

**THE COMPETITION TRIBUNAL**

**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.

**BETWEEN:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  FILED / PRODUIT  October 20, 2005  Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	#0132e

**UNITED GRAIN GROWERS LIMITED**

Applicant

**- and -**

**THE COMMISSIONER OF COMPETITION**

Respondent

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**REPLY OF THE APPLICANT TO THE COMMISSIONER'S RESPONDING  
 MEMORANDUM OF ARGUMENT ON THE MOTION FOR INTERIM RELIEF  
 Re: Section 106 Application**

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1. The Applicant, United Grain Growers Limited ("Agricore United") has made a motion for, among other things, the Tribunal's approval, pursuant to paragraph 49 of the Consent Agreement, of an extension of the Port Terminal Initial Sale Period to a date after the final disposition of Agricore United's Section 106 Application. Unless otherwise expressly defined herein, the terms used below have the respective meanings ascribed to them in the Statement of

Grounds and Material Facts filed by Agricore United in connection with the Section 106 Application (the "SGMF").

2. The Commissioner has filed a Responding Memorandum of Argument (together with the Confidential Affidavit of David Ouellet sworn September 9, 2005 (the "Ouellet Affidavit")) opposing Agricore United's motion on the alternative bases that (a) Agricore United has no right under the Consent Agreement to seek the Tribunal's approval to extend the Port Terminal Initial Sale Period and (b) even assuming that Agricore United does have such a right, in all of the circumstances it would have been unreasonable for the Commissioner to agree to a further extension of the Port Terminal Initial Sale Period. For the reasons set out below, Agricore United submits that the Commissioner's submissions should be rejected.

3. Agricore United also disagrees with several of the allegations made in the Commissioner's Responding Memorandum of Argument and in the Ouellet Affidavit regarding the factual background to this motion. For the reasons given in the Reply Affidavit of Murdoch MacKay sworn September 19, 2005 (the "MacKay Reply Affidavit"), those allegations are without merit and the Commissioner's factual narrative is in many respects inaccurate and misleading. Further, the MacKay Reply Affidavit establishes the following facts which are the appropriate context in which the Tribunal should decide this motion:

- (a) despite very poor and difficult market conditions for the sale of a Port Terminal, Agricore United has made diligent and good faith efforts to divest a Port Terminal since the Consent Agreement was executed in October 2002, including pursuing multiple offers (or potential offers) simultaneously;

- (b) extensions of the Port Terminal Initial Sale Period were always requested for valid and legitimate reasons, frequently as a result of circumstances entirely beyond Agricore United's control and always with the expectation that a divestiture of the UGG Terminal was possible; and
- (c) it is fully consistent with the public interest for the Commissioner or the Tribunal to extend the Port Terminal Initial Sale Period as requested in view of the fact that no Independent Grain Company would be harmed by the extension and commencing the Trustee Sale Period while the Section 106 Application is outstanding will result in needless expense and effort, distraction from the 106 Application itself and, if the Commissioner prevails, potentially a proposed sale by the Trustee resulting from a faulty process in which some prospective purchasers may have chosen not to participate because of the uncertainty concerning the Trustee's authority to make a sale flowing from the Section 106 Application and the issues raised therein.

**(a) Agricore United Has the Right to Seek the Tribunal's Approval to Extend the Port Terminal Initial Sale Period**

4. For the Tribunal's convenience, the key provisions of the Consent Agreement for the purposes of this motion are reproduced immediately below:

**"General**

48. The Commissioner and Agricore United may, by way of mutual agreement, extend any of the time periods applicable herein.

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". [emphasis added]

5. The Commissioner urges the Tribunal to conclude that paragraph 49 of the Consent Agreement does not provide Agricore United with the right or ability to seek the Tribunal's approval to extend the Port Terminal Initial Sale Period. Her interpretation of paragraph 49 rests principally on the following reasoning:

- paragraph 49 refers to and is concerned with "approvals" by the Commissioner;
- unless the words "approval" or "approve" are specifically used to describe the unilateral discretion or decision-making power granted to the Commissioner by the Consent Agreement paragraph 49 does not apply to it. In those instances where the words "approval" or "approve" are not used, the exercise of the Commissioner's power of decision is not reviewable by the Tribunal, regardless of whether it is exercised unreasonably and to the detriment of Agricore United; and
- the word "approval" is not used in paragraph 48 with respect to the extension of time periods. Instead, that provision refers only to "mutual agreement". Accordingly, the Commissioner's withholding of her agreement to extend the Port Terminal Initial Sale Period pending the determination of the Section 106 Application is not reviewable by the Tribunal, notwithstanding its serious consequences for Agricore United, as described in the SGMF and the Applicant's Memorandum of Argument for Interim Relief.

6. The Commissioner's reading of paragraph 49 should be rejected by the Tribunal for the reasons that follow.

7. First, the words "approval" and "approve" do not have one immutable meaning. On the contrary, they are capable of several meanings, including "consent" and "agree to". The *Canadian Oxford Dictionary*, for example, defines "approval" and "approve" as follows:

**"approval** *noun* **1** the act of approving. **2** an instance of this; consent; a favourable opinion (*with your approval; looked at him with approval*)...

**approve** *verb* **1 transitive** confirm; declare acceptable (*approved his application*). **2 intransitive** give or have a favourable opinion. **3 transitive** commend (*approved the new hat*) ... **approve of** **1** pronounce or consider good or satisfactory; commend. **2 agree to**". [emphasis added]

Katherine Barber ed., *Canadian Oxford Dictionary*, 2d ed. (2004) at 63

8. The *Collins English Dictionary* contains the following definitions:

**"approval** (ə'pru:v<sup>l</sup>) *n.* **1.** the act of approving. **2.** formal agreement; sanction. **3.** a favourable opinion; commendation. **4. on approval.** (of articles for sale) for examination with an option to buy or return.

**approve**<sup>1</sup> (ə'pru:v) *vb.* **1.** (when *intr.*, often foll. by *of*) to consider fair, good, or right; commend (a person or thing). **2.** (*tr.*) to authorize or sanction. **3.** (*tr.*) *Obsolete.* to demonstrate or prove by trial. [C14: from Old French *aprover*, from Latin *approbāre* to approve, from *probāre* to test, PROVE]". [emphasis added]

*Collins English Dictionary*, 3d ed. (1994) at 74

9. Finally, the *Webster's Third New International Dictionary* offers these definitions:

**"approval** *n* -s **1:** the act of approving: APPROBATION, SANCTION <a procedure likely to meet with the ~ of the circumspect -S.H.Adams> **2:** certification as to acceptability (as of a request for capital expenditure) <these ~s are usually indicated on the invoice before the voucher is prepared -H.S.Noble> - on approval *adv* (or *adj*) : subject to a prospective purchaser's decision to accept or refuse (goods sent out *on approval*).

**approve** *vb* -ED/-ING/-s [ME *approven*, *aproven*, fr. OF *aprover*, fr. L *approbare* to approve, prove, fr. *ad-* + *probare* to approve, prove - more at PROVE] *vt* **1 a** *obs:* to demonstrate the truth or correctness of: establish as fact or as being sound **b** *archaic:* CORROBORATE, AUTHENTICATE **c** *obs:* CONVICT <*approved* in this offense -Shak.> **2** *obs* **a:** TEST, TRY **b:** EXPERIENCE **3** *archaic* **a:** to make or show to be worthy of approbation or acceptance - used reflexively with *to* <the first care and concern must be to ~ himself to God -John Rogers> **b:** to

offer proof of by active demonstration : manifest or display actually or practically : EXHIBIT <his behavior under fire *approved* him a man of courage> **4:** to judge and find commendable or acceptable : think well of : have or express a favorable opinion or judgment of <a friend, whom he liked, but whose conduct he could not ~ -Osbert Sitwell> <Jane secretly *approved* his discernment -Rose Macaulay> **5 a:** to express often formally agreement with and support of or commendation of as meeting a standard <the governor *approved* the project> <one of the first hospitals in the state to be approved by the organization> **b:** to vote into effect: pass formerly <the legislature *approved* the bill> ~ *vi:* to have or express a favorable opinion: judge favorably - usu. Used with of <she wants to teach him not to fight; she doesn't ~ of fighting -Margaret Mead>

**syn** SANCTION, ENDORSE, ACCREDIT, CERTIFY: APPROVE applies to a feeling or expression of commendation or of agreement with but it may suggest a judicious attitude involved....". [emphasis added.]

Philip Babcock Gove ed., *Webster's Third New International Dictionary* (1971) at 106.

10. Indeed, it would be within the normal usage of the terms "approval" and "approve" to describe a situation in which the Commissioner has agreed to a request by Agricore United to extend the Port Terminal Initial Sale Period.

11. Further, it is well-settled that where more than one meaning of a word is available for selection, the appropriate choice of meanings is determined by the context in which the word to be interpreted is used.

Kim Lewison, Q.C., *The Interpretation of Contracts* (2004) at 141-42, 193.

12. Here, the word "approval" by its immediate context is shown not to have a narrow, fixed meaning. Specifically, the phrase "or if a decision of the Commissioner is unreasonably delayed or withheld" indicates the parties' intention that the term "approval" (and paragraph 49 more generally) is to have a broad and flexible meaning which, it is submitted, extends to circumstances, as exist here, where the Commissioner has unreasonably withheld her agreement to a requested extension of the Port Terminal Initial Sale Period.

13. In her Memorandum of Argument, the Commissioner simply reads the phrase "or if a decision of the Commissioner is unreasonably delayed or withheld" out of paragraph 49 and, it appears, would also have the Tribunal ignore it in construing that provision. However, such an interpretation would be contrary to the presumption against redundant words. In general, each part of a contract is taken to have been deliberately inserted, having regard to all the other parts of the document. Accordingly, in construing a contract all parts are to be given effect where possible, and no part of it should be treated as inoperative or surplus.

Lewison, *supra* at 198.

14. As the Commissioner acknowledges in her Memorandum of Argument (see paragraph 41-42), her interpretation of paragraph 49 creates an island of unreviewable discretion in respect of matters for which the Commissioner's unilateral decision-making power is not specifically described as an "approval". She offers no convincing rationale or justification for this result.

15. At paragraphs 36-42 of her Memorandum of Argument, the Commissioner says that the common thread running through what she calls the "approval paragraphs" and, by implication, each of the issues in respect of which, according to the Commissioner, Agricore United has a right of recourse to the Tribunal under the Consent Agreement, is that they "all relate specifically to matters pertaining to remedying the SLC" and "[the] approvals go to the *substance* of the remedy". The Commissioner then attempts to distinguish paragraph 48 from the "approval paragraphs" on the basis that "the provision relating to the extension of time pertains to the *process* by which a divestiture will be effected".

16. The Commissioner's analysis is problematic in at minimum two respects. First, the so-called "common thread" relied upon by the Commissioner to distinguish issues which are

reviewable by the Tribunal under paragraph 49 from those which are not founders on paragraph 8 of the Consent Agreement. That provision reads as follows:

"Agricore United shall not, without the consent of the Commissioner, provide financing for all or any part of any Divestiture under this Agreement which would permit Agricore United to influence or control, directly or indirectly, the relevant Port Terminal after the Divestiture".  
[emphasis added]

17. Paragraph 8 obviously "relate[s] specifically to matters pertaining to remedying the SLC" and the exercise of the discretion contemplated by that provision clearly goes to "the *substance* of the remedy". And yet, applying the Commissioner's interpretation of paragraph 49, because the word "approval" is not specifically used in that provision Agricore United would be without recourse to the Tribunal were the Commissioner to unreasonably withhold or delay in granting her consent to such financing.

18. The distinction sought to be drawn by the Commissioner between matters of "substance" and "process" is also untenable. As this motion demonstrates, matters of process, no less than issues of substance, can be of critical importance to the rights and interests of an affected party. More fundamentally, the distinction advanced by the Commissioner is at odds with the clear object of paragraph 49, namely the protection of Agricore United through the availability of recourse to the Tribunal in all circumstances in which the Commissioner exercises a unilateral power or discretion under the Consent Agreement in an unreasonable fashion.

19. It would be a very poor protection if paragraph 49 did not extend to the "consent" needed from the Commissioner in paragraph 8 or the "agreement" by the Commissioner required in paragraph 48 of the Consent Agreement. Given that, in the ordinary course, Agricore United would be entitled to seek review of any exercise of discretion by the Commissioner, it is submitted that the Tribunal should not favour an interpretation of paragraph 49 that would



deprive Agricore United of the ability or right to seek relief from the Tribunal in circumstances where the Commissioner acts unreasonably in the exercise of her discretion under the Consent Agreement.

20. In support of her construction of paragraph 49, the Commissioner also appears to rely (at paragraph 44-45 of her Memorandum of Argument) on Agricore United's failure to refer to the Commissioner's "approval" of an extension in its Notice of Motion and in its correspondence concerning earlier extensions of the Port Terminal Initial Sale Period as an admission by Agricore United that paragraph 49 does not apply to the Commissioner's unreasonable withholding of her agreement to any further extensions of the Port Terminal Initial Sale Period. This argument is without merit and should be rejected. It wrongly assumes that Agricore United shares the Commissioner's overly-technical (and incorrect) interpretation of paragraph 49. Consistent with its position on the within motion, Agricore United refers in its Notice of Motion to, among other things, the "Commissioner['s] unreasonable withhold[ing] [of] her agreement to the requested extension".

**(c) The Commissioner's Decision to Withhold Her Agreement to Extend the Port Terminal Initial Sale Period Was Unreasonable**

21. In responding to the merits of Agricore United's motion, the Commissioner submits that: (i) the authorities cited by Agricore United are of "little assistance"; (ii) it would have been unreasonable for the Commissioner to agree to a further extension; and (iii) the merits of the Section 106 Application should not be considered by the Tribunal when it determines the motion for interim relief. Each of these points is addressed in turn below.

**(i) Agricore United's Authorities Do Assist**

22. Agricore United has three reply submissions regarding the authorities relied upon by it in support of its alternative argument that the Commissioner has a common law and statutory duty

to act reasonably, fairly and in good faith in making decisions or exercising any authority under the Consent Agreement (or in response to the Section 106 Application).

23. First, *RONA Inc. v. Commissioner of Competition* makes it clear that to the extent that a duty to act in good faith has been recognized at common law (whether in the commercial context or otherwise), it should be applied by the Tribunal when interpreting the Commissioner's obligations under the Consent Agreement.

*RONA Inc. v. Commissioner of Competition* (2005), Comp Trib. 18 at para. 114.

24. Second, contrary to the Commissioner's assertion at paragraph 64 of her Memorandum of Argument, Professor McCamus does not conclude that a contractual duty to act in good faith does not exist in Canadian law. What Professor McCamus says and concludes is that Canadian courts have yet to recognize a generalized duty of good faith performance (independent from the terms expressed in contracts or from the objectives that emerge from those provisions), but that Canadian courts have indeed invoked and applied the concept of good faith in certain categories of cases:

"... the Canadian cases in which the concept of good faith is invoked appear to be fall into three categories, those imposing duties to cooperate in achieving the fulfilment of the objectives of the agreement, those imposing limits on the exercise of contractual discretionary powers, and those precluding parties from evading contractual obligations. Further, whatever the status of the doctrine of good faith performance might be at the present time, the recognition, in appropriate cases, of implicit contractual obligations of these three kinds appears to be a well-established feature of Canadian contract law doctrine".

J.D. McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance" (2004), 29 *Advocates' Quarterly* 72 at 91.

25. Third, and in any event, by the express terms of the Consent Agreement reasonableness (*simpliciter*) is the criterion against which the Commissioner's conduct is to be assessed by the

Tribunal in this case. Unreasonableness on the part of the Commissioner in withholding her agreement to extend the Port Terminal Initial Sale Period is alone sufficient to warrant the Tribunal granting the requested approval. No finding of dishonesty, ill will, improper motive, substantial nullification of the bargained objective or significant harm to the other party – some or all of which have been mandated by the courts to satisfy the more onerous bad faith standard – is required.

See, e.g., *Zurich Insurance Co. v. Modern Marine Industries Ltd.*, [1993] N.J. No. 264 at paras. 142-43 (Nfld. S.C. - T.D.)

**(ii) There was no Reasonable Basis for the Commissioner to Have Withheld Her Agreement Under Paragraph 48**

26. At paragraphs 60 and 68 of her Memorandum of Argument, the Commissioner contends that she did not agree to a further extension of the Port Terminal Initial Sale Period because to do so would frustrate the objects of the Consent Agreement and be contrary to the public interest. At paragraph 68, she goes further and asserts that:

"... in view of the interests at stake, the Tribunal's SLC finding, the time that Agricore United 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". [emphasis added]

27. The Commissioner provides no evidence in support of these claims. In any event, the record before this Tribunal establishes that they are without merit.

28. Agricore United submits that no prejudice to any of the Commissioner, farmers, Independent Grain Companies or the public interest would flow from the requested extension of the Port Terminal Initial Sale Period. As set out in Murdoch MacKay's Affidavit sworn August 11, 2005 and the SGMF, Agricore United's best information is that every Independent Grain Company that ships grain to the Port of Vancouver has or will have a port terminal access contract or handling agreement covering at least the next crop year ending July 31, 2006 and in

some cases many years. Moreover, the access provisions included in the Consent Agreement have been in place for almost three years and have addressed any possible concerns that the Commissioner may have regarding access to port terminals in the Port of Vancouver for the reasonably foreseeable future. In addition, subsections 69(1) and (2) of the *Canada Grain Act* require that port terminal operators receive all grain shipped to the Port of Vancouver, without discrimination, subject to certain exceptions and conditions.

29. In light of the foregoing, it is also inconceivable how a further extension would frustrate the objectives of the Consent Agreement, namely ensuring that Independent Grain Companies will have access to port terminal grain handling services in the Port of Vancouver at competitive rates, including diversion premiums. Moreover, it is less than obvious that the appointment of the Trustee prior to the determination of the Section 106 Application would actually further the objectives of the Consent Agreement. As the Commissioner acknowledges at paragraph 71 of her Memorandum of Argument, "[w]hether a sale of the UGG Terminal would then follow [the appointment of a trustee] and, if so, in what time, is not clear".

30. As regards the Tribunal's SLC finding, it must be remembered that Agricore United did not, for the purpose of the SLC Motion, contest the Commissioner's allegation that the Acquisition would likely result in a substantial lessening of competition. Further, the market developments since October 2002 detailed in the SGMF as well as in the Applicant's Memorandum of Argument for Interim Relief, together with the Commissioner's decision, at least to date, not to challenge the proposed SWP/JRI JV (which represents further consolidation in the same market) greatly enhances the prospects for successfully disputing the substantial prevention or lessening of competition alleged by the Commissioner to be in existence at this time.

31. Finally, the Commissioner's allegations relating to the duration of the Port Terminal Initial Sale Period are discussed at length in the MacKay Reply Affidavit. The evidence in that Affidavit makes it clear that the Commissioner's allegations are unfounded and rest on a selective view of the relevant factual background.

32. In light of the foregoing, and given the prejudice (as described in the SGMF and the Applicant's Memorandum of Argument for Interim Relief) to Agricore United flowing from the commencement of the Trustee Sale prior to the final determination of the Section 106 Application, there was no reasonable basis for the Commissioner to have withheld her consent under paragraph 48 of the Consent Agreement and the Tribunal should order the approval of the requested extension of the Port Terminal Initial Sale Period. Indeed, it appears from the record that, as in *RONA*, the Commissioner's withholding of her agreement to extend the Port Terminal Initial Sale Period flows from an insistence the Consent Agreement be enforced at all costs and that the Trustee Sale proceed immediately, notwithstanding the absence of any prejudice to the public interest flowing from the requested extension and despite the change of circumstances described in the SGMF.

**(iii) The Merits of the Section 106 Application Should be Considered by the Tribunal when Assessing the Motion for Interim Relief**

33. At paragraphs 69 and 70 of her Memorandum of Argument, the Commissioner asserts that the merits of the Section 106 Application should not be considered by the Tribunal when assessing Agricore United's motion for interim relief because "[the Section 106 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".

34. As the MacKay Reply Affidavit makes clear the Commissioner's assertion is misleading. In fact, well before it filed its Notice of Application with the Tribunal, Agricore United and its

counsel had informed the Commissioner and her representatives on several occasions of the significant changes that had occurred in the Western Canadian grain handling industry and, in light of those changes, had taken the position that the Consent Agreement should be varied to remove the requirement that Agricore United divest a Port Terminal.

35. More significantly, and directly contrary to the Commissioner's contention that she did not have knowledge of the Section 106 Application until after she had communicated her decision to refuse a further extension of the Port Terminal Initial Sale Period, approximately one month before the Notice of Application was filed with the Tribunal, Agricore United and its counsel advised the Commissioner's representatives that Agricore United would consider applying to the Tribunal under section 106 of the *Competition Act* in the event that the Commissioner did not agree to further extend the Port Terminal Initial Sale Period.

**(d) Relief Sought**

36. For the reasons set out above as well as in Agricore United's Memorandum of Argument for Interim Relief and the SGMF, Agricore United respectfully requests that, in addition to costs, the Tribunal grant approval, pursuant to paragraph 49 of the Consent Agreement, extending the Port Terminal Initial Sale Period to a date following the final determination of the Section 106 Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

**DATED AT TORONTO**, this 19<sup>th</sup> day of September, 2005.

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TO: The Registrar of the Competition Tribunal

AND TO: Counsel to the Commissioner of Competition

**IN THE MATTER OF** the *Competition Act*,  
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