Competition Tribunal Tribunal de la Concurrence

Reference: *United Grain Growers Limited v. The Commissioner of Competition* 2005 Comp. Trib. 35
File No. CT-2002-001
Registry Document No.: 0142

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

AND IN THE MATTER OF an application by United Grain Growers Limited under section 106 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;

AND IN THE MATTER OF a request under section 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19, as amended, for leave to intervene.

B E T W E E N

United Grain Growers Limited
(applicant)

and

The Commissioner of Competition
(respondent)

and

The Canadian Wheat Board
(applicant for leave to intervene)

Decided on the basis of the written record.
Presiding Judicial Member: Simpson J. (Chairperson)
Date of Order: November 4, 2005
Order signed by: Madam Justice Sandra J. Simpson

REASONS AND ORDER GRANTING REQUEST FOR LEAVE TO INTERVENE

[1] On September 7th, 2005, the Canadian Wheat Board (the "CWB") filed a request for leave to intervene in the proceedings before the Tribunal involving Agricore United ("AU") and the Commissioner of Competition (the "Commissioner").

BACKGROUND

[2] United Grain Growers Limited ("UGG") acquired Agricore Cooperative Limited ("Agricore") on November 1, 2001. Since the closing of the acquisition, UGG and Agricore have been carrying on business as Agricore United.

[3] On January 2, 2002, the Commissioner of Competition (the "Commissioner") filed an application with the Competition Tribunal (the "Tribunal") alleging that the acquisition of Agricore by UGG would likely prevent or lessen competition substantially in the market for the provision of port terminal grain handling services in the Port of Vancouver (the "Merger Case").

[4] On September 12, 2002, the Tribunal made a finding that the acquisition caused a substantial lessening of competition as alleged by the Commissioner; this allegation was not contested by UGG for the purposes of the proceedings before the Tribunal. On October 17, 2002, the Commissioner and AU registered a consent agreement (the "Consent Agreement") whereby AU was to divest either the UGG Terminal or its interest in the Pacific Complex, another Port Terminal in Vancouver.

[5] AU subsequently decided to divest the UGG Terminal (the "Terminal"). The Consent Agreement provided that if the Terminal was not divested by a certain date (the "Date"), a Trustee would be appointed to sell the Terminal.

[6] The Date was extended eleven times until it became August 15, 2005. When AU sought a twelfth extension, the Commissioner refused. AU then applied to the Tribunal (the "Application"), under subsection 106(1) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), for an order rescinding the Consent Agreement, on the grounds that circumstances have changed and that divestiture of the Terminal is no longer feasible.

[7] AU's main allegation involves the dwindling supply of independent grain. Because of it, the prospects of an effective divestiture are much diminished. Moreover, the reduced volume of uncommitted independent grain demonstrates that the divestiture is no longer needed, as independent grain companies have been able, apparently, to secure port terminal grain handling services at the Port of Vancouver at competitive rates.

[8] The Commissioner opposes the application, mainly on the grounds that the circumstances leading to the signing of the Consent Agreement have not changed: the Commissioner is still concerned with the SLC in the port terminal grain handling services in the Port of Vancouver flowing from the merger of United Grain Growers and Agricore. The Commissioner also submits that the levels of uncommitted grain have not substantially changed since the signing of the Consent Agreement.

CWB'S REQUEST FOR LEAVE TO INTERVENE

[9] The CWB is a farmer controlled marketing organization, incorporated pursuant to the provisions of the *Canadian Wheat Board Act*, R.S.. c. C-12. It has exclusive jurisdiction over the purchase and sale of wheat, durum and barley ("CWB grains") grown in Western Canada and intended for export or domestic human consumption. All the sales revenue earned by the CWB, after deducting operating costs, is returned to the approximately 70,000 producers of CWB grains.

[10] The CWB does not own any grain handling facilities in Canada, including any at the Port of Vancouver, and it therefore relies on grain handling services and the facilities provided by both integrated and non-integrated companies. The CWB submits that the port terminal grain handling services in the Port of Vancouver are essential to its operations.

[11] The CWB was granted intervenor in the Merger Case (*The Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp. Trib. 20) for the purposes of the proceeding which ended with the registration of the Consent Agreement. It was granted leave to intervene on the sole substantive issue in that proceeding, namely whether the proposed divestiture "would satisfy the four conditions [concerning the buyer] and [would] effectively remedy the substantial prevention or lessening of competition in the market for port terminal grain handling services in the Port of Vancouver".

[12] In this Application, the issue is whether the circumstances have changed and if so, whether the parties would have signed the Consent Agreement in the new circumstances or whether the Consent Agreement would have been effective in achieving its intended purpose.

[13] By letter dated September 9th, 2005, the Commissioner indicated that it supports the CWB's request to intervene in this Application, on terms similar to those ordered in the Merger Case.

[14] AU, in its response to the request for leave to intervene, submits that leave should be denied because the CWB has failed to establish that it has relevant submissions to make that are unique or distinct from the position of the Commissioner. The CWB is not in a position, according to AU, to make representations as to the respective intentions of the Commissioner or of AU at the time the Consent Agreement was signed or at the time the section 106 application was made. In the alternative, any representation made by AU would simply be repetitive. Should the Tribunal grant leave, the intervention should be limited to attendance and submissions under section 32 of the *Competition Tribunal Rules*, SOR/94-290 (the "Tribunal Rules").

[15] The *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended (the "CTA") gives the Tribunal authority to grant intervenor status to any person who is not a party to the proceedings. Subsection 9(3) of the CTA reads as follows:

(3) 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.	(3) Toute personne peut, avec l'autorisation du Tribunal, intervenir dans les procédures se déroulant devant celui-ci, sauf celles intentées en vertu de la partie VII.1 de la *Loi sur la concurrence*, afin de présenter toutes observations la concernant à l'égard de ces procédures.

[16] Section 30 of the Tribunal Rules provides the following:

30. The Tribunal may grant a request for leave to intervene, refuse the request or grant the request on such terms and conditions as it deems appropriate.	30. Le Tribunal peut soit accorder la demande d'autorisation d'intervenir en imposant, le cas échéant, les conditions qu'il juge indiquées, soit la refuser.

[17] In the Merger Case, Mr. Justice McKeown, then Chairman of the Tribunal, considered the test for leave and said:

> **[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.)).

[18] The Tribunal is of the view that CWB's request for leave in this Application satisfies the test stated above. Whether the Consent Agreement is rescinded or not, and whether the divestiture occurs or not are issues which directly impact the CWB and its member producers.

[19] The Application in this case is not made by the Commissioner, but by AU. Accordingly, the representations to be made by CWB must be relevant to the issue raised by AU, namely, whether there has been a change of circumstances such that the Consent Agreement should no longer be maintained. The Tribunal is of the view that CWB, given its in-depth knowledge of the industry and the large number of grain producers it represents, is in a unique position to make original representations on this issue. The concern expressed by AU, that the CWB cannot speak to the intentions of either the Commissioner or AU at the time of the signing of the Consent Agreement, is valid, but does not preclude the CWB from being able to contribute its point of view on the alleged change of circumstances nor on the issue of whether, in the new circumstances, the Consent Agreement would have been ineffective.

[20] In its submissions on the issue of the CWB intervention, AU argues that if the CWB is granted leave to intervene, its intervention should be limited to appearances and submissions under section 32 of the Tribunal Rules.

[21] However, in the Merger Case, the CWB was allowed to call viva voce evidence, cross-examine witnesses and introduce expert evidence within the scope of its intervention. The participation was subject to any confidentiality order in the proceedings, and was premised on being non-repetitive. The Tribunal believes these terms should be repeated in this Application because they allow for meaningful participation by the CWB, without imposing an undue burden on the other parties.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[22] The CWB is granted leave to intervene on the following substantive issues in this Application:

> Whether the circumstances that led to the making of the agreement have changed and whether, in the circumstances that exist at the time the application is made, the agreement would not have been made or would have been ineffective in achieving its intended purpose.

[23] In the course of its intervention, the CWB may

> **[i]** review any cross-examination transcripts and, subject to confidentiality orders, access any documents produced by parties to the Application, on written request;
>
> **[ii]** call *viva voce* evidence if the CWB provides: (1) the names of the witnesses sought to be called; (2) a will-say statement for each witness, with 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 facts to be proven have not been adequately dealt with in the evidence so far; and (4) a statement that the Commissioner has been asked to adduce such evidence and has refused;
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> **[iii]** cross-examine witnesses at the hearing of the Application to the extent that it is not repetitive of the cross-examinations of the parties to the Application;

[iv] submit legal arguments, at the hearing of the Application and at any pre-hearing motions or case management conferences, that are non-repetitive in nature;

[v] introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the Tribunal Rules and case management decisions.

DATED at Ottawa this 4th day of November, 2005.

SIGNED on behalf of the Tribunal by the Chairperson of the Tribunal.

(s) Sandra J. Simpson

COUNSEL

For Agricore United:

Mr. Kent Thomson
Ms. Sandra Forbes

For the Commissioner:

Mr. Jonathan Chaplan

For the Canadian Wheat Board:

Mr. James E. McLandress
Ms. Margaret I. Wiebe