



Reference: *Commissioner of Competition v. Saskatchewan Wheat Pool Inc.*, 2006 Comp. Trib. 30

File No.: CT2005009

Registry Document No.: 0079

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 92 of the *Competition Act*;

AND IN THE MATTER OF a joint venture between Saskatchewan Wheat Pool Inc. and James Richardson International Limited in respect of port terminal grain handling in the Port of Vancouver.

B E T W E E N :

Commissioner of Competition
(applicant)

and

Saskatchewan Wheat Pool Inc.
James Richardson International Limited
6362681 Canada Ltd. and 6362699 Canada Ltd.
(respondents)

and

Canadian Pacific Railway Company
Canadian National Railway Company
Canadian Wheat Board and
Vancouver Port Authority
(intervenors)



Decided on the basis of the written record
Presiding Judicial Member: Simpson J. (Chairperson)
Date of Order: August 8, 2006
Order signed by: Madam Justice S. Simpson

AMENDED INTERIM CONFIDENTIALITY ORDER ON CONSENT OF THE PARTIES AND INTERVENORS

[1] FURTHER TO the request by the Commissioner of Competition (the “Commissioner”) for an amended interim confidentiality order;

[2] AND FURTHER TO the draft amended interim confidentiality order filed on consent by the Parties and the Intervenor;

THE TRIBUNAL ORDERS THAT:

[3] For the purposes of this Order:

- (a) “Respondents” shall mean Saskatchewan Wheat Pool Inc., James Richardson International Limited, 6362681 Canada Ltd., 6362699 Canada Ltd. and their respective affiliates and predecessors and “Respondent” shall mean any of them.
- (b) “Intervenor” shall mean Canadian Pacific Railway Company, Canadian National Railway Company, Canadian Wheat Board, Vancouver Port Authority and their respective affiliates and predecessors and “Intervenor” shall mean any of them.
- (c) “Commissioner’s Documents” shall mean those documents originating with the Commissioner, documents listed in the Commissioner’s Affidavit of Documents, documents that may be otherwise filed or produced by the Commissioner in this Application or on any related motions, other than any of the Respondents’ Documents or the Intervenor’s Documents.
- (d) “Commissioner’s Confidential Documents” shall mean the Commissioner’s Documents designated by the Commissioner as confidential. The Commissioner’s Confidential documents shall be designated as Level A or Level B confidential, to denote the persons who are permitted access to those documents. The Commissioner’s Confidential Documents which are designated as Level A confidential may be disclosed by the Respondents and Intervenor only in accordance with paragraph 13 below. The Commissioner’s Confidential Documents which are designated as Level B confidential may be disclosed by the Respondents and Intervenor only in accordance with paragraph 14 below. For greater certainty, only the Commissioner may assert a confidentiality claim over the Commissioner’s Documents.
- (e) “Respondents’ Documents” shall mean, collectively, those documents originating with each of the Respondents, documents listed in each of the Respondent’s Affidavits of Documents, documents that may be otherwise filed or produced by each of the Respondents in this Application or on any related motions, other than any of the Commissioner’s Documents, the other Respondent’s Documents or any of the Intervenor’s Documents.
- (f) “Respondent’s Confidential Documents” shall mean a Respondent’s Documents designated as confidential by that Respondent. A Respondent’s Confidential

Documents shall be designated as Level A confidential or Level B confidential, to denote the persons who are permitted access to those documents. A Respondent's Confidential Documents may be disclosed by the Commissioner, the other Respondents and the Intervenor only in accordance with paragraphs 13 and 14 below. For greater certainty, only each individual Respondent may assert a confidentiality claim over its own Respondent's Documents.

- (g) "Intervenor's Documents" shall mean, collectively, those documents originating with each of the Intervenor, documents listed in each of the Intervenor's Affidavits of Documents, documents that may be otherwise filed or produced by each of the Intervenor in this Application or on any related motions, other than any of the Commissioner's Documents, the other Intervenor's Documents or the Respondent's Documents.
- (h) "Intervenor's Confidential Documents" shall mean an Intervenor's Documents designated as confidential by that Intervenor. An Intervenor's Confidential Documents shall be designated as Level A confidential or Level B confidential, to denote the persons who are permitted access to those documents. An Intervenor's Confidential Documents may be disclosed by the Commissioner, the Respondent and the other Intervenor only in accordance with paragraphs 13 and 14 below. For greater certainty, only each individual Intervenor may assert a confidentiality claim over its own Intervenor's Documents.
- (i) The Commissioner's Confidential Documents, the Respondent's Confidential Documents and the Intervenor's Confidential Documents are collectively referred to as the "Protected Documents". For greater certainty, "Protected Documents" includes the information contained in those documents.
- (j) "Parties" shall mean the Commissioner and the Respondent, and "Party" shall mean the Commissioner or any of the Respondent.
- (k) "Independent Expert" shall mean an expert retained by a Party or Intervenor who (i) is not a current employee of the Respondent or Intervenor or their affiliates, (ii) has not been an employee of any of the Respondent or Intervenor or their affiliates within 5 years prior to the date of this Order, and (iii) is not a current employee of a competitor or customer of any of the Respondent or Intervenor or their affiliates.
- (l) "Designated Representatives" shall mean those persons designated by each of the Respondent or Intervenor in accordance with paragraph 12 below.

[4] This Order shall apply to all persons, to the extent that they acquire access to Protected Documents in this application.

[5] Disclosure of documents containing any of the following type of information could cause specific and direct harm:

- (a) Information relating to negotiations with customers on prices, rates and incentives;
- (b) Private contractual arrangements between customers and the Respondents, Intervenors or third parties;
- (c) Operational information;
- (d) Financial reports;
- (e) Budgets;
- (f) Strategic plans;
- (g) Internal market studies and analyses;
- (h) Records of negotiations between the Respondents, between the Respondents and Intervenors or between Intervenors;
- (i) Other documents containing competitively sensitive and/or proprietary information of the Respondents, Intervenors or third parties; and
- (j) Documents provided to the Commissioner in the course of her inquiry on a confidential basis.

[6] No Protected Document shall be disclosed except with the prior written consent of the Party or Intervenor that claimed confidentiality over the Protected Document or in accordance with this Order or any further Order of the Tribunal.

[7] If requested by a Party or Intervenor, a Party or Intervenor shall provide a copy of the Protected Documents listed in its affidavit of documents or otherwise produced by it in this application to external counsel for the Respondents or Intervenors or counsel to the Commissioner, as the case may be. Counsel for the Parties and Intervenors may make such copies of the Protected Documents as they require to prepare for and conduct the hearing of this application, but cannot disclose Protected Documents except in accordance with this Order.

[8] Within 14 days of service of their respective affidavits of documents, the Parties and Intervenors shall provide written notice to the other Parties and Intervenors identifying the Confidential Documents and, with respect to each document, whether Level A or Level B confidentiality is claimed.

[9] As preparation for the hearing of this application proceeds, the Parties and Intervenors shall use their best efforts to resolve any issues that may arise among them concerning a claim of confidentiality or the appropriate level of confidentiality for the Protected Documents. If agreement cannot be reached, a Party or Intervenor may apply to the Tribunal to determine the confidentiality or level of confidentiality of any Protected Document.

[10] A Party or Intervenor may, at any time and with prior reasonable notice to the other Parties and Intervenors, redesignate its Protected Documents as non-confidential or from Level A to Level B confidentiality. Documents redesignated as non-confidential shall then cease to be confidential and shall form part of the public record if introduced into evidence at the hearing of the application, unless the Parties and Intervenors agree otherwise or the Tribunal orders otherwise.

[11] In the event that it proves necessary, a pre-hearing conference shall be held (on a date to be fixed by the Tribunal), to deal with any unresolved issues of confidentiality concerning any Protected Documents likely to be adduced into evidence at the hearing of this application.

[12] The Respondents and Intervenors may each designate three individuals as their respective representatives (the “Designated Representatives”) who will be permitted access to documents designated as Level B Protected Documents in accordance with the terms of this Order. Such designation shall be made by written notice to the Tribunal, with a copy sent concomitantly to the Commissioner and outside counsel to the Respondents and Intervenors.

[13] Level A Protected Documents may only be disclosed to the Commissioner, Counsel for the Commissioner, the Commissioner’s staff directly involved in the application, outside counsel to the Parties and Intervenors, outside counsel’s staff who are directly involved in the application and Independent Experts.

[14] Level B Protected Documents may only be disclosed to the Commissioner, Counsel for the Commissioner, the Commissioner’s staff directly involved in the application, outside counsel to the Parties and Intervenors, outside counsel’s staff who are directly involved in the application, Independent Experts and the Designated Representatives of the Parties and Intervenors.

[15] A Party or Intervenor may, at any time and with prior reasonable notice to other Parties and Intervenors, redesignate any of its own Level A Protected Documents as Level B Protected Documents vis-à-vis a particular Party or Intervenor.

[16] This Order shall not apply to any copies of any Protected Documents which came into the possession of a Party or Intervenor (or their outside counsel) independent of and prior to the discovery process or this Application.

[17] Nothing in this Order diminishes, waives or otherwise affects any contractual, statutory or common law confidentiality obligations that a Party or Intervenor may have in respect of copies of the Protected Documents.

[18] Level A Protected Documents shall be clearly marked “CONFIDENTIAL - Level A” on the face of the document and on each page which is claimed as confidential. Level B Protected Documents shall be clearly marked “CONFIDENTIAL - Level B” on the face of the document and on each page which is claimed as confidential. The Party or Intervenor that produces a Protected Document shall identify itself on each page of each such Protected Document.

[19] Notwithstanding any provision of this Order, the Commissioner is permitted to disclose the Commissioner's Confidential Documents to any person for the purpose of preparing for the hearing of this Application, subject to the limits prescribed in section 29 of the *Competition Act*.

[20] Independent Experts and Designated Representatives shall not copy or disclose Protected Documents directly or indirectly to any other person, except for persons permitted to receive such Protected Documents in accordance with this Order or any other Order of the Tribunal.

[21] Prior to gaining access to Protected Documents, Independent Experts and Designated Representatives shall execute a confidentiality agreement in the form attached as Schedule A ("Confidentiality Agreement"). A Confidentiality Agreement signed pursuant to this Order shall be filed promptly with the Registrar of the Tribunal who shall retain all such agreements in confidence until completion or final disposition of this application and any related appeals, at which time the Confidentiality Agreements may be disclosed to the Parties and Intervenors upon request.

[22] If a Party or Intervenor is required by law to disclose a Protected Document provided by another Party or Intervenor, or if a Party or Intervenor receives written notice from a person who has signed a Confidentiality Agreement pursuant to this Order that they are required by law to disclose a Protected Document provided by another Party or Intervenor, that Party or Intervenor shall give prompt written notice to the other Parties and Intervenors so that the Parties and Intervenors may seek a protective order or other appropriate remedy.

[23] For greater certainty, all persons, including the Commissioner and his staff, who obtain access to documents, including Protected Documents, through the discovery process in this application are subject to an implied undertaking to use all of the Protected Documents and information contained therein solely for the purposes of this application and any related appeals.

[24] Documents over which no privilege or confidentiality claim has been asserted shall form part of the public record in this proceeding if introduced into evidence at the hearing of this application or otherwise placed on the record. Public documents which form part of the public record in this proceeding shall be marked "Public" on the face of the document.

[25] The confidentiality of Protected Documents shall be maintained up to and throughout the hearing of the application and thereafter. Protected Documents shall not form part of the public record in the application if introduced into evidence at the hearing of this application, unless the Parties and Intervenors agree otherwise or the Tribunal orders otherwise after hearing the submissions of the Parties and Intervenors.

[26] The Commissioner shall not file on the public record any documents which are based on or incorporate the Respondents' Confidential Documents or the Intervenors' Confidential Documents or other confidential information provided to the Commissioner by the Respondents or Intervenors without first providing reasonable written notice to the Respondents and Intervenors, including a description of the confidential information to be disclosed, so as to provide the Respondents and Intervenors with a reasonable opportunity to seek a protective order or other appropriate remedy from the Tribunal.

[27] No Respondent shall file on the public record any documents which are based on or incorporate the Commissioner's Confidential Documents, other confidential information provided to the Respondents or Intervenors by the Commissioner, the Confidential Documents of another Respondent or an Intervenor, or other confidential information provided to the Respondent by another Respondent or an Intervenor without first providing reasonable written notice to the Commissioner or the affected Respondent or Intervenor, as the case may be, including a description of the confidential information to be disclosed, so as to provide the Commissioner or the affected Respondent or Intervenor with a reasonable opportunity to seek a protective order or other appropriate remedy from the Tribunal.

[28] No Intervenor shall file on the public record any documents which are based on or incorporate the Commissioner's Confidential Documents, other confidential information provided to the Respondents or Intervenors by the Commissioner, the Confidential Documents of a Respondent or another Intervenor, or other confidential information provided to the Intervenor by a Respondent or another Intervenor without first providing reasonable written notice to the Commissioner or the affected Respondent or Intervenor, as the case may be, including a description of the confidential information to be disclosed, so as to provide the Commissioner or the affected Respondent or Intervenor with a reasonable opportunity to seek a protective order or other appropriate remedy from the Tribunal.

[29] Subject to paragraph 30 below, all documents produced by a Party or Intervenor during the course of discovery shall be deemed authentic with respect to such aspects of authorship, execution, copies, sending, service or delivery as they appear on the face of the document.

[30] At the hearing of the application, a Party or Intervenor may challenge the authenticity of a document in respect of any of the aspects referred to in paragraph 29 above, as long as notice of such challenge is provided to the other Parties and Intervenors no later than 10 days prior to the commencement of the hearing of the application. The Party or Intervenor so challenging shall have the burden of proof.

[31] This Order does not determine the admissibility of any documents as evidence at the hearing of the application.

[32] The Respondents and Intervenors on their own behalf hereby waive any rights they may have to receive documents or other information provided directly or indirectly to Counsel by another Party or Intervenor that are designated as Level A Protected Documents and hereby instruct their Counsel not to disclose to them such information or documents.

[33] The termination of proceedings in this application shall not relieve any person to whom Protected Documents were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such information in accordance with the provisions of this Order, any further Order of the Tribunal or any Confidentiality Agreement.

[34] This Order shall be subject to further direction or Order of the Tribunal, including in relation to the use of Protected Documents at the hearing of the application.

DATED at Ottawa, this 8th day of August, 2006.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

SCHEDULE A

IN CONSIDERATION of being provided with the Commissioner's Confidential Documents, the Respondents' Confidential Documents and the Intervenor's Confidential Documents collectively referred to as the "Protected Documents" and which includes the information contained in those documents, I _____ of the City of _____, in the Province or State of _____ hereby agree to maintain the confidentiality of the Protected Documents so obtained. I will not copy or disclose the Protected Documents so obtained to any other person, except (a) my staff who are directly involved in this matter; (b) counsel for the party on whose behalf I have been retained and members of his firm who are directly involved in this application; (c) other experts retained by or on behalf of the party on whose behalf I have been retained and who have signed a similar confidentiality agreement with the parties to this application; and (d) persons permitted by order of the Competition Tribunal, nor will I use the Protected Documents so obtained for any purpose other than in connection with this application and any related appeals.

Upon completion of this application and any related appeals, I agree that the Protected Documents, and any copies of same, shall be dealt with in accordance with instructions from counsel for the party I am retained by or as prescribed by order of the Competition Tribunal.

I acknowledge that I am aware of the order granted by the Competition Tribunal on _____, in this regard, a copy of which is attached to this agreement and agree to be bound by same. I acknowledge that any breach of this agreement by me will be considered to be a breach of the said order of the Competition Tribunal. I further acknowledge and agree that the Commissioner of Competition (the "Commissioner"), Saskatchewan Wheat Pool Inc., James Richardson International Limited, 6362681 Canada Ltd., 6362699 Canada Ltd., Canadian Pacific Railway Company, Canadian National Railway Company, Canadian Wheat Board, Vancouver Port Authority, and their respective affiliates shall be entitled to injunctive relief to prevent breaches of this agreement and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled in law or in equity.

In the event that I am required by law to disclose any of the Protected Documents, I will provide [insert name of retaining or employing party] with prompt written notice so that the person that claimed confidentiality over such Protected Documents may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Protected Documents that is legally required and I will exercise my best efforts to obtain reliable assurance that confidential treatment will be accorded to the Protected Documents.

I will promptly, upon the request of the person providing the Protected Documents, advise where such material is kept. At the conclusion of my involvement, I will promptly, upon the request of the person providing the Protected Documents, advise where such material is kept. At the conclusion of my involvement, I will, upon the request and direction of the person providing the Confidential Information destroy, return or otherwise dispose of all Confidential Information and copies thereof received or made by me having been duly authorized and directed to do so.

I hereby attorn to the jurisdiction of the Federal Court of Canada and/or the Competition Tribunal to resolve any disputes arising under this agreement.

SIGNED, SEALED AND DELIVERED before a witness this _____ day of _____ 2006.

(Witness Signature)

Signature

(Print name)

(Print Name)

_____day of _____

COUNSEL:

For the applicant:

Commissioner of Competition

André Brantz
Jonathan Chaplan
Valerie Chénard

For the respondents:

Saskatchewan Wheat Pool Inc.
6362681 Canada Ltd. and
6362699 Canada Ltd.

Peter Bergbusch

James Richardson International Limited

Adam F. Fanaki
Robert Russell

For the intervenors:

Canadian Pacific Railway

Marc Shannon

Canadian National Railway

Darin J. Hannaford

Canadian Wheat Board

Donald B. Houston
Jeanne L. Pratt

Vancouver Port Authority

H. David Edinger