Competition Tribunal Tribunal de la Concurrence

Reference: *Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp. Trib. 35
File no.: CT2002001
Registry document no.: 84

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: 20020809
Member: Lemieux J. (presiding)
Date of reasons and order: 20020927
Reasons and order signed by: Lemieux J.

REASONS AND ORDER REGARDING ISSUES CONSIDERED AT PRE-HEARING CONFERENCE ON AUGUST 9, 2002

INTRODUCTION

[1] The focus of this motion brought by the respondent, United Grain Growers Limited ("UGG"), is on the Tribunal's discovery process in an application brought by the Commissioner of Competition (the "Commissioner") under section 92 of the *Competition Act*, R.S.C. 1985, c. C 34 (the "Act") arising out of the acquisition by UGG of Agricore Cooperative Ltd. ("Agricore").

[2] The Commissioner's representative, Mr. David Ouellet, was examined on oral discovery but many answers were refused principally on the ground of public interest privilege. Litigation privilege was also invoked as well as other grounds for refusal.

[3] UGG, in this motion, seeks a wide range of alternative orders from the Tribunal including: (1) compelling Mr. Ouellet's re-attendance to answer improperly refused answers; (2) requiring the Commissioner to waive his privilege by a certain date with the full right of oral and documentary discovery in respect of such waiver; (3) an order requiring the Commissioner to decide by a certain date which witnesses he intends to call and to provide detailed will-say statements of their expected testimony which constitute a complete waiver of privilege associated with all relevant facts, opinions, conclusions, information and documentation the Commissioner has obtained from such witness; and (4) an order requiring the Commissioner to provide further and better summaries of information received during his investigation.

[4] UGG's basic position is that the Commissioner's claim of public interest privilege does not arise in this particular case no justification for it having been made out or, if such a claim is valid, it was: (1) relied on improperly by the Commissioner to refuse to disclose his case on discovery and the relevant information in his possession and avoid normal continuing discovery obligations; (2) or such privilege was waived; and (3) in any event, fairness dictates that the Tribunal should override the privilege in the circumstances of this case in order to enable UGG to know the case it has to meet.

[5] The Commissioner counters by submitting: (1) a valid claim to public interest privilege exists in this case and is well recognized by the Tribunal to protect information gathered by the Commissioner in his investigation of the acquisition which led to his application; (2) the Commissioner's use of the public interest privilege was entirely proper and in accordance with the Tribunal's jurisprudence on the application of the privilege; (3) the privilege was not waived; and (4) no compelling case has been made out by UGG upon which the Tribunal could exercise its discretion to set aside the public interest privilege.

BACKGROUND

[6] On January 2, 2002, the Commissioner launched an application with the Tribunal pursuant to section 92 of the Act for an order requiring UGG to divest, at its option, all of its interest in Pacific Elevators Limited Grain Terminal at the Port of Vancouver (the " PEL Terminal") or UGG's Grain Terminal (the "UGG Terminal") in the same Port. That application was accompanied by a lengthy statement of grounds and material facts ("SGMF").

[7] UGG, in its response filed on February 6, 2002, did not contest the Commissioner's allegation that UGG's acquisition of Agricore on November 1, 2001 (the "acquisition") is likely to prevent or lessen competition substantially in the market for port terminal grain handling services in the Port of Vancouver. It also agreed with the Commissioner that the divestiture of either the entire PEL Terminal consisting of two terminals, the Pacific Terminal 1 ("PAC 1") and Pacific Terminal 3 ("PAC 3"), and the Annex or the UGG Terminal, at its option, would be sufficient to remedy the substantial lessening of competition ("SLC") arising out of the acquisition.

[8] However, in its response, UGG submitted that the divestiture of that part of the PEL Terminal known as the Pacific Terminal 1 (the "PAC 1") would also provide a satisfactory remedy to the SLC because, in its view, PAC 1 could meet the four conditions stated by the Commissioner in paragraph 77 of the SGMF needed to provide an effective remedy.

[9] On March 18, 2002, the Commissioner filed his affidavit of documents pursuant to section 13 of the *Competition Tribunal Rules*, SORS/94-290 (the "Rules") claiming litigation and public interest privilege for 26 categories of documents including:

(a) correspondence between officers of the Competition Bureau (the "Bureau") and participants in the grain handling industry including, but not limited to:

(i) grain handlers;

(ii) suppliers to the grain handling industry, such as the railroads;

(iii) government bodies with mandates pertaining to grain and grain handling such as the Canadian Grain Commission ("CGC") and the Canadian Wheat Board ("CWB"); and

(iv) purchasers of grain handling services or products;

(b) notes of interviews conducted in person or by telephone by officers of the Bureau with industry participants;

(c) memoranda and notes created by officers of the Bureau and staff relating to industry participants in the grain handling industry including any summaries of interview notes;

(d) submissions of industry participants in the course of the investigation or inquiry;

(e) complaints made by industry participants to the Commissioner — by telephone (notes of conversations) and in writing;

(f) questionnaires completed by industry participants in the course of the investigation or inquiry;

(g) materials produced by industry participants in the course of the investigation or inquiry; and

(h) draft questionnaires to be completed by industry participants for the purpose of the investigation.

[10] Quite out of the ordinary, the Commissioner's affidavit of documents did not claim privilege over materials provided to the Bureau by industry participants who had received notices under section 11 of the Act and who responded by filling out a written questionnaire and produced requested documents. The Commissioner waived privilege but classified some of the disclosures as confidential according to the Interim Confidentiality (Protective) Order dated May 27, 2002 with access limited to designated persons at Level A (counsel and experts only but not clients).

[11] Pursuant to the Rules, the Chairman of the Tribunal issued a scheduling order on May 20, 2002 which contemplated oral examination for discovery of the representatives of UGG and of the Commissioner which had been agreed to by the parties. I add here that the Tribunal's Rules compel documentary discovery but not oral examination for discovery.

[12] The Commissioner's representative, Mr. Ouellet, was examined on oral discovery during four days in July 2002. According to UGG's counsel, some 239 answers to questions put to Mr. Ouellet were refused or taken under advisement on grounds of public interest privilege; 56 answers were refused because of litigation privilege; 33 were not answered because the question sought a conclusion and not facts; 12 answers were not forthcoming because the answers were within UGG's knowledge; 61 answers were refused on grounds that they called for matters of expert opinion; and 5 were rejected because the question called for a legal opinion.

[13] Other grounds for refusal were for reasons that the questions were too broad or burdensome, the document spoke for itself or the question was irrelevant.

[14] UGG's motion must be appreciated in the context of the Commissioner's disclosure prior to and during discovery as well as the remaining disclosure to take place prior to the hearing.

[15] Prior to discovery, the Commissioner disclosed:

(a) a confidential current summary, in aggregate form as opposed to summarizing what each interviewer said, of the main facts learned by the Commissioner from third parties in the course of the Bureau's review of the acquisition. This summary covers subjects such as general grain handling industry information, grain handling on the Prairies, grain handling at the Port of Vancouver including matters such as storage, terminal access, information concerning PEL, rail coordination issues, rail sidings capacity at the terminals, identification of SLC in Vancouver grain handling as well as post-merger issues. The purpose of such summaries is to disclose to a respondent the facts known to the Commissioner (see, *Director of Investigation and Research v. Canadian Pacific Ltd.*, [1997] C.C.T.D. No. 42 (QL)(Comp. Trib.));

(b) documentary disclosure, as noted, some of which was not subject to claims of privilege but subject to claims of confidentiality made pursuant to subsection 16(2) of the Rules. Falling in this category is the extensive documentation including answers to the Commissioner's questionnaire

and supporting documentation (over 3,000 documents) received by the Commissioner from third parties under section 11 of the Act;

(c) disclosure during the oral examination of Mr. Ouellet which UGG says is inadequate because of the public interest privilege assertion; and

(d) continuing disclosure by the Commissioner after discovery which UGG says is thwarted by the Commissioner's use of the public interest privilege.

[16] Upcoming disclosures, in accordance with the Tribunal's scheduling order, are:

(a) will-say statements for all non-expert witnesses whom the parties will call to testify; and

(b) expert reports and rebuttals.

[17] Moreover, prior to the hearing, the parties will file an agreed statement of facts.

THE ISSUES

[18] UGG's motion calls for the resolution of the following issues:

(a) whether the Commissioner's claim of a public interest privilege has been made out, an issue which turns on whether the asserted privilege is a class privilege or one which must be established on a case-by-case basis balancing relevant interests involving the four conditions known as the *Wigmore* test as endorsed by the Supreme Court of Canada in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 at 260;

(b) whether the Tribunal has the discretion to override the Commissioner's claim of public interest privilege and, if so, in what circumstances;

(c) whether the public interest privilege was either completely or partially waived; and

(d) whether the Commissioner misused the public interest privilege he enjoyed in this case which involves considerations as to the purpose and scope of the privilege.

[19] In argument before me, counsel for the Commissioner repeated certain discovery principles she had stated on discovery, namely:

(a) at trial, if the Commissioner wants to rely on information he received during his investigation, he must disclose that information and its source by waiving his privilege over that information well in advance of trial, the timing of which will normally occur on the delivery of the will-say statements after discovery is completed. While the Commissioner is continuously refining his case up to the beginning of the trial with additional disclosures, such disclosure cannot prejudice a respondent at trial by taking him by surprise;

(b) subject to the public interest privilege, the Commissioner has an obligation, prior to discovery, as well as in answer to discovery questions, to give the facts within the Commissioner's knowledge at that time, provided the facts can be answered in a summarized aggregated non individualized informant basis that would not compromise the privilege, an obligation discharged partially in the delivery of the confidential summary which must include all of the facts known to the Commissioner whether they favour his position or not. The words "at that time" have been underlined because of the Commissioner's argument that when discovery takes place, the Commissioner's investigation is an ongoing process which may only be in its pre-trial preliminary stage assessment;

(c) the Commissioner has a continuing obligation to disclose after discovery relevant material facts that comes to the Commissioner's knowledge that contradict answers given on discovery subject only to the public interest privilege essentially, in this context, source identification; and

(d) the Tribunal is the ultimate arbitrator of the public interest privilege and has the discretion to override the public interest privilege asserted by the Commissioner but differing with counsel for UGG on what UGG must show to set aside the privilege.

[20] Counsel for UGG in reply stated that the position taken by the Commissioner's counsel at the hearing before me was not the stance she had taken during discoveries.

ANALYSIS

[21] Before dealing with the issues, a few comments about discovery in cases before the Tribunal are appropriate.

[22] As to the purpose of discovery, in *Director of Investigation and Research v.* Southam Inc.(1991), 38 C.P.R. (3d) 68 at 71, [1991] C.C.T.D. No. 16 (QL)(Comp.Trib.), Justice Reed stated:

> Discovery has two purposes: (1) the obtaining of admissions so that the issues between the parties can be narrowed; (2) the obtaining by one party of the information in the knowledge of the other. (footnote omitted)

It is generally well accepted, that the primary purpose discovery is to enable the opposite party to know what is the case to be met.

[23] Justice McKeown in the *Canadian Pacific case*, cited above at paragraph 15, recognized one of the purposes of discovery was to enable a party to prepare its case.

[24] In the Tribunal context dealing with competition matters, Justice McKeown in *Commissioner of Competition v. Air Canada* (May 22, 2002) CT2001002, Reasons and Order Regarding Matters Considered at Pre-hearing Conference on May 2 and 3, 2002 [2002] C.C.T.D. No. 16 (QL)(Comp.Trib.), stated the Tribunal exercises discretion over the discovery process in cases before it pursuant to paragraph 21(2)(d) of the Rules. He recognized there was no automatic

right to oral discovery by any party with the Tribunal having the ability to make orders respecting examination for discovery where the process is desirable.

[25] I add that Justice McKeown in *Director of Investigation and Research v. Washington,* [1996] C.C.T.D. No. 24 (QL)(Comp.Trib.), recognized it was in the public interest to have proceedings before it conducted in a fair and expeditious manner concluding the amount of disclosure ordered will depend on the circumstances.

[26] I also subscribe to what Justice Hugessen of the Federal Court, Trial Division, said about discovery in *Montana Band v. Canada,* [2000] 1 F.C. 267 at paragraph 5:

> The general purpose of examination for discovery is to render the trial process fairer and more efficient by allowing each party to inform itself fully prior to trial of the precise nature of all other parties' positions so as to define fully the issues between them. It is in the interest of justice that each party should be as well informed as possible about the positions of the other parties and should not be put at a disadvantage by being taken by surprise at trial . . . .

[27] I now turn to a consideration of the issues.

Issue 1 —Is the Commissioner's claim of public interest privilege made out?

[28] To answer this issue it is necessary to determine the foundation of this privilege.

[29] The policy considerations underpinning the public interest privilege which the Commissioner may enjoy for investigation materials acquired or generated by the Bureau in the course of investigations carried out pursuant to statutory authority under the Act were identified by Justice Strayer, on behalf of the Federal Court of Appeal, in *D & B Companies of Canada v. Director of Investigation and Research,* [1994] F.C.J. No. 1643, (the "Nielsen case") at paragraph 2 of that decision.

[30] Referring to Justice McKeown's Tribunal decision on appeal before him refusing to order production of a complaint which led to the Director's investigation and also to the notes, materials and statements obtained or prepared by the Director [now the Commissioner] or his staff from meetings and discussions with the complainant and to the statements, notes, material and correspondence obtained or prepared by the Director from meetings and discussions with Canadian and U.S. packaged goods retailers, manufacturers and market research companies, Justice Strayer wrote at page 355:

> . . . He [Justice McKeown] repeated the policy considerations which support this privilege: namely that the director has to be able to obtain information from the relevant industry in performing his functions under the *Competition Act.* . . . To gain the cooperation of people in the industry he must be able to gather information in confidence, his informants not being identified unless of course they are called as witnesses in a proceeding before the tribunal. He also noted that the appellant

had been given ample opportunity to learn of the nature of these documents and of the case which it has to meet, without having the actual documents. The director has provided the appellant with summaries of all of these documents including the information obtained from those in the industry but excluding names of sources. The tribunal offered to arrange for a judicial member not sitting on this case to review the documents and summaries to ensure the accuracy of the latter, if the appellant so requested. It has not so requested. Apart from this information, the appellant has had examination for discovery and discovery of documents of both the director and of the complainant. It also has been given a list of witnesses and summaries of their anticipated evidence three weeks prior to their appearance, all in accordance with tribunal orders. (emphasis added)

[31] Justice Strayer went on to say in paragraph 3 of that decision:

> I am satisfied that the learned presiding judicial member correctly followed and applied previous tribunal decisions in finding such documents to be within a privileged class. In *Director of Investigation and Research v. Nutrasweet . . .* Reed J. on behalf of the tribunal, held that the complaint filed with the director which led to the application by the director was within a class of documents that should be privileged from disclosure in a public interest. That interest was described as "the public interest in protecting . . . confidentiality, in order to allow complainants to come forward in an uninhibited fashion". . . . (emphasis added)

[32] Justice Strayer referred to another Federal Court of Appeal decision in *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.,* [1991] F.C.J. No. 1021, where Justice Heald quoted with approval Justice Reed's statement in the Southam, cited above at paragraph 22, where she wrote at page 84 of the reported case:

> Whether or not litigation privilege applies, however, is somewhat academic since in the tribunal's view public interest privilege covers much of what the Director seeks to keep from the respondents. The Director refuses to provide the specific interview notes, to identify the individuals interviewed, when they were interviewed and who they were interviewed by. At the same time, he has agreed to give the respondents a summary of what was said. In the competition law area, at least in merger and abuse of dominant position cases, the individuals who are interviewed may be potential or actual customers of the respondents; they may be potential or actual employees. They may fear reprisals if they provide the Director with information which is unfavourable to the respondents. Many of them are likely to be in a vulnerable position vis-à-vis the respondents. It is in the public interest, then, to allow the Director to keep their identifies confidential, to keep the details of the interviews confidential, to protect the effectiveness of his investigations. It is in the public interest to keep the interview notes confidential except when the interviewers are called as witnesses in a case or otherwise identified by the parties claiming privilege. In addition, the Director is not required to prepare the respondent's case by identifying the potential witnesses for them.

It is conceivable that in some cases a respondent's ability to answer a case might be impaired if information concerning the identity of those interviewed or detailed information concerning the interview is not given (although it is difficult to conceive of a situation where this would be so). In any event, there is no indication that this is the case in the present litigation. The public interest in keeping the details of the interviews confidential outweighs any benefit that the respondents might obtain from them. This is particularly so given the fact that the Director has agreed to provide summaries of the relevant information. (emphasis added)

[33] Justice Strayer concluded by writing at page 356:

It therefore appears that not only is McKeown J.'s decision in this case consistent with earlier decisions of the tribunal, but also that this Court has already endorsed that approach by the tribunal. In recognizing a class of documents which should enjoy public interest privilege it appears to me that the tribunal has acted well within established principles of the law of evidence. . . . It has decided to bring such documents within the class of documents which, as communications to government agencies by outside sources, should be protected in order to enable that agency to obtain necessary information. While evidence might be helpful to the tribunal to decide that such a privilege is necessary, courts have reached such conclusions on the basis of their own analysis of the purpose of legislation and its functioning. . . . . The tribunal did in fact have evidence before it here, the affidavit quoted above, to the effect that these documents were obtained in confidence. While that information in the affidavit is sparse, it has not as far as I am aware been successfully challenged. (emphasis added)

[34] Justice McKeown in *Washington*, cited above at paragraph 25, expressed the view that protecting the Director's ability ". . . to effectively use all the tools available . . . in investigating potential competitive problem is in the public interest". In his view, certain provisions of the Act pointed to Parliament's view of this public interest as did the common law.

[35] Counsel for UGG argued that the Commissioner had not passed the four part *Wigmore* test to justify the existence of the public interest privilege in this case.

[36] The *Wigmore* test as set out by Justice Reed in *Director of Investigation and Research v. NutraSweet Co.*, [1989] C.C.T.D. No. 54 (QL)(Comp. Trib.), as taken from *Slavutych*, cited above at paragraph 18, is as follows:

"(1) The communications must originate in a confidence that they will not be disclosed.
"(2) This element of confidentiality must be essential to the full a[n]d satisfactory maintenance of the relation between the parties.
"(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

"(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."

[37] Counsel for UGG stated that the Commissioner made no attempt in this case to adduce any evidence that the public interest privilege is applicable. He filed no affidavit nor said anything with respect to the confidentiality of the factual information sought by UGG and deflected all attempts to try to elicit that information from Mr. Ouellet. In other words, he did not, on discovery, let UGG examine on the basis of the privilege, i.e. the confidentiality expectation, the first part of the *Wigmore* test.

[38] Counsel for the Commissioner replies that the existence of the public interest privilege attaching to the Commissioner's investigation is a recognized class privilege which he need not justify on a case-by-case basis in each proceeding before the Tribunal. The public interest privilege was initially determined by Justice Reed in *Nutrasweet*, cited above at paragraph 36, on the basis of meeting the *Wigmore* test and reiterated by her in the Southam case, cited above at paragraph 22, without alluding to the *Wigmore* test. Specific advertence and consideration of the *Wigmore* test is only necessary, she argued, when a new class of privilege is sought to be established relying on several Supreme Court of Canada's decisions.

[39] In my view, counsel for the Commissioner expresses the correct view on this issue — the existence of a recognized class privilege generally attaching to the Bureau's investigation conducted under the Act for the purpose of enforcing that statute obviates the necessity of establishing at the discovery stage in each proceeding before the Tribunal on a case-by-case basis the existence of this privilege.

[40] This view comes from a plain reading of Justice Strayer's decision on behalf of the Federal Court of Appeal in *D & B Companies* case, cited above at paragraph 29, of the existence of a privileged class based on the public interest attaching to the Commissioner's investigative materials.

[41] I note that the Federal Court of Appeal, in the D& B decision above, upheld Justice McKeown's Tribunal decision where he specifically ruled that previous Tribunal decisions and a previous Federal Court of Appeal decision in *Hillsdown*, cited above at paragraph 32, had "established privilege for a class of documents".

Issue 2 — Should the privilege be overridden here?

[42] Counsel for UGG cited seven factors which should lead me to exercise a discretion which both parties say I have to override the use of the public interest privilege as the basis for Mr. Ouellet's refusal to answer relevant questions.

[43] These factors are also invoked by UGG for their proposition that the public interest privilege was not appropriately claimed here. Such factors need not be considered in support of

this argument which may well have been appropriate if I had to consider anew whether the privilege had to be made out in this case. I have ruled otherwise on issue one above.

[44] As her first factor, counsel for UGG is of the view that the whole rationale for the public interest does not exist here because the identity of the sources of the Commissioner information are known. The eighteen section 11 questionnaire responses are known because their written responses were disclosed by the Commissioner. These section 11 responses are major players in the industry such that most of the important sources have been disclosed.

[45] As a second factor, UGG's counsel argues that the Commissioner never sought to justify the privilege and, in particular, the need for the privilege in this case is to protect information provided in confidence.

[46] The third factor put forward by counsel for UGG relates to the underpinning of the privilege — to protect informants from fear of reprisal. Counsel for UGG argues that fear of reprisal is non existent in this case looking at the entities present — the railways, government bodies such as the CGC and the CWB, big competitors in the Port of Vancouver, and independent grain companies who are protected because they have contractual relations with the terminals in the Port of Vancouver.

[47] Conflicting decisions of the Tribunal is the fourth factor urged by UGG's counsel. That conflict is as to the existence of an expectation of confidentiality because of section 29 of the Act.

[48] The fifth factor relates to the amount of disclosure that UGG has received from the Commissioner. Counsel for UGG argues the Commissioner's representative on discovery was gagged by the assertion of the public interest privilege. UGG has been prevented on discovery, counsel for UGG says, from knowing the Commissioner's case and the relevant information he has and is relying on or which damages his position.

[49] Factor six speaks to the prejudice to UGG. It is argued by UGG that it is prejudiced because of the Commissioner's use of the public interest privilege to control the timing of disclosure and what is actually disclosed has resulted in (1) its inability to obtain all relevant facts in the Commissioner's possession at the time of discovery; (2) its inability to obtain any commitment from the Commissioner to disclose any relevant facts that come into his possession on a continuing basis up until trial even when those facts relate to or contradict information where privilege has been waived; (3) its inability to actually obtain admissions on important facts; and (4) its inability to ask proper questions on documents where the privilege has been waived.

[50] The absence of prejudice to the Commissioner — his investigation is not being hindered — is the seventh factor. There is no prejudice, counsel for UGG argues, in requiring the Commissioner, as is normally the case in ordinary discovery, to disclose all relevant facts in his possession, and any concerns he may have can be addressed by keeping the information confidential as Level A.

[51] In dealing with this issue, I adopt the high standard advanced by counsel for the Commissioner which UGG must meet to convince the Tribunal to override the exercise of the public interest privilege here.

[52] That standard was first alluded to by Justice Reed in Southam, cited above at paragraph 22, where she expressed the view that it was "conceivable that in some cases a respondent's ability to answer a case might be impaired if the information concerning the interview or detailed information concerning the interview is not given". She thought it was difficult to conceive of a situation where that would be so.

[53] Justice Simpson in *Director of Investigation and Research v. Canadian Pacific Ltd.*, [1997] C.C.T.D. No. 39 (QL)(Comp.Trib.), stated that the public interest privilege "will prevail unless overridden by a more compelling competing interest".

[54] Justice McKeown in *Washington*, cited above at paragraph 25, reached the same conclusion picking up on Justice Reed's comment in Southam, cited above at paragraph 22, Justice McKeown expressed himself in these words at paragraph 9:

> Washington et al. say that the answers sought are relevant facts that they would like to have. That is not enough to outweigh the considerable public interest at stake. We are in agreement with Reed J. that fairly compelling circumstances will be required to outweigh the public interest element. Unlike the Director, who generally starts from the position of knowing nothing about the industry and must obtain all her information from third parties, the respondents are participants in this industry themselves. They already have considerable knowledge about its operations and the players and potential players. We also note that the Director in this case has provided a summary of the information obtained from the interviews to the respondents, as was the case in *Southam.* (emphasis added)

[55] Counsel for UGG has failed to persuade me that the seven factors advanced are sufficient for the proper exercise of the Tribunal's discretion to set aside in this case a privilege whose foundation has been recognized to be in the public interest. There are, in my view, better and less drastic ways to ensure UGG's ability to answer the Commissioner's case. Those better and less drastic ways reside in the proper application of the discovery principles developed by this Tribunal over the years in resolving the tension which the exercise of this privilege creates, principles whose aim is to ensure the Tribunal's process is fair.

[56] I am not in agreement with counsel for UGG on the validity of some of the advanced factors and, in other cases, if sound, whether they can be said, in fact, to arise in this case.

[57] Factor one is not made out because, while the identity of many of the Commissioner's third party information providers is known, the identity of others is not. UGG concedes this fact. Of more importance is that the scope of the public interest privilege is not limited to protecting only the source of the information but in my view, unless disclosed, protects the information itself.

[58] In my opinion, the proposition that the public interest privilege covers the information itself has been recognized by the Tribunal in several cases:

(a) Justice Reed in *Southam*, cited above at paragraph 22, wrote at page 84 of the reported case that it was in the public interest ". . .to keep the details of the interviews confidential to protect the effectiveness of his investigation";

(b) Justice McKeown in *Washington*, cited above at paragraph 25, ruled the details of interviews " . . . fall squarely within the public interest privilege. . .";

(c) in that same case, Justice McKeown was concerned that the summary be at a level of generality so as to not reveal "the very details that are sought to be protected by the privilege"; and

(d) Justice Noël in *Director of Investigation and Research v. Canadian Pacific*, [1997] C.C.T.D. No. 28 (QL)(Comp.Trib.) stated that there was no basis for Canadian Pacific's submission that the privilege did not apply to information provided under compulsion and that the purpose of the privilege is to give the Director [now the Commissioner] ". . . the ability to maintain control over information entrusted to him, thereby minimizing the risk of disclosure and preserving the effectiveness of the investigative process".

[59] Factor two is not relevant as I have determined that the privilege is a recognized and established class privilege protecting the Commissioner's investigation.

[60] I believe counsel for UGG that factor three draws too narrowly the rationale for the privilege to that of only protecting informants from fear of reprisal. The rationale for the privilege also includes protecting from information disclosure, subject to the constraints of use at trial, so as to encourage information providers to be forthcoming and candid about what they say to the Bureau.

[61] As to factor four, I do not think in terms of any balancing of competing interest turns on any asserted conflict in the jurisprudence as to expectation of confidentiality. The confidentiality threshold was met when Justice Reed considered the *Wigmore* test in first establishing the class privilege in *Nutrasweet,* cited above at paragraph 36.

[62] As to factor five, I am satisfied UGG has received substantial disclosure of information. It has received the Commissioner's confidential summary of all material facts, good or bad, in aggregated form conveyed to him in his investigation of the transaction and his counsel recognizes a continuing disclosure obligation.

[63] My review of the entire transcript of the discovery proceeding satisfies me that UGG, on discovery, received substantial disclosure although that disclosure was more limited than it should have been, a concern which I will address later in these reasons.

[64] UGG is of the view that the privilege has been misapplied and blocked answers to relevant questions. In my assessment, there is some merit to UGG's position but not to the point of making

out incurable prejudice which can only be rectified by totally eliminating the privilege, thereby suffocating its rationale.

[65] For these reasons, I decline to override the exercise of the public interest privilege in this case.

Issue 3 — Waiver

[66] Counsel for UGG argues that, if the information gathered for the Commissioner's application is the subject of public interest privilege, the Commissioner has completely waived that privilege for four reasons and is no longer able to prevent disclosure of any relevant information.

[67] First, reliance constitutes waiver. She says UGG is entitled to know the factual information the Commissioner is relying on in reaching decisions to date and cites four examples.

[68] The first example given by counsel for UGG is that the Commissioner relied on the information gathered as the basis for putting questions to UGG's representative, Mr. John Dewar; on discovery, and he also relied on that information for the purpose of briefing his experts.

[69] The second example, supporting a claim for waiver which she says is the strongest claim is the Commissioner's voluntary disclosure of the eighteen section 11 questionnaire responses with supporting document. The effect of this voluntary disclosure is a waiver by the Commissioner over a broad range of subject areas and issues that are relevant.

[70] The third example, for finding waiver occurred when Mr. Ouellet was questioned and provided answers.

[71] A fourth example is in respect of two questions which arose when counsel for the Commissioner provided information to the Tribunal during argument.

[72] Counsel for UGG argued against the Tribunal recognizing any partial waiver in this case which would allow the Commissioner, for example, to:

(a) selectively waive privilege on some section 11 responses and not others;

(b) selectively waive privilege over some information provided by section 11 information providers without waiving all privilege on all information provided by that person; and

(c) selectively waive some particular information but maintaining privilege over other information that reveals the particular information is incorrect or misleading.

[73] Three Tribunal cases were cited in support of UGG's argument on reliance equals waiver. As I read those cases, they speak to reliance or information at the hearing of an application as

requiring waiver. This is made clear by Justice Rothstein in *Director of Investigation and Research v. Superior Propane Inc.*, [1998] C.C.T.D. No. 17 at paragraph 6:

> While this is not a hearing on the merits, it is a hearing convened at the instance of the Director to obtain interim relief on an urgent basis prior to an application being filed under section 92. The Director is still not prepared to disclose the identity of the sources of the information upon which he relies to persuade the Tribunal to grant the order he seeks under section 100. This position is inconsistent with the dictum of McKeown J. in Canadian Pacific and that of Reed J. in Southam. . . . Indeed, weight and importance of the information provided by the informers is critical in the assessment to be made by the Tribunal and this goes to the identity and reliability of the sources of the information. While it might be possible to treat the information on a confidential basis, if the information is to be taken in and used by the Tribunal, privilege will be waived.

[74] On this basis, reliance during discovery or for purposes of expert briefing by the Commissioner of information received during his investigation does not constitute waiver.

[75] There is no merit, in my view, to UGG's argument for complete waiver based on answers provided by Mr. Ouellet during discovery or disclosed at the Tribunal during argument.

[76] This type of disclosure is either required in the case of discovery answers or expected in the case of Tribunal proceedings and does not count as building blocks in favour of complete waiver recognition.

[77] As counsel recognized it, UGG's strongest argument is the fact that the Commissioner disclosed an important amount of material to UGG in the form of section 11 questionnaire responses from major industry players. Some of this material as acknowledged by UGG's counsel supports UGG's case.

[78] There are two facets to UGG's argument: (1) whether on its face the disclosure of the section 11questionnaire responses amounted to complete waiver of the public interest privilege because of the scope and amount of that disclosure or alternatively; and (2) whether the Tribunal should deem a waiver of the public interest privilege to have occurred either because the Commissioner was using it to obtain an unfair advantage or allowing it would present a misleading picture or because the Commissioner took inconsistent positions on its application.

[79] 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.

[80] Contrary intention is revealed when the Commissioner's affidavit of documents is considered as a whole. In that affidavit the Commissioner asserts over a large category of documents traditionally falling within the public interest class and then lists in Schedule II relevant documents for which no privilege is claimed but for which disclosure of materials would be restricted by subsection 16(2) of the Rules. This is where the section 11 material is found.

[81] The clear intent gleaned from the Commissioner's affidavit of documents is to assert the traditional public interest privilege over recognized classes of documents derived from his investigation of the acquisition and to only carve out or waive the section 11 documents.

[82] The Tribunal will let the public interest privilege stand unless it is shown without the entire disclosure of the Commissioner's investigation that the section 11 questionnaire responses are misleading or were designed by the Commissioner to take an unfair advantage. I have no evidence of that.

[83] The conclusion I reach is the same as that reached by Justice Sharpe, then with the General Division of the Ontario Court, in *Transamerica Life Insurance Company v. Canada Life Assurance Company* (1995), 27 O.R. (3d) 291, a case involving an alleged waiver of the public interest privilege being asserted by Canada in respect of documents held by the Office of the Superintendent of Financial Institutions where he said at page 13 that "It is plainly not the law that production of one document from a file waives the privilege attaching to other documents in the same file". He concluded:

> The waiver rule must be applied if there is an indication that a party is attempting to take unfair advantage or present a misleading picture by selective disclosure. However, a party should not be penalized or inhibited from making the fullest possible disclosure. In my view, too ready application of the waiver rule will only serve to inhibit parties to litigation from making the fullest possible disclosure.

[84] I repeat there is no such evidence before me.

[85] I do not think UGG's argument on single subject matter waiver is relevant to the facts of this case. It has been subjected to adverse comment or at the very least to restricted application requiring a conclusion that in all of the circumstances, a party's conduct, and I would apply it to discovery, can be taken to mislead either the court or the litigant so as to require the conclusion that privilege has been abandoned. (See, Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp., [1988] B.C.J. No. 1988 (B.C.C.A.)).

[86] Part of UGG's waiver argument, that is concerned with selective waiver, also applies to its allegation of the misuse of the public interest privilege in this particular discovery which is the next and final issue to be considered.

Issue 4 — Was the public interest privilege misapplied?

[87] UGG's complaint is that the manner and extent which the public interest privilege has been used at discovery in this case frustrates its purpose.

[88] Counsel for UGG argues that the Commissioner cannot use the privilege to not disclose his case on discovery and the relevant material information in his possession and use it to avoid his normal discovery obligations. The only exception is where disclosure of those facts may disclose the identity of the person.

[89] I agree with that basic proposition, in the discovery context, even though for the reasons cited above I have determined the public interest privilege covers the information gathered by the Commissioner during his investigation.

[90] As I see it, to mitigate the harshness which a rigid application of the public interest privilege would have on the discovery process and in order to promote effective pre-trial preparation which ensures the trial will be conducted smoothly and efficiently, narrowed to the greatest extent with surprises eliminated as much as possible, the Tribunal requires, prior to discovery, production of documents as well as an aggregated summary of the main relevant facts gathered during the Commissioner's investigation.

[91] The purpose of this disclosure is obvious. The respondent is put in the position of knowing what facts the Commissioner has gathered up to that point in time including those which have led him to make the application on the basis of the SGMF.

[92] Discovery of the Commissioner must be meaningful and generally speaking the ordinary rules of discovery in civil matters should apply subject only to the exercise of the various privileges which the Commissioner enjoys including both litigation and public interest privilege.

[93] Through the summaries and productions the Commissioner has disclosed information which he has about the case. In my view, on discovery, he should not attempt to cut back on that disclosure by not answering questions which seek relevant facts within the Commissioner’s knowledge arising from those productions. The application of the public interest privilege, in the discovery process, should be limited to refusing to disclose facts which the Commissioner has which would reveal the source of the information. Generalized answers must be given.

[94] I reviewed the entire transcript of discoveries and generally conclude the discoveries proceeded as they would normally in civil cases subject to the constraints of the privileges and normal discovery objections available.

[95] I discount the sparing between counsel and there was much of it and do not attach too much importance to changes of position as long as those changes enhanced the discovery process and were otherwise corrected as they seem to be in this case when counsel for the Commissioner agreed to provide, as a continuing discovery obligation, information which the Commissioner subsequently receives which is contrary to evidence given on discovery provided it does not disclose the source of the information. If such a case arose the Commissioner is obligated to tell UGG that he has contrary information without disclosing it.

[96] Both counsel, at the beginning of Mr. Ouellet’s discovery, attempted to claim their turf. Counsel for UGG did not recognize the public interest privilege and sought answers to questions

where the source of the Commissioner's information provided would be known. Those questions were properly objected to.

[97] Counsel for the Commissioner clearly staked out the constraints of public interest privilege on the discovery process, as she was entitled to do. However, in my view, she may have been too assiduous in quickly invoking its application without, in some cases, seeking to clarify whether the information could be provided on a generalized basis or even letting Mr. Ouellet answer whether he had any information at all which would have rendered the use of the public interest privilege moot but which would have laid the foundation to a meaningful application of the Commissioner's continuing disclosure obligations. As counsel for UGG put it in discovery, the fact the Commissioner does not have any knowledge on a matter may be useful in the preparation for trial because of the comfort provided by the continuous disclosure obligation.

[98] There are a number of propositions put forward by counsel for the Commissioner which I do not agree with.

[99] First, at page 72 of the transcript, counsel for UGG at discovery stated he thought it was a novel proposition the Commissioner was entitled to "walk in a case like this and selectively waive privilege and pick and choose which information you will disclose . . . and in effect, hide under a bushel all those facts which run contrary to the Bureau's position in this case but produce the ones that you think support it". Counsel for the Commissioner answered that it was the law insofar as the Commissioner was concerned.

[100] The proper application of the public interest privilege is variable in my view. In some circumstances, it may well be the Commissioner has a *bona fide* discretion to insist on the full weight of this privilege and deem it appropriate not to waive it. However, on discovery, its use must be adapted to the purposes of discovery but not to the point of revealing the source of the information. I am of the view on discovery the Commissioner is obligated to reveal all facts within his knowledge including those contrary to his position.

[101] Second, I do not accept the proposition the Commissioner has no obligation to reveal his case on discovery and can wait to disclose it through the will-say statements of the witnesses he intends to call.

[102] I am not persuaded by the argument the Commissioner only really knows his case at the point in time when will-say statements are to be delivered. I recognize the asymmetry which exists. A respondent such as UGG has in-depth knowledge of the industry — its operations as well as those of its competitors.

[103] The Commissioner has little or no knowledge of the industry. That is why he must investigate it before making an application. But surely when he makes that application he knows why he is making it and what facts and law he is basing it on. The Commissioner's representative must answer relevant factual questions which go to his case subject to the assertion of the public interest privilege properly circumscribed in its application to the discovery context.

[104] To cover off one last point, in terms of the Commissioner's obligations after the delivery of the will-say statements, it is my view, based on Tribunal case law cited by its counsel, he need only disclose, if it has not been disclosed previously, the information upon which the witness will speak to. There is no obligation to disclose, if any, all information provided to the Commissioner by the witness to be. That will be the subject of proper cross-examination at trial. In addition, the litigation privilege may also attach to that information.

Other issues

[105] Other issues were raised in the memorandum of the parties. However, they were not addressed in argument and in the circumstances it would not be appropriate for me to answer them. Moreover, whether they remain a source of difficult between the parties will depend on the impact this decision will have.

[106] The Tribunal remains available to the parties should those issues need to be pursued.

[107] FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

(a) each party is to forthwith reassess the Commissioner's refusal on grounds of public interest privilege;

(b) orders the re-attendance of Mr. Ouellet, at the Commissioner's expense, to answer improperly refused questions inconsistent with these reasons within seven (7) days of the date of this order or within such time as the parties may agree; and

(c) no costs are awarded on this motion.

DATED at Ottawa, this 27th day of September, 2002.

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

François Lemieux

APPEARANCES:

For the applicant:

The Commissioner of Competition

John L. Syme
Melanie L. Aitken
Arsalaan Hyder

For the respondent:

United Grain Growers Limited

Sandra A. Forbes

For the intervenor:

Canadian Wheat Board

No representation - only written submission filed