



Reference: *Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp. Trib. 38
File no.: CT2002001
Registry document no.: 0097

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: 20021007
Member: Dawson J. (presiding)
Date of reasons and order: 20021007
Reasons and order signed by: Dawson J.

**REASONS AND ORDER REGARDING DISCLOSURE OF WILL-SAY STATEMENT
UPON COMMISSIONER'S FURTHER APPLICATION**

[1] Counsel for the Commissioner of Competition (“Commissioner”) and for the respondent asked for a further pre-hearing conference call on October 7, 2002, following the Tribunal’s Reasons and Order Regarding Disclosure of Will-Say Statements dated October 2, 2002.

[2] Counsel for the Commissioner filed the affidavit of Mr. David Ouellet, sworn October 4, 2002, in support of the submission that both Mr. Kenneth Pitts’ identity as a witness and his will-say statement should remain designated as Confidential-Level A. Counsel for the Commissioner argued that the evidence, including the characterization of Mr. Pitts as an expert witness, the manner in which evidence with respect to Mr. Pitts’ relationship with counsel for the respondent has emerged and Mr. Pitts’ apparent uncertainty as to the status of the preceding and his ability to speak to the Commissioner’s representatives support realistic concerns regarding interference with Mr. Pitts’ testimony.

[3] Counsel for the respondent provided a copy of the retainer agreement between counsel and Mr. Pitts and argued that there was no evidence that removing the Confidential-Level A designation would give rise to any risk of reprisal on the part of the respondent.

[4] Newly retained counsel for Mr. Pitts, Mr. David Harris, was permitted to participate in the pre-hearing conference call and advised that Mr. Pitts had no concern about his will-say statement being provided or about his name being disclosed to the respondent.

[5] Counsel for the respondent also requested that the Tribunal order that each party provide its position on what portions of the expert reports can be treated as non-confidential or as Confidential-Level B by the end of the day on Tuesday, October 8, 2002. Counsel for the Commissioner proposed Thursday, October 10, 2002, as a more realistic deadline.

[6] Having considered the affidavit of Mr. Ouellet, the retainer agreement with Mr. Pitts and the submissions of counsel, I am not satisfied that the evidence warrants any departure from the order of October 2, 2002. It follows that the designation Confidential-Level A attaches neither to the contents of Mr. Pitts’ will-say statement nor to the attachment of his name to that will-say statement.

[7] In so concluding I am particularly influenced by the fact that Mr. Pitts does not consider such protection necessary to protect him from any reprisals as the Commissioner originally asserted, and by the fact that Mr. Pitts is a former employee of the respondent on retainer to the respondent’s counsel. In that circumstance, the evidence does not justify keeping his will-say statement and name protected by designation as Confidential-Level A.

[8] Having so concluded, as I stated during the pre-hearing conference, this conclusion is separate and unrelated to the issue of confidentiality pursuant to the Order of Justice Blais and the pending section 11 proceedings involving Mr. Pitts.

[9] With respect to the confidentiality designation of expert reports, the parties are to advise each other of their respective positions by the end of the day on Wednesday, October 9, 2002. Any unresolved dispute will be dealt with at a pre-hearing conference call to be held at 10:00 a.m., local Winnipeg time, on Friday, October 11, 2002.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[10] The Confidential-Level A designation of the will-say statement of Mr. Pitts, including his name, is to be removed by the Commissioner.

[11] The parties are to advise one another of their respective positions with respect to the confidentiality designations of the expert reports by the end of the day on Wednesday, October 9, 2002.

[12] A further pre-hearing conference call will be held at 10:00 a.m., local Winnipeg time, on Friday, October 11, 2002, to deal with any unresolved dispute with respect to the confidentiality designations of the expert reports. Counsels are requested to advise the Tribunal as soon as possible as to the need for such call.

DATED at Toronto, Ontario, this 7th 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 Campion
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

no representation

For Mr. Kenneth Pitts:

David Harris