



Reference: *The Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp. Trib. 20  
File no.: CT2002001  
Registry document no.: 0031

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**  
(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 GRANTING 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) (the “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 at 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 in the proceedings was filed by the Canadian Wheat Board (the “CWB”) on February 19, 2002. This request was decided orally at a hearing on May 15, 2002. The CWB was granted leave to intervene on the substantive issue. The following are the reasons for the order.

[5] The CWB is a farmer controlled marketing organization which is incorporated pursuant to the provisions of the *Canadian Wheat Board Act*, R.S.C. 1985 c. C-24. The statutory object of the corporation is to market grain grown in Western Canada in interprovincial and export trade. Its mission is to market quality products and services in order to maximize returns to Western Canadian grain producers. All of the money received by the CWB for the sale of CWB grains is combined into one of four accounts (wheat, durum, barley and designated (i.e. malt) barley) and, after deducting the CWB’s operating costs, the sales revenue earned is returned to producers. Any increase in the operating costs of the CWB results in a reduction in the return to producers.

[6] The CWB is concerned that enhanced market power not adequately remedied will adversely impact access to facilities, price levels and quality of service both at the Port of Vancouver and primary grain elevator levels, thus, resulting in competitive consequences affecting the CWB and the producers that it represents. More specifically, the CWB submits that the alternative partial divestiture proposed by the

respondent in the Commissioner's application will not adequately remedy the substantial lessening or prevention of competition arising from the acquisition. Therefore, the CWB alleges that it is directly affected by the matters at issue in the application, which is to determine whether the divestiture of the Pacific 1 Terminal or other alternate remedies satisfy the four conditions set out in paragraph 77 of the Statement of Grounds and Material Facts.

[7] The CWB also alleges that it has a unique perspective on the potential competitive effects of the acquisition and the extent to which the partial divestiture proposed by UGG would provide an adequate remedy because it is the direct representative of Western Canadian producers of wheat and barley and is a major user of terminal facilities at the Port of Vancouver.

[8] The Commissioner supports the intervention of the CWB as counsel submits that the request satisfies the test for granting intervenor status set out in subsection 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c.19 (2nd Supp.), and in the jurisprudence of the Tribunal.

[9] Counsel for the respondent submits that the test for granting intervenor status has not been satisfied by the CWB and that the request for leave to intervene should be denied. Counsel submits that the CWB has not demonstrated that it has unique knowledge of the matters in issue that would provide the Tribunal with a perspective different from the Commissioner's namely because of the narrowness of the issue between the parties as formulated in the pleadings. Counsel argues that CWB only asserts that because it is a customer it has a "unique perspective to 'bring to bear' on the potential competitive effects of this acquisition". Further, counsel submits that the CWB intends to intervene in this case simply to express its view in favour of the Commissioner's position which is not a proper basis on which leave to intervene should be granted.

[10] Counsel for the respondent also submits that the CWB should not be given leave to intervene as this would result in a prejudice to the respondent who may be required to divulge highly confidential information concerning its cost structure, margins, operations and future business plans. Counsel submits that the respondent has gone to great lengths to streamline this proceeding and to limit the scope of the issues by negotiating an arrangement with the Commissioner and that this result might be defeated by the participation of the CWB.

[11] 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.

[12] 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.)).

[13] I am of the view that the CWB has demonstrated that its request for leave to intervene satisfies the test stated above. In particular, CWB's extensive involvement in the grain industry with producers clearly places it in a unique position to assist the Tribunal in its consideration of the effectiveness of the remedies that are proposed.

[14] Confidentiality concerns raised by counsel for the respondent cannot by themselves constitute grounds for denying intervenor status. However, CWB will have to respect any confidentiality obligations arising by virtue of any confidentiality orders.

[15] I am of the view that the CWB shall only be entitled to address the issues which I identify below, that will assist the Tribunal in making a decision on the Commissioner's application. Further, I took note of the fact that the CWB is prepared to agree to the conditions proposed by the Commissioner regarding the calling of witnesses which are stated at paragraph 31 of the Response of the Applicant to the Request for Leave to Intervene by the Canadian Wheat Board. I am of the view that those conditions will provide adequate and proper disclosure to the parties of the evidence intended to be called, if at all, by the CWB, and ensure that it is not repetitive or disruptive to the proceedings.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[16] The Canadian Wheat Board is granted leave to intervene on the sole substantive issue of this proceeding:

(a) 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 in the market for port terminal grain handling services in the Port of Vancouver.

[17] The Canadian Wheat Board shall be allowed to participate in the proceedings and is permitted:

(a) to review any discovery transcripts and access any discovery documents of the parties to the application but not direct participation in the discovery process, subject to confidentiality orders;

(b) to call *viva voce* evidence on the following conditions and containing the following information: (1) the names of the witnesses sought to be called; (2) the nature of the evidence to be provided and an explanation as to what issue within the scope of the intervention such evidence would be relevant; (3) a demonstration that such evidence is not repetitive, that the to be facts proven have not been adequately dealt with in the evidence so far; and (4) a statement that the Commissioner had been asked to adduce such evidence and had refused;

(c) to cross-examine witnesses at the hearing of the application to the extent that it is not repetitive of the cross-examination of the parties to the application;

(d) to submit legal arguments at the hearing of the application that are non-repetitive in nature and at any pre-hearing motions or pre-hearing conferences; and

(e) to introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the *Competition Tribunal Rules*, SOR/94-290, and case management.

[18] UGG shall not be permitted to seek documentary and oral discovery of the CWB.

DATED at Ottawa, this 29<sup>th</sup> 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:

The Canadian Wheat Board

Randall T. Hughes  
Susan E. Paul  
Jeff Lindsay