Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp.Trib. 22
File no.: CT2002001
Registry document no.: 0033

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 Inland Terminal Association of Canada**
(applicant for leave to intervene)

Date of hearing: 20020514 to 20020515
Member: McKeown J. (Chairman)
Date of order: 20020529
Order signed by: McKeown J.

**REASONS AND ORDER DENYING REQUEST FOR LEAVE TO INTERVENE**

**[1]** On January 2, 2002, following the acquisition by United Grain Growers Limited ("UGG") of Agricore Cooperative Ltd. ("Agricore"), the Commissioner of Competition (the "Commissioner") filed an application pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") for: (a) an order or orders against the respondent pursuant to section 92 of the Act requiring the respondent to divest, at the respondent's option: (i) all of its interests in the Pacific Elevators Limited ("Pacific") grain terminal at the Port of Vancouver (as more fully described in paragraph 21 of the Statement of Grounds and Material Facts dated December 19, 2001) ("Statement of Grounds and Material Facts"), Western Pool Terminals Limited ("WPTL") and the Loan Agreement between Pacific, WPTL and Alberta Wheat Pool dated January 11, 1996; or (ii) UGG's grain terminal at the Port of Vancouver (as more fully described in paragraph 21 of the Statement of Grounds and Material Facts); and (b) such further orders as may be appropriate.

**[2]** While the Commissioner's position is that there are two options: either the divestiture of the UGG facility or the divestiture of the respondent's 70 percent interest in the Pacific terminal as a whole, the respondent submits that there should be a third option; namely, the divestiture of the so-called Pacific 1 terminal.

**[3]** The existence of a substantial lessening of competition ("SLC") in the market for port terminal grain handling services in the Port of Vancouver has been agreed to by the parties for the purpose of this proceeding and is not in issue in this application. The sole substantive issue in this proceeding is what divestiture will effectively address this SLC; specifically whether the divestiture of the Pacific 1 terminal would satisfy the four conditions set out in paragraph 77 of the Statement of Grounds and Material Facts. Both parties agree that a divestiture that satisfies these four conditions would be sufficient to remedy the SLC.

**[4]** A request for leave to intervene was filed by the Inland Terminal Association of Canada ("ITAC") on February 18, 2002. At the hearing of the request for leave to intervene ITAC was not represented by counsel and relied solely on its written representations.

**[5]** The Commissioner submits that the issues raised by ITAC relate to the provision of grain handling services in the Port of Vancouver and access to such service on commercially competitive terms which fall within the Tribunal's mandate and jurisdiction. Further, the Commissioner points out that ITAC has indicated in its request for leave to intervene that it does not own any facilities at the Port of Vancouver and that if terminal access was restricted or denied, there would be detrimental consequences for members of ITAC. Hence, the Commissioner submits that, as a customer of terminal facilities in Vancouver, ITAC has demonstrated that it is directly affected, and that this effect is particularly acute in light of the fact that it does not own any port terminal facilities. The Commissioner also submits that ITAC's representations are relevant and very different from that of the Commissioner.

[6] The respondent submits that the sole substantive issue between the parties is not even adverted to in the filing of the ITAC request for leave to intervene. Further, counsel submits that the application for leave to intervene does not provide any indication of any specialized or unique perspective that the ITAC can bring to bear on the sole substantive issue outstanding between the parties to this proceeding.

Based on these submissions, counsel argues that the application is deficient and does not meet the test articulated by subsection 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), and previous decisions made by the Tribunal regarding requests for leave to intervene.

**[7]** As stated in *Director of Investigation and Research v. Tele-Direct* (Reasons and Order Granting Requests for Leave to Intervene) 61 C.P.R. (3d) 528, [1995] C.C.T.D. No. 4 (QL), the test for granting intervenor status is set out in subsection 9(3) of the *Competition Tribunal Act:*

> Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person.

**[8]** Further, as previously stated in *The Commissioner of Competition v. Canadian Waste Services Holdings* (26 June 2000), CT2000002/20, Reasons and Order Granting Request for Leave to Intervene at paragraph 3, [2000] C.C.T.D. No. 10 (QL) (Comp. Trib.) referred to in *Commissioner of Competition v. Air Canada* [2001], C.C.T.D. No. 5 (QL) (Comp. Trib.) at paragraph 11, the Tribunal must be satisfied that all of the following elements are met in order to grant the status of intervenor:

(a) The matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate (see *Director of Investigation and Research v. Air Canada* (1992), 46 C.P.R. (3d) 184 at 187, [1992], C.C.T.D. No. 24 (QL)).

(b) The person seeking leave to intervene must be directly affected. The word "affects" has been interpreted in *Air Canada, ibid.*, to mean "directly affects".

(c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (see Tele-Direct, cited above in § [2]).

(d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (see *Washington v. Director of Investigation and Research,* [1998] C.C.T.D. No. 4 (QL) (Comp. Trib.)).

**[9]** I agree with counsel for the respondent that ITAC has failed to demonstrate that it has a unique perspective that will assist the Tribunal in deciding the issue before it, namely whether the divestiture of the Pacific 1 Terminal or other alternate remedies would satisfy the four conditions set out in paragraph 77 of the Statement of Grounds and Material Facts and will effectively remedy the substantial prevention or lessening of competition agreed upon by the parties.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[10] The request for leave to intervene filed by ITAC is denied.

DATED at Ottawa, this 29th day of May, 2002.

SIGNED on behalf of the Tribunal by the presiding judicial member

(s)W.P. McKeown

APPEARANCES:

For the applicant:

John Syme
Arsalaan Hyder

For the respondents:

Kent E. Thomson
Sandra A. Forbes

For the applicant for leave to intervene:

Inland Terminal Association of Canada

not represented by counsel