

**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 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.

**BETWEEN:**

**UNITED GRAIN GROWERS LIMITED**

Applicant

-AND-

**THE COMMISSIONER OF COMPETITION**

Respondent

COMPETITION TRIBUNAL  
TRIBUNAL DE LA CONCURRENCE

**FILED / PRODUIT**  
September 26, 2005  
CT-2002-001

Jos LaRose for / pour  
REGISTRAR / REGISTRAIRE

-AND-

**MISSION TERMINAL INC.**

Proposed Intervenor

OTTAWA, ONT

# 0135b

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**AFFIDAVIT OF BRUCE HAYLES**

**Re: Applicant's Section 106 Application and in Support of the  
Request for Leave to Intervene by Mission Terminal Inc.**

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## **Introduction**

1. I am the President of Mission Terminal Inc. ("Mission") a proposed intervener in this proceeding. I have a long history of involvement in the Western Canadian grain industry and as such I have knowledge of the matters to which I hereinafter depose except where they are stated to be based on information and belief, in which case I believe them to be true.

2. Mission seeks leave to intervene in the section 106 application (the "Application") brought by United Grain Growers Limited (now carrying on business as Agricore United) to set aside the consent agreement dated October 17, 2002 (the "Consent Agreement") entered into by Agricore United and the Commissioner of Competition.

3. As will be outlined below, Mission will be directly affected by the Application and has a unique and distinct perspective separate and apart from the other parties that will assist the Tribunal in deciding the issues in the Application.

## **Mission's Business**

4. Mission is a corporation incorporated under the *Canada Business Corporations Act* on April 19, 1999. Mission's parent company, Upper Lakes Group Inc. ("Upper Lakes") was established in 1932. The founder of Upper Lakes arranged to build Toronto Elevators, the only terminal grain elevator then in Toronto, and created Upper Lakes to move grain from Thunder Bay to Toronto. Since then, Upper Lakes and its affiliates have been active in operating grain elevators, trading grain and shipping grain through the Great Lakes and the St. Lawrence Seaway. For over half a century, Upper Lakes has operated a grain elevator at the Port of Trois Rivières, Quebec.

5. Mission is the owner and operator of a grain handling port terminal located in Thunder Bay, Ontario (the "Thunder Bay Terminal"). Mission carries on business as a non-integrated port terminal grain handling operator ("Independent Port Terminal Operator") in that, while it owns a port terminal and provides port terminal grain handling services, Mission does not own any primary or other inland elevators. This distinguishes its grain handling business and the grain handling services that it provides from those of both integrated grain companies and non-integrated grain companies.

6. The Thunder Bay Terminal has been in operation since 2000 and services Western Canadian grain farmers whether shipping to the port is arranged by the Canadian Wheat Board ("CWB") or directly, as well as Canadian non-board grain shippers. Mission is one of two independent port terminal operators that regularly handles shipments of wheat, durum and barley for the Western Canadian grain industry.

7. Mission handles the vast majority of producer car shipments of grain passing through the Port of Thunder Bay. Producer cars are railcars that are ordered by farmers in which they load grain directly, usually with their own equipment. Producer car shipments bypass the primary grain elevator systems and the use of producer cars results in significant grain handling cost savings to Canadian farmers who ship their grain to a port terminal in this way.

8. The producer car method of handling grain is chronically underutilized by the Canadian grain handling industry because neither integrated grain handling companies nor non-integrated grain handling companies have a financial incentive to facilitate such shipments since these shipments do not require the use of the primary elevator systems owned and operated by such companies. In contrast, Mission as an Independent Port Terminal Operator has made it part of its

business plan to service and facilitate producer car shipments. As a result, producer car shipments to Mission have more than doubled since the 2002-2003 crop year.

9. Mission's use of its Thunder Bay Terminal is currently the subject matter of a lengthy court proceeding wherein an integrated grain handling company is attempting to restrain Mission from using the facility for grain handling purposes. When integrated grain handling companies closed and sold port terminal facilities in Thunder Bay, they attempted to prevent purchasers from providing grain handling services.

#### **Acquisition of a Port Terminal**

10. As a consequence of the Consent Agreement, Mission became aware of the opportunity to purchase from Agricore United one of the Port Terminals (as defined in the Consent Agreement) in the Port of Vancouver.

11. Mission has invested considerable time and money investigating the feasibility of purchasing and operating such a Port Terminal. Mission believes that there is a good business case to support such an acquisition and is ready, willing and able to purchase a Port Terminal. Mission has expressed its interest in acquiring a Port Terminal to Agricore United on several occasions. Full particulars of Mission's interest and the steps taken in that regard are known to Agricore United and the Competition Bureau.

12. Mission's business plan would be to operate an independent port terminal at the Port of Vancouver in much the same manner in which Mission operates its Thunder Bay Terminal. Mission would service Western Canadian grain farmers, whether shipping to the port is arranged by the CWB or directly, as well as Canadian shippers of non-board grain.

13. Currently, producer car shipments account for approximately 180,000 to 220,000 tonnes of grain through the Port of Vancouver. Mission believes that as the owner of a Port Terminal it would have a reasonable prospect of capturing much of this existing business. Mission would also work with farmers directly to promote an increased utilization of producer car shipments. Mission is unaware of any other player in the Canadian grain handling industry who would be taking this approach to the operation of a Port Terminal. Certainly no integrated grain handling companies would, in my view, take positive steps to facilitate the use of producer car shipments.

### **Impact of the Order Sought**

14. As noted above, Mission remains ready, willing and able to complete the purchase of a Port Terminal from Agricore United in the Port of Vancouver.

15. If the order sought in the Application were granted, Mission will lose the opportunity to purchase a Port Terminal and to become a new competitor providing independent port terminal grain handling services in the Port of Vancouver.

16. In addition to the specific and direct impact on Mission, the granting of the order sought would have a significant adverse impact on the Canadian grain industry.

17. First, it would lessen the opportunity for farmers to save substantial money by utilizing producer car shipments. In effect, farmer's shipping choices would be reduced as they would be forced to ship through an integrated grain handling company or through a non-integrated grain handling company to a port terminal controlled by an integrated grain handling company.

18. Second, based on Mission's experience in Thunder Bay, grain handled by Mission for the CWB is handled at a lower cost than if handled by integrated grain handling companies either

alone or in conjunction with non-integrated grain handling companies. The benefit of those lower handling costs ultimately flows to Canadian grain farmers.

19. Third, the failure to require the sale of a Port Terminal will ensure that there will be an unacceptable concentration of ownership of port terminals in the Port of Vancouver. This, of course, was the very situation that the Consent Agreement was designed to remedy.

### **Mission's Unique Perspective**

20. Given its unique position in the market as an Independent Port Terminal Operator with extensive experience competing with integrated grain handling companies in Canada and as a potential competitor who has completed an extensive analysis of the purchase of a Port Terminal, Mission has a unique perspective on the issue raised by Agricore United in the Application regarding the commercial viability of an independent port terminal operation.

21. If granted leave to intervene, subject to issues with respect to confidentiality, Mission will adduce evidence regarding the commercial viability of an independent grain handling port terminal in the Port of Vancouver. The fact that Mission is prepared to make such a significant investment by purchasing a Port Terminal is indicative of our belief that an independent port terminal operation is a viable business. Mission's evidence will provide the Tribunal with the unique perspective of a potential purchaser on this issue. As far as I am aware, only Mission is in a position to adduce this evidence in response to this issue raised by Agricore United in the Application.

22. Agricore United has also raised in the Application the alleged anti-competitive nature of grain handling agreements with the CWB. Mission is a party to one of only two such agreements

currently extant. Consequently, Mission has a unique perspective on the impact that such agreements have on the Western Canadian grain handling industry, on the CWB and on Western Canadian grain farmers. If leave to intervene is granted, subject to issues of confidentiality, Mission will provide a perspective that will assist the Tribunal in assessing whether such agreements do or do not have an anti-competitive impact. Mission is in a position to demonstrate based on its experience with the CWB in Thunder Bay that such agreements do not have an anti-competitive impact on the market. Again, I am not aware of any other party who is in a position based on actual experience to respond to this issue raised by Agricore United.

23. Moreover, having analyzed the competitive situation at the Port of Vancouver as a potential purchaser of a Port Terminal and as a Canadian port terminal owner and operator throughout the relevant time period with expert knowledge of the Canadian grain industry, Mission has a unique perspective to challenge the allegation made by Agricore United that there have been significant changes in the circumstances that existed at the time the Consent Agreement was entered into in October 2002.

24. Finally, Mission as the only independent owner and operator of a grain handling port terminal in Thunder Bay regularly handling wheat, durum and barley for the Western Canadian grain industry, has a unique perspective on the potential competitive effects of the order sought and the extent to which divestiture would provide an adequate remedy, as well as the effects that rescinding the Consent Agreement would have on the Western Canadian grain industry.

#### **Extent of Intervention**

25. Mission proposes that it be permitted to intervene in the Application on the following basis:

- (a) That Mission 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 Agricore United not be permitted to seek documentary and oral discovery of Mission.

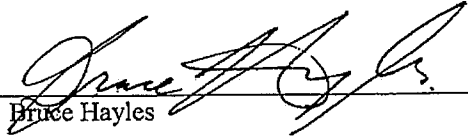
26. Mission will respect any confidentiality orders that may be in place.

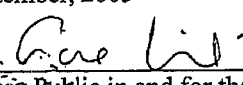


27. I swear this affidavit in support of the request of Mission for leave to intervene in the Application and for no other or improper purpose.

SWORN BEFORE ME at the City of  
Winnipeg, Manitoba this 26<sup>th</sup> day  
of September, 2005

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Bruce Hayles

  
A Notary Public in and for the Province  
of Manitoba.

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