

Competition Tribunal



Tribunal de la Concurrence

Reference: The Commissioner of Competition v. United Grain Growers Limited, 2002 Comp. Trib. 27
File no.: CT2002001
Registry document no.: 0048

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: 20020709
Member: Lemieux J. (presiding)
Date of order: 20020710
Order signed by: Lemieux J.

**REASONS AND ORDER REGARDING CONFIDENTIALITY, SCHEDULING AND
RETAINER OF COMMISSIONER'S EXPERT WITNESS**

[1] The Commissioner of Competition (the “Commissioner”) has moved the Competition Tribunal (the “Tribunal”) for:

- (a) An order supplementing and varying the Tribunal’s scheduling order dated May 29, 2002;
- (b) An order confirming that the confidentiality order dated May 27, 2002 (the “confidentiality order”) is inapplicable to the discovery transcripts; and
- (c) An order confirming that Dr. William Wilson, Professor of Agricultural Economics at North Dakota State University, is free to act as an expert witness for the Commissioner on this application.

Modification to The Tribunal’s Scheduling Order

[2] The parties are in the discovery process. The Tribunal’s scheduling order contemplated the discovery of United Grain Growers Limited’s (“UGG”) representative over the course of five days, June 24, 2002 to June 28, 2002. The discovery of UGG’s representative, John Dewar, could not be completed, counsel for the Commissioner agreeing to complete his discovery in one day on July 15, 2002. That would enable the Commissioner’s representative to be discovered during the balance of that week as contemplated by the scheduling order.

[3] Counsel for the Commissioner’s motion for variation to the Tribunal’s scheduling order is based on what she identifies as a fundamental chasm between the parties on the interpretation of an agreement reached between them on how the competition issues arising out of UGG’s acquisition of Agricore Cooperative Ltd. in November, 2001, particularly in relation to the grain terminal facilities in the Port of Vancouver, would be advanced before the Tribunal.

[4] She states there is a need to discover on a wide range of issues such as how the relevant product market (the port terminal grain handling facilities) in the relevant geographic market of the Port of Vancouver operates and what is the scope of the substantial lessening of competition. According to her, terminal throughput is an important factor which raises the need for evidence on grain supply. There is a need to know about the current competitive dynamics in the Port of Vancouver.

[5] Counsel for the Commissioner’s concerns are heightened by the fact UGG has taken under advisement several questions which are still outstanding.

[6] She argues the parties need the direction of the Tribunal on what issues are relevant and proposes the best way to obtain that direction from the Tribunal is to have UGG advise the Commissioner which questions taken under advisement will continue as refusals so that a refusal motion can be made to the Tribunal as soon as practicable. Once the Tribunal’s decision is made, the Commissioner would complete the discovery of John Dewar. The discovery of the Commissioner’s representative would go on as scheduled, that is, during the week of July 15, 2002.

[7] I do not think what counsel for the Commissioner proposes is the most orderly and appropriate way to resolve the issues which divides the parties. What she proposes unnecessarily splits the discovery process and may well lead to several refusals motions.

[8] In my view, counsel for the Commissioner should examine Mr. Dewar in Toronto as originally agreed, that is on July 15, 2002, which she said she was prepared to do. Mr. Dewar's examination should be conducted until it is completed and should encompass all issues which she deems important including ones where she and counsel for UGG diverge on. Discovery by UGG of the Commissioner's representative would then begin immediately after the completion of Mr. Dewar's examination and continue until completion.

[9] I am not ruling, in this motion, whose views should prevail on the proper interpretation of the agreement and the pleadings particularly the Commissioner's reply. I am attracted to the philosophy put forward by counsel for UGG that objections on relevance, during discovery, should be few and far between with the Tribunal deciding on questions of relevance and weight on the hearing of the main application scheduled to begin in Vancouver on October 21, 2002.

[10] I recognize there may be a need for the Tribunal to decide on refusals arising out of the discoveries of either the UGG or the Commissioner's representative so that they may re-attend on further examination. The Tribunal is prepared to accommodate the parties on August 9, 2002, should matters be unresolved. Counsel for UGG must advise counsel for the Commissioner by July 28, 2002, which questions taken under advisement will continue as refusals, with counsel for the Commissioner reciprocating by August 2, 2002.

Discovery Transcripts

[11] The parties agreed before me the best way to bring forward this issue was through the accomplishment of the following steps while maintaining the transcripts at confidentiality level A until the Tribunal decided:

- (a) On or before July 16, 2002, UGG will advise the Commissioner and counsel for the Canadian Wheat Board ("CWB") which portions of the discovery transcripts then available UGG maintains should be designated as confidential and at what level of confidentiality. Counsel for UGG undertook to provide counsel for CWB a copy of the discovery transcripts.
- (b) On or before July 23, 2002, the Commissioner and counsel for CWB will advise UGG whether the Commissioner or the CWB take any issue with the confidentiality designation. If any issue is expressed, the parties and the intervenor will attempt to resolve it.
- (c) For the balance of the discovery transcripts, counsel for UGG shall advise counsel for the Commissioner and counsel for CWB by July 31, 2002, which portions of those transcripts counsel seek confidentiality on. Counsel for the Commissioner and counsel for CWB shall respond by August 2, 2002.

(d) If the parties or the intervenor are unable to resolve any issue raised by the Commissioner or the CWB concerning UGG's designation of confidentiality regarding the discovery transcripts, UGG will bring a motion returnable August 9, 2002, before the Tribunal for an order resolving the issue.

[12] There is one nuance to what is set out above and which counsel for the Commissioner raised and was agreed to. If the parties and the intervenor agree that certain portions of the discovery transcripts should be designated as confidential and the appropriate level of confidentiality, UGG will bring forward a consent order to the Tribunal for its endorsement as an amendment to the existing confidentiality order.

The Commissioner's Retainer of Dr. Wilson

[13] The Commissioner proposes to retain William Wilson as an expert witness for the Commissioner in this application.

[14] Counsel for UGG raised an issue with the Commissioner that Dr. Wilson may be in conflict of interest because of a retainer he had received from UGG in 1996 to advise it on a different transaction, the ultimately unsuccessful bid by Alberta Wheat Pool and Manitoba Pool Elevators (the "Pools") for UGG.

[15] Discussion took place between the parties. Dr. Wilson deposed, in an affidavit, as follows:

- (a) without denying he may have been consulted by UGG in 1996 or 1997, he has no recollection whatsoever of any such contact;
- (b) a diligent search of his files reveals he is unable to find any record evidencing any UGG request for advice and a consultation of his diary found no record of any consultation with UGG or its counsel; and
- (c) his search confirmed he has no documents whatsoever relating to the proposed acquisition of UGG by the Pools.

[16] Counsel for UGG advised counsel for the Commissioner on July 5, 2002, UGG would not object to the Commissioner retaining Dr. Wilson on the basis of Dr. Wilson's statement he has no recollection or report of his previous retainer in which UGG asserts he performed and was paid for nine (9) hours of work.

[17] Before me, counsel for UGG stated the Tribunal's order on this matter, if insisted upon by the Commissioner, should reflect the basis upon which UGG had agreed not to object, i.e. on the assurances received from Dr. Wilson he had no recollection or records on the UGG retainer.

[18] However, UGG went further by filing the affidavit of John Dewar, deposed on information and belief, received from one of the solicitors to UGG, which asserts in 1996 the retainer and work performed by Dr. Wilson for UGG.

[19] I agree with counsel for the moving party the Commissioner is entitled to an order from this Tribunal based on the evidence before me, the Commissioner is free to retain Dr. Wilson without fear of any future allegation by UGG of conflict of interest which could disqualify him.

[20] Counsel for UGG filed no probative evidence before me such a conflict exists. Moreover, in the circumstances, it would be unfair to leave open the possibility that UGG might raise this issue during the hearing. Based on proper evidence before me, I am satisfied Dr. Wilson has no conflict.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[21] The examination of John Dewar shall resume on July 15, 2002 in Toronto and continue until completion.

[22] UGG shall discover the Commissioner's representative immediately after the completion of the examination of John Dewar.

[23] Counsel for the parties may move in accordance with these reasons for an order regarding any outstanding refusals to answering questions on discovery.

[24] UGG shall provide the Commissioner with answers to undertakings by August 12, 2002.

[25] The Commissioner shall provide UGG with answers to undertakings by August 19, 2002.

[26] Counsel for the parties and for the intervenor may move in accordance with these reasons for an order amending the Tribunal's confidentiality order dated May 27, 2002, in respect of discovery transcripts.

[27] The Commissioner is a liberty to retain Dr. William Wilson as an expert witness on the basis of the Tribunal's determination on the evidence. Therefore, Dr. Wilson has no conflict of interest arising out of his previous retainer in 1996 with UGG.

DATED at Ottawa, this 10th day of July, 2002.

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

(s) F. Lemieux

APPEARANCES:

For the applicant:

The Commissioner of Competition

Melanie L. Aitken
Arsalaan Hyder

For the respondent:

United Grain Growers Limited

Kent E. Thomson
Sandra A. Forbes

For the intervenor:

The Canadian Wheat Board

Randal T. Hughes