

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp. Trib. 33
File no.: CT2002001
Registry document no.: 0074

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

The Canadian Wheat Board
(intervenor)



Date of hearing: 20020910
Members: Dawson J. (presiding), L. Schwartz, A. Reny
Date of findings and determinations: 20020912
Findings and determinations signed by: Dawson J.

**FINDINGS AND DETERMINATIONS OF THE COMPETITION TRIBUNAL
PURSUANT TO SECTION 92 OF THE COMPETITION ACT**

[1] FURTHER to the application filed on January 2, 2002, by the Commissioner of Competition (the “Commissioner”) pursuant to section 92 of the Competition Act, R.S.C. 1985, c. C-34, as amended (the “Act”), for an order directing the divestiture of certain assets and certain other remedies in respect of the Respondent’s acquisition of Agricore Cooperative Ltd. on November 1, 2001 (the “Acquisition”), the merged entities having carried on business as “Agricore United” as of November 1, 2001;

[2] AND FURTHER to the Joint Submission by the Respondent and the Commissioner requesting certain findings and determinations pursuant to section 92 of the Act and subsections 8(1) and 8(2) of the Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), as amended (the “Competition Tribunal Act”);

[3] AND UPON READING the notice of application filed January 2, 2002 (the “Notice of Application”); the Statement of Grounds and Material Facts dated December 19, 2001 (the “SGMF”); the affidavit of David Ouellet sworn December 19, 2001; the response filed February 6, 2002 (the “Response”); the reply filed February 25, 2002 (the “Reply”); the Joint Submission and Request for Findings and Determinations, dated September 6, 2002; the draft Findings and Determinations; the Respondent’s Memorandum of Argument; the affidavit of Debra Bilous, sworn August 13, 2002; the Commissioner’s Memorandum of Argument; the affidavit of Dr. William W. Wilson, sworn September 10, 2002; the affidavit of David Ouellet, sworn September 6, 2002, and the Parties’ Position on the SGMF;

[4] AND UPON CONVENING the hearing of this matter in respect of the findings and determinations set out below and hearing the expert testimony of Dr. William W. Wilson and the evidence of David Ouellet, a senior competition law officer at the Competition Bureau who was involved with the investigation of the case, and adjourning the balance of the hearing to a later date;

[5] AND UPON DETERMINING THAT this is an appropriate case for the Tribunal to make findings and determinations at the outset of the hearing pursuant to section 92 of the Act and subsections 8(1) and 8(2) of the Competition Tribunal Act;

[6] AND UPON CONSIDERING the Confidential Agreement reached between the Commissioner and the Respondent on October 31, 2001;

[7] AND BEING SATISFIED that based on the evidentiary record before the Tribunal as of September 10, 2002, the Tribunal should make the findings below;

[8] AND FOR THE REASONS that will be delivered in writing after the completion of the balance of the hearing scheduled to take place in Vancouver, on October 21, 2002;

Definitions

[9] For the purposes of these Findings and Determinations, the following definitions apply:

- (a) “PEL Interest” means the Respondent’s interest in Pacific Elevators Limited (“PEL”) and Western Pool Terminals Ltd. (“WPTL”) and its interest in the loan agreement between PEL, WPTL and Alberta Wheat Pool dated January 11, 1996;
- (b) “Pacific 1 Terminal” means that part of the Pacific Elevators complex known as the Pacific 1 Terminal and more particularly described in the Response;
- (c) “SGMF” means the Statement of Grounds and Material Facts filed with the Notice of Application;
- (d) “SLC” means the substantial lessening of competition as alleged by the Commissioner in the SGMF; and
- (e) “UGG Terminal” means the grain terminal in Vancouver, British Columbia, owned by the Respondent prior to the Acquisition;

[10] The Tribunal hereby finds and determines that:

- (a) the Acquisition causes an SLC as alleged by the Commissioner and, for the purposes of this proceeding, not contested by the Respondent, without the need for further evidence to establish an SLC or elements of an SLC;
- (b) the divestiture by the Respondent of either the UGG Terminal or the PEL Interest, as requested by the Commissioner in the Notice of Application, is sufficient to address the SLC;
- (c) the divestiture by the Respondent of the Pacific 1 Terminal, either alone or in combination with a portion of the Annex component of the Pacific Elevators complex (the “Annex”), would also be sufficient to address the SLC if:
 - (i) the divestiture is to an entity that does not have any direct or indirect interest in a Vancouver port grain terminal (other than Neptune or Vancouver Wharves);
 - (ii) the acquiring entity is independent of Agricore United;
 - (iii) the divestiture would result in the acquirer being able to operate on a stand alone basis independent of the other port grain terminal operators similar to, for example, the stand alone basis on which the UGG Terminal operates today; and
 - (iv) the divestiture would enable the acquirer to handle at least 2.2 million tonnes of any combination of grain, oil seeds and specialty crops per annum in the Port of Vancouver on a commercially competitive basis; and
- (d) the Tribunal leaves to determination at a later date the issue of whether the Pacific 1 Terminal, either alone or in combination with a portion of the Annex, meets the four part test set out immediately above (the “Four Part Test”).

[11] The Tribunal further confirms that the parties' joint submission and request for findings and determinations, and the findings and determinations made herein, do not limit the scope of the evidence which the parties are permitted to lead in respect of the issue of whether the Pacific 1 Terminal meets the Four Part Test.

DATED at Ottawa, this 12th day of September, 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 Campion

John L. Syme

Melanie L. Aitken

For the respondent:

United Grain Growers Limited

Kent Thomson

Sandra A. Forbes

John D. Bodrug

For the intervenor:

The Canadian Wheat Board

Randal T. Hughes