring that the marketing of the Parties' Vancouver port grain terminal services be held separately from each other and from the JV operator and management, by prohibiting joint marketing of the Parties' Vancouver port grain terminals to Non-Integrated Graincos and by appointing an independent Hold Separate Monitor who will be responsible for monitoring the Parties' compliance with the proposed Interim Order.

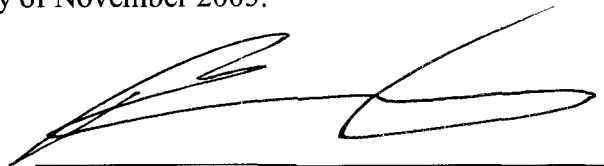
27. The Commissioner submits that the terms of the proposed Interim Order are not any more intrusive or restrictive than is necessary to preserve blocking the proposed JV as an adequate remedy.

Order Requested

28. The Commissioner requests that the Tribunal issue an Interim Order in accordance with the Draft Interim Order attached to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Gatineau, Québec this 10th day of November 2005.



JONATHAN CHAPLAN
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VALÉRIE CHÉNARD
Counsels to the Commissioner of Competition

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Interim Relief

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