

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 92 of the *Competition Act*;

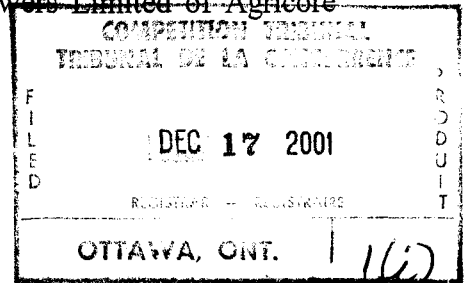
AND IN THE MATTER OF the acquisition by United Grain Growers Limited of Agricore Cooperative Ltd., a company engaged in the grain handling business.

BETWEEN:

COMMISSIONER OF COMPETITION

- and -

UNITED GRAIN GROWERS LIMITED



Applicant

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. 92 and 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 a Consent Order pursuant to sections 92 and 105 of the Act (the "Application").

2. On November 1, 2001, the Respondent acquired, among other things, certain primary grain elevators in Western Canada and an interest in CanAmera Foods Limited Partnership ("CanAmera") (the "Acquisition"). CanAmera is one of the largest canola oil seed

processors in Canada. Archer Daniels Midland Company ("ADM"), a shareholder of the Respondent, is also a major canola oil seed processor and is a direct competitor with CanAmera.

3. In the Application, the Applicant seeks an order requiring the divestiture of the grain elevators identified in Schedule "A" to the Draft Interim Consent Order (the "Elevators to be Divested") and an order requiring the Respondent to abide by certain confidentiality provisions relating to its interest in CanAmera.
4. In the 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 Elevators to be Divested, 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 the Elevators to be Divested in accordance with standards similar to those existing for the same time period for the previous three years; and
 - take certain steps so as to prevent ADM from receiving competitive commercially sensitive information concerning the operations of CanAmera.

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 a Consent Order pursuant to sections 92 and 105 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. Each of the Elevators to be Divested competes in a geographic market with another grain elevator owned by the Respondent.
17. In the absence of an interim order, the Respondent's decision-making regarding the Elevators to be Divested maybe affected by its interest in its other, competing grain elevators. This, in turn, could affect the competitive viability of the Elevators to be Divested and, ultimately, have an impact, effectiveness of a Tribunal order that those Elevators be divested.

C. Balance of Convenience

17. 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.

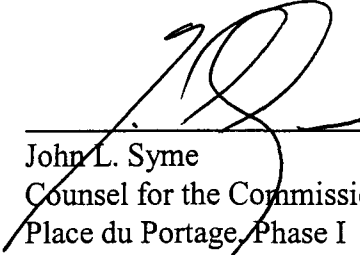
RELIEF SOUGHT

18. 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 13th day of December, 2001.



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