



Reference: *Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp. Trib. 039  
File no.: CT2002001  
Registry document no.: 0104b

**PUBLIC VERSION**

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 under section 92 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.

B E T W E E N:

**The Commissioner of Competition**  
(applicant)

and

**United Grain Growers Limited**  
(respondent)

and

**Canadian Wheat Board**  
(intervenor)

and

**Saskatchewan Wheat Pool**  
(intervenor)



Date of pre-hearing conference: 20021016  
Member: Dawson J. (presiding)  
Date of reasons and order: 20021017  
Reasons and order signed by: Dawson J.

**REASONS AND ORDER REGARDING COMMISSIONER'S REFUSALS**

[1] Counsel for the respondent moves at a pre-hearing conference call held on October 16, 2002, to address what is described as the Commissioner of Competition's (the "Commissioner") refusals to provide to the respondent (i) [confidential information deleted]; (ii) [confidential information deleted] and (iii) [confidential information deleted].

[2] [Confidential information deleted.]

[3] Counsel for the Commissioner argues that the respondent's demand for [confidential information deleted] is improper as the scope of public interest privilege and its application to the respondent's demands was decided by Justice Lemieux in the Reasons and Order Regarding Issues Considered at Pre-Hearing Conference on August 9, 2002, dated September 27, 2002 ("Reasons and Order").

[4] In the Reasons and Order, Justice Lemieux confirmed that public interest privilege is a class protection, that it applies to this case, and that it has not been waived by the Commissioner. Justice Lemieux specifically confirmed that the respondent cannot compel the Commissioner to undermine this public interest privilege by requiring disclosure of information, if that disclosure would reveal the source of the Commissioner's information, unless such information will be relied on by the Commissioner at trial. Justice Lemieux rejected the respondent's attempt to access all information collected from third parties identified by the Commissioner as potential witnesses at trial. With respect to answers obtained pursuant to section 11 orders that were provided to the respondent on a voluntary basis, Justice Lemieux stated at paragraph 79 of the Reasons and Order:

I agree with counsel for the Commissioner that UGG has not made a case for a complete waiver of the public interest privilege over his entire investigation simply because of his voluntary disclosure of section 11 questionnaire responses.

[5] I will not review the entire Reasons and Order of Justice Lemieux as they clearly express the state of the law regarding public interest privilege. I am of the view that the Reasons and Order do not grant the respondent the right to obtain the information cited above at paragraph 1 of these reasons and order. Having said this, if the Commissioner intends to rely on newly received information which is subject to public interest privilege, then the Commissioner must provide the information to the respondent, even if the source will be revealed. Counsel for the Commissioner also acknowledges the obligation to correct information provided to the opposite party that is no longer accurate.

[6] Therefore, the Commissioner is obliged to provide whatever supplementary material or information is necessary to make the will-say statements of the factual witnesses complete as contemplated in paragraphs 95 and 104 of the Reasons and Order.

[7] As well, the answers provided by Mr. David Ouellet during his examination for discovery should be revised by counsel for the Commissioner where necessary in order to correct information that is no longer accurate, or to add recently obtained information in accordance with the principles

regarding public interest privilege enunciated by Justice Lemieux in the Reasons and Order. For example, if in the discovery process, Mr. Ouellet advised the respondent that the Commissioner had no information on a specific point and this is no longer the case, this should be corrected. The extent of the answer provided should reflect the principles articulated by Justice Lemieux.

[8] [Confidential information deleted.]

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT;

[9] The Commissioner need not provide to the respondent items (i), (ii) or (iii) referred to in paragraph 1 of the confidential version of these reasons and order.

[10] The Commissioner shall provide whatever supplementary material or information is necessary to make the will-say statements of the factual witnesses complete as contemplated in paragraphs 95 and 104 of the Reasons and Order.

[11] The Commissioner shall revise the answers provided by Mr. Ouellet during his examination for discovery where necessary to correct information that is no longer accurate or to provide recently obtained information in accordance with the principles regarding public interest privilege enunciated by Justice Lemieux in the Reasons and Order.

[12] [Confidential information deleted.]

DATED at Ottawa, this 17<sup>th</sup> day of October, 2002.

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

APPEARANCES:

For the applicant:

The Commissioner of Competition

John Campion  
John L. Syme  
Melanie L. Aitken

For the respondent:

United Grain Growers Limited

Kent Thomson  
Sandra A. Forbes  
John Bodrug

For the intervenor:

Canadian Wheat Board

Maggie Wiebe

Saskatchewan Wheat Pool

Reginald A. Watson  
Peter T. Bergbusch