CT-2005-009

THE COMPETITION TRIBUNAL

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 Commission of Competition for an Order pursuant to section 92 of the *Competition Act*;

AND IN THE MATTER OF an application by the Commission of Competition for an Order pursuant to section 104 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;

BETWEEN:

THE COMMISSIONER OF COMPETITON

Applicant

- AND -

SASKATACHEWAN WHEAT POOL INC.,

JAMES RICHARDSON INTERNATIONAL LIMITED

6362681 CANADA LTD. AND 6362699 CANADA LTD.

Respondents

-AND-

CANADIAN WHEAT BOARD

Intervenor

AFFIDAVIT OF WARD WEISENSEL
Re: Applicant's Section 92 and Section 104 Application

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1. I am the Chief Operating Officer, Operations for the Canadian Wheat Board ("the CWB") and have held that position since February 2004. Prior to that time, I have been employed by the CWB in various capacities since 1991. My positions at the CWB have included Executive Vice President – Marketing, Vice President of Transportation & Country Operations, Assistant Vice President - Grain Transportation Division, Head of Corporate Policy and Marketing Manager for the Asia-Pacific desk. I have a Masters degree in Agricultural Economics from the University of Saskatchewan (1988) and operated a grain farm in Saskatchewan from 1981 to 1989. As such I have knowledge of the matters hereinafter deposed to, except where they are stated to be based on information and belief, in which case I believe them to be true.

The Canadian Wheat Board

2. The CWB is a producer-controlled marketing organization. A 15-member Board of Directors governs the CWB. Producers from across Western Canada elect 10 of the Directors and the Government of Canada appoints the remaining five (including the President and Chief Executive Officer). The Board of Directors is responsible for the overall governance of the corporation and its strategic direction.

3. The CWB is a corporation incorporated pursuant to the provisions of the *Canadian Wheat Board Act*, R.S., c. C-12 (the "*CWB Act*"). The statutory object of the corporation is to market grain grown in Western Canada in an orderly manner in interprovincial and export trade. As determined by its Board of Directors, the CWB's vision is to unite western Canadian grain farmers as the world-recognized, premier grain marketer and its mission is to market and provide quality products and services in order to maximize value to its owners, western Canadian grain farmers.

4. The *CWB Act* and the regulations passed under it make the CWB the single-desk seller of wheat, durum and barley grown in Western Canada and intended for export or domestic human consumption ("CWB grains"). While all CWB grains must pass through the CWB, as the CWB's vision and mission confirm, the CWB acts in the interests of Western Canadian wheat and barley farmers to obtain the best return for their products that the marketplace will allow.

5. Every crop year approximately 70,000 producers deliver their CWB grains over the course of the crop year to primary elevator companies that act as handling agents for the CWB. In the vast majority of cases the CWB's agents issue an "initial" payment on behalf of the CWB for the grain that each producer delivers. This payment reflects the CWB's initial price for the particular grain in question delivered instore Vancouver or St. Lawrence, less deductions made by the elevator agent for transportation related charges and handling charges (e.g., cleaning, primary elevation, weighing and inspection, etc.). The initial payment represents a substantial portion of the total payment that producers will receive for their grain. The balance is distributed through "adjustment" and "interim" payments as sales are made with a "final" payment being made generally within five or six months of the end of the crop year. The Canadian crop year runs from August 1st to July 31st. All payments are based on the particular tonnage, class, grade, and protein of the grain that the producer delivers. In a relatively small number of cases producers can select one of the alternate forms of payment that the CWB offers known as "Producer Payment Options" or "PPO's".

6. The CWB markets the grain that it receives to over 70 countries around the world. Annual sales revenues are in the range of $4 billion to $6 billion (Canadian). All of the money received from the sale of all CWB grain is pooled into one of four "pool accounts" (wheat, durum, barley, and designated or malt barley). After deducting the CWB's operating costs, all of the sales revenue earned by the CWB is returned to producers. This results in roughly 96% to 98% or more of all sales proceeds being returned to producers. The amount that each pool participant ultimately receives for their CWB grain is the pooled price that the CWB is able to obtain during the year on sales of the particular class, grade and protein of the grain that the producer delivered, net of operating expenses. Any increase in the operating costs of the CWB results in a reduction in the return to producers of CWB grains.

Grain Companies in Canada

7. From my review of the Statement of Grounds and Material Fact, filed by the Applicant, grain companies in Canada appear to have been categorized as "Integrated Grainco's", companies which have both port and country facilities and "Non-Integrated Grainco's" which may have only one country facility, but do not own port terminal facilities. The CWB conducts

business with both Integrated Grainco's and Non-Integrated Grainco's. Both the Integrated Grainco's and Non-Integrated Grainco's act as CWB handling agents in the country in respect of CWB grain delivered to their respective primary elevator facilities by producers. However, in their capacity as terminal owners, the Integrated Grainco's do not act as agents for the CWB. Rather, they supply terminal facility services to the CWB as independent parties. In this regard it should be noted that the CWB owns no elevator facilities whatsoever. Once CWB grain has been delivered in the country to particular companies' primary elevator facility the cost of transferring that grain to a different country facility is prohibitive. Thus, the CWB requires access to that particular company for terminal facility services whether those services are provided by the company itself (in the case of Integrated Grainco's) or by a terminal with whom the owner of the country facility has entered into a terminal access arrangement (in the case of Non-Integrated Grainco's).

8. Currently, at the Port of Vancouver the ownership interests are as follows:

- Agricore United owns 100% of the United Grain Growers Limited ("UGG") terminal, and 100% of Pacific Elevators and has a 50% interest in Cascadia Terminal (Subject to the Consent Agreement and related Proceedings referred to at paragraph 26 herein).
- SWP is the sole owner of its facility.
- JRI is the sole owner of its facility.
- Cargill has a 50% interest in Cascadia Terminal.

9. The Non-Integrated Grainco's fall roughly into two categories, namely larger entities with multiple primary elevator facilities and smaller entities most, of which own only a single grain handling facility in the country. Louis Dreyfus Canada Ltd., N. M. Paterson & Sons Limited and Parish & Heimbecker Limited ("P & H") would be in the category of larger Non-Integrated Grainco's.

10. As the Non-Integrated Grainco's do not own port terminal facilities these companies depend on the four Integrated Grainco's for access to port terminal facilities.

11. The Integrated Grainco's can determine the economic viability of Non-Integrated Grainco's through their ownership of terminal elevators because the ability of an Non-Integrated Grainco's to compete for the farmers' grain in Western Canada often depends on several factors including:

a) The ability of the Non-Integrated Grainco's to attract grain and earn income from that grain in the country;

b) the level of diversion payments paid out to Non-Integrated Grainco's in return for the processing of their origins at port, and

c) the granting of terminal authorization to unload the Non-Integrated Grainco's cars at port.

Accordingly, ownership of the country and port terminal facilities continues to effect competitiveness throughout the grain industry.

Grain Terminal Facilities at the Port of Vancouver

12. The port terminal grain handling services in the Port of Vancouver are essential to the CWB's operations.

13. In each of the crop years 1999-2000 and 2000-2001, an average of 8.9 million tonnes ("MT") of CWB grains passed through these facilities, accounting for approximately 47.5% of CWB grains exported.

14. In the crop years 2001-2002 to 2003-2004, the following quantities of CWB grains passed through the terminal facilities in the West Coast ports of Vancouver and Prince Rupert:

Crop Year	Total CWB ports	Ten-Year Exports	Ver. as % of Total	Total Exports
	[illegible]	[illegible]	[illegible]	[illegible]
2001-2002	16.724	6.975	41.7	1.099
2002-2003	9.039	1.975	21.85	1.687
2003-2004	16.544	5.687	34.38	2.792

15. The terminal facility at Prince Rupert is owned by a consortium of the owners of the integrated terminal facilities located in Vancouver. The owners of the Prince Rupert facility jointly decide whether and for how long that facility will open each year.

16. The sharp drop in exports during the 2002-03 crop year was as a result of a lockout of Vancouver terminal workers by the owners thereof. To compound matters, that year the Prairies also experienced the worst drought in modern memory. The lower than average numbers in 2003-04 reflect the lingering effects of that drought.

17. There remains a limited ability to shift tonnage of CWB grain between the Canadian West Coast ports (Vancouver and Prince Rupert) and other Canadian and U.S. ports in an attempt to enhance terminal competition at Vancouver. West Coast ports continue to yield the greatest returns for Western producers of CWB grain and the use of alternative facilities results in reduced returns for those producers.

18. The CWB's 10-year forecast of annual Canadian grain and oilseeds exports showed an overall increase to 27.1MT by 2008-2009. A portion of that increase in trade was projected to come from markets traditionally served through West Coast ports, including Vancouver. The CWB's latest 10-year forecast of Canadian grain and oilseeds exports continues to predict an overall increase, however, that increase has been revised downward slightly to 25.8MT per year by 2010-2011. The West Coast ports are expected to handle 14.9MT of that total by 2011, up from the 1997-2001 average annual handle of 13.5MT. Accordingly, the Port of Vancouver is expected to remain a key export corridor for the sale of CWB grains.

The Anti-Competitive Effect of the SWP/JRI Joint Venture

19. I have reviewed the affidavit of Denis Corriveau, as well as the Statement of Grounds and Material Facts filed in support of the Commissioners Application. CWB essentially agrees with the Applicants concerns regarding this joint venture and in particular, CWB is concerned that:

a) this joint venture will further consolidate an already highly concentrated market, both at Port and in the country facilities;

b) this further consolidation will result in higher tariffs to CWB and ultimately to the farmers of Western Canada;

c) access to port position both for CWB and Non-Integrated Grainco's will become even more difficult;

d) the level of service at port terminals and in the country will erode; and

e) the cost of service in the country at primary elevators could increase to the disadvantage of Western Canadian Farmers.

20. The CWB is concerned that any further consolidation of the terminal capacity at the Port of Vancouver would further enhance the market power that now exists in that market. This in turn would adversely impact access to facilities, prices, and quality of service both at the Port of Vancouver and upstream at the primary grain elevator level. As noted above, any increase in operating costs in either location will have a direct impact on the CWB and therefore on Western Canadian farmers.

21. The existing market power at the Port of Vancouver manifests itself in the terminals' posted tariffs. These tariffs have risen continuously for the past several years without a

commensurate increase in the level or quality of services provided. As noted in the Commissioners Statement of Grounds and Material Facts, at paragraph 3(a), any increase in these tariffs will be charged to CWB and therefore they are a significant cost to Western Canadian farmers. Any increase in terminal tariffs of any kind will ultimately impact the return to producers either directly, when they deliver their grain in the country, or indirectly, through lower pool distributions resulting from increased operating costs for the CWB.

22. As an example, every tonne of CWB grain that passes through a terminal in Vancouver is subject to a "FOBbing" charge for loading grain onto a vessel. This is in addition to terminal tariffs for various services and programs that the CWB requests and in addition to terminal tariffs for inward weighing & inspection and cleaning that producers pay when they deliver their CWB grain to the elevators in the country. As at 2002, FOBbing charges were in the range of $8 to $10 per tonne depending on the facility that handled the grain and the product in question. Today the range is $9.75 to $11.55 per tonne.

23. It is also noteworthy that despite the drastic reduction in exports, tariffs in Vancouver have not come down over time and in fact have increased. As noted above, total CWB exports in 2002-03 dropped to just over 9MT and total exports through Vancouver dropped to just under 2MT. These reductions were consistent with the overall reduction in total grain and oilseed exports through Vancouver, which went from 10.11MT in 2001-02 down to 3.91MT in 2002-03 and back up to 9.28MT in 2003-04. However, during that time frame average posted elevation tariffs in Vancouver, to choose just one example, increased from $7.73 in 2001-02 to $8.10 in 2002-03 to $8.48 in 2003-04.

24. The concentration in market power in Vancouver also continues to manifest itself by the steadfast refusal of Integrated Grainco's not only to enter into, but even to negotiate individual terminal agreements with the CWB. To date, the CWB has individual terminal agreements with only two terminals, Hudson Bay Terminals (Omnitrax) in the Port of Churchill and Mission Terminals in the Port of Thunder Bay. The CWB proposed the implementation of commercially negotiated individual terminal agreements with the Integrated Grainco's in the Port of Vancouver in an attempt to assist CWB to manage its costs and thus to benefit Western

Canadian Farmers. Such agreements were intended to specify a guaranteed level of terminal space to CWB and specify the number of CWB unloads. The CWB's willingness to enter into such terminal capacity agreements has been repeated on a number of occasions since and the owners of these facilities have clearly acknowledged the CWB's desire to enter such agreements. The joint venture of SWP and JRI may reduce the opportunity for CWB to negotiate such an agreement even further.

25. With respect to access to Port, CWB already has issues with gaining terminal authorization at various times of the year and therefore it can experiences delay and associated costs in moving CWB grain. In the event of a joint venture and further consolidation at port, CWB is very concerned that it will be at a further disadvantage in implementing an orderly marketing program as this consolidation will result in access to one fewer alternatives at Port position. This will likely further increase costs and clearly affect the ability of CWB to ship grain at Vancouver.

26. CWB is already concerned with the current situation at the Port and Vancouver and in particular the fact that Agricore United currently owns both the AU terminal facility and the Pacific Elevators Limited terminal ("Pacific"). Although Agricore had entered into a Consent agreement agreeing to divest itself of one of these facilities, it is currently challenging the relevant Consent Agreement requiring it to do so. CWB filed a Request for Leave to Intervene in that proceeding before the Tribunal and its request was granted by the Honourable Justice Sandra Simpson. I attach as Exhibit A to this my affidavit, the Reasons and Order Granting Request For Leave to Intervene.

Unique Perspective of the Canadian Wheat Board

27. As noted above the CWB is the direct representative of Western Canadian producers of wheat and barley and is a major user of both country primary elevators and terminal facilities at the Port of Vancouver. In my view the CWB's role and extensive involvement in the industry make it particularly well placed to comment on the potential implications to Western Canadian Farmers and the grain industry as a whole on the implications of the proposed joint venture. Such

a joint venture will certainly have an effect on the CWB's costs, as recognized by the Commissioner and on the CWB's ability to orderly market grain. Only the CWB can comment fully on these issues.

28. Accordingly, the CWB has a unique perspective on the potential competitive implications of this joint venture on the CWB and on the Western Canadian grain industry.

Extent of Intervention

29. The CWB proposes that the following restrictions apply to its intervention, if so granted namely:

a) That the Canadian Wheat Board be allowed to participate in the proceedings and be permitted:

i. 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;

ii. 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 facts to be 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;

iii. 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;

iv. 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

v. 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.

b) And that CWB not be subject to documentary and oral discovery of the CWB.

30. The CWB will, of course, respect any confidentiality orders that may be in place.

Purpose of Affidavit

31. I make this affidavit in support of the request of the Canadian Wheat Board for leave to intervene in both the Section 92 and Section 104 Application and not for any improper purpose.

SWORN BEFORE ME at the City of)
Winnipeg, Manitoba this 3rd day)
of January 2006)

Ward Weisensel

A Notary Public in and for the Province
of Manitoba.

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.

BETWEEN

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

This is Exhibit "4" referred to in the Affidavit of Wade Wiebe sworn before me this 3 day of January 2006.

A Notary Public
for the Province of Manitoba
My Commission Does Not Expire

[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;
>
> [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