

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34; as amended;

IN THE MATTER OF an application by the Commissioner of Competition under section 104 of the *Competition Act*;

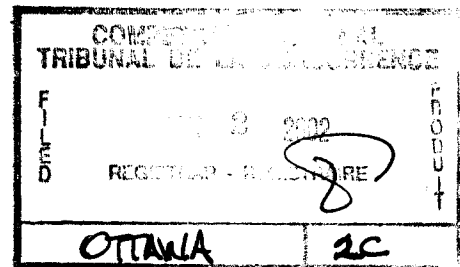
AND IN THE MATTER OF the acquisition by United Grain Growers Limited of Agricore Cooperative Ltd., a company engaged in the grain handling business.

BETWEEN:

COMMISSIONER OF COMPETITION
(applicant)

- and -

UNITED GRAIN GROWERS LIMITED
(respondent)



APPLICANT'S MEMORANDUM OF ARGUMENT ON INTERIM RELIEF

1. This Memorandum is filed in connection with the Commissioner of Competition's application pursuant to s. 104 of the *Competition Act* (the "Act") for a Consent Interim Order (the "Consent Interim Order Application"), pending the final determination of the Commissioner's application for an order pursuant to section 92 of the Act (the "Application").
2. In a merger transaction which closed on November 1, 2001 (the "Acquisition"), the Respondent acquired, among other things, certain port terminal assets of Agricore Cooperative Ltd. ("Agricore"). Those assets included Agricore's interest in the Pacific grain handling terminal and the Cascadia grain handling terminal, both of which are located in the Port of Vancouver.
3. In the Application, the Applicant seeks an order requiring the Respondent to divest, at its option, either the Pacific terminal or the UGG terminal.

4. In this Consent Interim Order Application, the Commissioner seeks an interim order requiring that in the period between the issuance of the Draft Interim Consent Order and the Tribunal's disposition of the Application, the Respondent:

- take such steps as are necessary to maintain the competitive viability of the Pacific and UGG terminals, including providing such sales, managerial, administrative, operational and financial support as is necessary in the ordinary course of business to promote the continued effective operation of those terminals; and
- take certain steps to ensure that grain handling companies without an interest in Vancouver port terminal facilities (“Non-integrated Graincos”) continue to have access to port terminal grain handling services at the Port of Vancouver.

THE LAW

A. Interim Orders

5. Subsection 104(1) of the Act provides:

104 (1) Where an application has been made for an order under this Part, other than an interim order under section 100, the Tribunal, on application by the Commissioner, may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

6. As noted above, the Applicant has made an application for an order pursuant to sections 92 of the Act.

7. It is submitted that, having regard to all of the circumstances, the principles ordinarily considered by superior courts in granting interlocutory or injunctive relief warrant the making of the proposed Consent Interim Order.

8. The Supreme Court of Canada has set out the principles to be considered by courts when

granting interlocutory or injunctive relief. It is submitted that prior to granting interlocutory relief, the Tribunal should be satisfied that:

- (a) there is a serious issue to be determined;
- (b) in the absence of an interim consent order, irreparable harm is likely to result; and
- (c) the balance of convenience favours issuing the interlocutory relief.

RJR-Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 314, at 334;
Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110;
American Cyanamid Co v. Ethicon Ltd., [1975] A.C. 396.

9. This three-part test has been applied by the Tribunal in determining an application for an interim order under section 104 of the Act.

Canada (Director of Investigation and Research) v. Southam Inc., (1991) 36 C.P.R. (3d) 22 (C.T.).

B. The Consent Order Process

10. Section 105 of the Act provides:

105. Where an application is made to the Tribunal under this Part for an order and the Commissioner and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal may make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested.

11. When proceedings are brought on consent, the Tribunal has stated that its role is to determine only whether the consent order meets a minimum test. The Tribunal further treats the Applicant's proposal with initial deference and will assume at the outset that the proposed consent order will meet its stated objectives.

Director of Investigation and Research v. Bank of Montreal et al., 68 C.P.R. (3d) 527 at 537.

ARGUMENTS

A. Serious Issue

12. It is submitted in assessing whether an applicant for injunctive relief has raised a serious issue in the proceeding in respect of which relief is sought, the threshold to be met is a low one. It is further submitted that in this context, the Tribunal must make a preliminary assessment of the merits of the case in order to determine whether there is a serious question to be tried, as opposed to a frivolous and vexatious claim.

RJR-Macdonald, supra, at pp. 337 and 338.

13. The Applicant has conducted a thorough review of the Acquisition.

Affidavit of D. Ouellet, paras. 8-11

14. It is submitted that the issues raised in the Application are neither frivolous nor vexatious and meet the first part of the test for the issuance of an interim order.

B. Irreparable Harm

15. It is submitted that in assessing irreparable harm where the applicant is a public authority, the issue of the public interest is to be considered not only as a factor in the balance of convenience, but also as an aspect of irreparable harm to the interests of the authority. The onus on the public authority is low where the promotion of compliance with a statutory scheme is at issue.

RJR-Macdonald, supra, at p. 346.

16. It is submitted that irreparable harm will occur in this case in the absence of an interim order. The Pacific and UGG terminals compete in a geographic market with another terminal elevator located at the Port of Vancouver and owned by the Respondent.

17. It is submitted that in the absence of an interim order, the Respondent's decision-making regarding the Pacific and UGG terminals may be affected by its interest in its other, competing terminal. This, in turn, could affect the competitive viability of the Pacific and UGG terminals and, ultimately, have an impact, effectiveness of a Tribunal order that one of those terminals be divested. Moreover, in the absence of an interim order, the Respondent would be in a position to take actions that could adversely affect the ability of Non-integrated Graincos to compete for grain on the prairies, either by limiting access to the most important port grain handling market in Canada, namely Vancouver, or by reducing or eliminating revenue streams flowing from grain handling in the Port of Vancouver.

C. Balance of Convenience

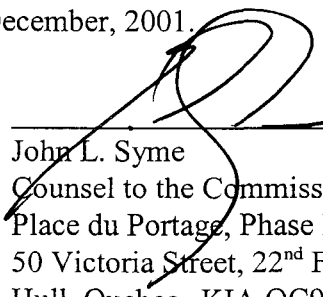
18. It is submitted that the balance of convenience is clearly in favour of granting of the proposed Interim Consent Order in this case, in that the public interest in maintaining and encouraging competition outweighs any inconvenience or harm to the Respondent that may result from that order, as evidenced by the Consent of the Respondent to the interim order.

RELIEF SOUGHT

19. The Applicant and the Respondent have agreed that pending the final determination of the Application by the Tribunal, a Consent Interim Order in the form attached to the Notice of Application should issue. The Applicant therefore seeks, pursuant to s. 92 and s. 105 of the Act, the issuance of the Consent Interim Order attached hereto.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Hull, Quebec, this 19th day of December, 2001.



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