Competition Tribunal Tribunal de la Concurrence

Reference: *Commissioner of Competition v. United Grain Growers Limited,* 2002 Comp. Trib. 36
File no.: CT2002001
Registry document no.: 0085b

PUBLIC

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)

Date of pre-hearing conference: 20020926
Member: Dawson J. (presiding)
Date of reasons and order: 20021002
Reasons and order signed by: Dawson J.

REASONS AND ORDER REGARDING DISCLOSURE OF WILL-SAY STATEMENTS

[1] Counsel for the Commissioner of Competition (the "Commissioner") and for the respondent asked for a pre-hearing conference call on September 26, 2002, to discuss the appropriate level of confidentiality that should be assigned to six of the will-say statements prepared by the Commissioner in respect of non-expert witnesses he may call to testify at the hearing of the application. Pursuant to the Order Amending the Amended Scheduling Order Dated August 12, 2002, issued on September 4, 2002 ("Order Amending Scheduling Order"), the Commissioner provided the six will-say statements to the respondent but designated all of them as "Confidential - Level A" pursuant to the Interim Confidentiality (Protective) Order dated May 27, 2002, except that counsel for the respondent is permitted to advise the respondent as to the names of the five witnesses.

[2] Counsel for the Commissioner argues that these six will-say statements should remain designated as Confidential - Level A on two grounds: (1) the statements contain information that is commercially competitive and; (2) the witnesses have expressed their reluctance to testify, due to the repercussions they fear from the respondent.

[3] The respondent does not dispute the principle that commercially sensitive information should be protected but instead submits that the vast quantity of the information contained in the will-say statements is not of that nature. Counsel described much of the contents of the statements to be "motherhood statements" or general industry information. Therefore, the Tribunal heard the submissions of counsel for the parties as to why the information is commercially sensitive and the appropriateness of the confidentiality designation.

[4] Counsel for the respondent also submits that public interest privilege can no longer be asserted at the time of exchanging will-say statements, that this privilege has been waived. Counsel further submits that the respondent must have the ability to know the evidence that the Commissioner intends to present at the hearing of the application in order to obtain instructions and prepare a full answer.

[5] With respect to the claim for public interest privilege and alleged fears of reprisal, counsel for the Commissioner refers to *Director of Investigation and Research v. Southam Inc.* (1991), 38 C.P.R. (3d) 68, [1991] C.C.T.D. No. 10 (QL) (Comp. Trib.). In that case, at pages 84-85, the Tribunal recognized the fear of reprisals and the public interest that allows the Commissioner to keep identities confidential in order to protect the effectiveness of his investigations. However, in that decision the Tribunal also considered at what time information obtained from interviews should be provided.

[6] In the present case, no authority was cited to support the view advanced by the Commissioner that the public interest privilege automatically attaches to the exchange of will-say statements at this late stage of the proceedings when the Commissioner is disclosing the nature of the evidence that will be presented at the hearing. Further, it was contemplated in the Order Amending Scheduling Order that the exchange of will-say statements would take place by September 19, 2002. At the pre-hearing conference call, counsel for the Commissioner simply provided a generalized statement that "many of his witnesses were reluctant to testify because of fear of reprisal".

[7] The effect of the designation Confidential - Level A is to prevent counsel for the respondent from disclosing to their client the information that the Commissioner intends to call at the hearing. Logically, that result should be supported by evidence of the sort required to conduct the hearing *in camera.*

[8] It is a well recognized principle that when considering the extent and nature of required disclosure, one must consider the need of the opposite party to know the case to be met so as to be able to prepare a full answer to the case. In other words, the public interest must be balanced against the need to prevent trial by ambush.

[9] It follows in this case that the Confidential- Level A designation cannot be attached to the entire will-say statements at this late stage of the proceedings on the basis of unsubstantiated fears. The respondent needs to prepare for the hearing, and specifically counsel must be able to discuss the Commissioner's proposed evidence and seek instructions on the facts and matters necessary to prepare a full response. However, if the Commissioner has evidence to support a credible fear of retaliation on the part of any witness, such evidence may be provided to counsel for the respondent and to the Tribunal within two days of the issuance of these reasons and order with a request for a further pre-hearing conference. It follows that counsel for the respondent may not act on these reasons and order until after the expiration of that two-day period and should not thereafter act on these reasons and order to the extent that the Commissioner files evidence in respect of one or more of the will-say statements.

[10] As to the information that is alleged to be commercially sensitive, after reviewing each of the will-say statements and considering carefully the arguments made by counsel, parts of the will-say statements shall remain designated as Confidential - Level A, as more particularly described below.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[11] The Commissioner shall remove the Confidential - Level A designation from the six will-say statements in dispute, except for the information described below that is found to be commercially sensitive, and which shall remain protected by that level of confidentiality. However, as stated above, the Commissioner can come forward within two days of these reasons and order with evidence to substantiate any fear of reprisal that he might have with respect to any of these six factual witnesses and request a further pre-hearing conference.

[12] As to the claim of confidentiality based on the need to protect commercially sensitive information, the following information shall remain designated Confidential - Level A:

(a) Witness 1: the last sentence of the fourth bullet on page 2, the third and fourth bullets on page 3, the fourth, fifth and sixth bullets on page 4;

(b) Witness 2: the first sentence of the third bullet on page 1, the fifth, sixth, seventh, eighth and ninth bullets on page 2, the first bullet on page 3;

(c) Witness 3: the first sentence of the fifth bullet on page 1; and

(d) Witness 4: all the portions that were designated Confidential - Level A shall remain designated as such.

DATED at Mont-Tremblant, Québec, this 2nd day of October, 2002.

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

(s) Eleanor R. Dawson

APPEARANCES:

For the applicant:

The Commissioner of Competition

John L. Syme
Melanie L. Aitken

For the respondent:

United Grain Growers Limited

Sandra A. Forbes
John D. Bodrug

For the intervenor:

Canadian Wheat Board

Susan Paul