CT-2002/001

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

RESPONSE OF THE APPLICANT TO THE REQUEST FOR LEAVE TO INTERVENE FILED BY MISSION TERMINAL INC.

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1. On November 1, 2001, United Grain Growers Limited ("UGG") acquired Agricore Cooperative Limited ("Agricore") (the "Acquisition"). Since the closing of the Acquisition, UGG and Agricore have been carrying on business as "Agricore United". Accordingly, the Applicant will hereinafter be referred to as "Agricore United".

2. This Response by Agricore United is filed pursuant to Rule 28(1) of the *Competition Tribunal Rules* in response to Mission Terminal Inc.'s ("Mission") request for leave to intervene in Agricore United's section 106 application (the "Section 106 Application"). Unless otherwise expressly defined herein, the terms used below incorporate the respective meanings ascribed to them in the Statement of Grounds and Material Facts filed by Agricore United in connection with the Section 106 Application (the "SGMF").

A. Summary of Agricore United's Position

3. Agricore United submits that Mission's request for leave to intervene should be denied because Mission has failed to establish that it has relevant submissions to make that are unique or distinct from the position of the Commissioner with respect to the narrow issue on the Section 106 Application to warrant its participation as an intervenor (as opposed to simply being called by the Commissioner as a witness).

4. In her Direction to Counsel dated September 2, 2005, the Chair of the Tribunal identified the question before the Tribunal on the Section 106 Application as whether the Consent Agreement (contemplating the divestiture of a Port Terminal) would have been agreed to or would have been effective in achieving its intended purpose, given the alleged changes in the circumstances that led to the making of the Consent Agreement.

> *Competition Tribunal, Direction to Counsel (Friday September 2, 2005) United Grain Growers Limited v. Commissioner of Competition - Status of Intervention Canadian Wheat Board* ("Direction on Intervention").
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> *Competition Act*, s. 106.

5. More particularly, the Tribunal's decision in *RONA Inc. v. The Commissioner of Competition* establishes that "[t]he current test for an application to vary or rescind a consent agreement is whether, in light of the new circumstances existing at the time of the application, the consent agreement would have been signed". In applying this test, the Tribunal "can only consider the parties' intentions at the time that the consent agreement was made and at the time that the application to vary or rescind the agreement was filed".

> *RONA Inc. v. The Commissioner of Competition,* 2005 Comp. Trib. 18 at para. 78.

6. As detailed in the SGMF, it is Agricore United's position that, in the circumstances that now exist, it would not have entered into the Consent Agreement or any consent agreement contemplating the divestiture of a Port Terminal. Moreover, given the significantly reduced volume of uncommitted independent grain shipped through the Port of Vancouver as a result of subsequent events, and the adverse implications that such reduced volume has for the prospects for an effective divestiture, Agricore United submits that the Commissioner also would not, on any reasonable basis, have entered into the Consent Agreement or any consent agreement contemplating the divestiture of a Port Terminal.

> Statement of Grounds and Material Facts (11 August, 2005), LT-2002-001, at para. 10.

7. Whether the Commissioner and Agricore United would have entered into the Consent Agreement in the circumstances that now exist will be vigorously argued before the Tribunal by Agricore United and the Commissioner. Agricore United submits that Mission is not in a position to make relevant representations concerning the respective intentions of Agricore United or the Commissioner, either at the time the Consent Agreement was made or at the present time.

In any event, any representations that Mission could possibly make would not go beyond or add anything distinct from the submissions that will be made by the parties to the Consent Agreement themselves.

8. In the alternative, in the event that the Tribunal decides to grant Mission leave to intervene, Agricore United submits that such intervention should be limited to a specific issue or issues and to the participation contemplated by section 32 of the *Competition Tribunal Rules*. In this regard, Mission has not demonstrated that an enhanced level of participation is necessary in order for it to participate effectively in the event that its request for leave to intervene was granted.

Competition Tribunal Rules, SOR/94-290, s. 32.

B. The Test for Granting Leave to Intervene

9. The Tribunal's authority for granting intervenor status to a non-party is provided for in subsection 9(3) of the *Competition Tribunal Act*:

> "Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.I of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person."

Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), s. 9(3).

10. In this regard, section 30 of the *Competition Tribunal Rules* provides as follows:

> "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."

Competition Tribunal Rules, supra, s. 30.

11. In exercising its discretion to grant leave to intervene, the Tribunal must be satisfied that:

(a) the matter alleged to affect the person seeking leave to intervene is legitimately within the scope of the Tribunal's consideration or sufficiently relevant to the Tribunal's mandate under the *Competition Act*;

(b) the person seeking leave to intervene is directly affected;

(c) all representations proposed to be made by the person seeking leave to intervene are relevant to an issue specifically raised in the parties' pleadings; and

(d) the person seeking leave to intervene brings a unique or distinct perspective separate and apart from that provided by other parties that will assist the Tribunal in deciding the issues before it.

Canada (The Commissioner of Competition) v. Canadian Waste Services Holdings, [2000] C.C.T.D. No. 19 at para. 3 (Comp. Trib.).

12. The Tribunal has confirmed that the issues that are relevant to the proceeding in question are those defined in the parties' pleadings, not by the prospective intervenor:

> "We agree with the respondents that the intervenors are restricted to making representations on issues that are relevant to the proceedings *as defined by the pleadings*. We do not dispute that all the acts alleged by White and NDAP/DAC might be relevant to the general question of abuse of dominant position; however, if the Director [the applicant in that case] has chosen not to put them in issue in his application, then they are not relevant to the instant proceeding before the tribunal." [emphasis added]

Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc. (1995), 61 C.P.R. (3d) 528 at 531 (Comp. Trib.).

13. Similarly, in *Southam*, the Tribunal denied intervenor status to a party who sought "to address results arising from the merger which the Director [had] not put in issue". (Again, the Director was the applicant in *Southam*.)

Director of Investigation and Research v. Southam Inc. (1991), 37 C.P.R. (3d) 478 at 479 (Comp. Trib.) ("*Southam (1991)*").

14. Moreover, in considering a request from Smit International (Americas) Inc., a prospective buyer of the assets to be divested under a proposed consent order, to intervene in *Washington*, the Tribunal made the following statement:

> "On a preliminary reading of the pleadings the consent variation application appears to raise one relatively narrow issue: does the entry of Tiger Tugz in Burrard Inlet eliminate the substantial lessening of competition caused by the Seaspan merger such that divestiture is no longer required? At a minimum, the areas [in] relation to which Smit proposes to focus its intervention must be relevant to this question and Smit's proposed representations must offer a unique perspective which is of some assistance to the Tribunal."
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> *Washington v. Canada (Director of Investigation and Research)* (1998), 78 C.P.R. (3d) 479 at 484 (Comp. Trib.).

15. As Smit did not offer any useful evidence or unique representations on the relevant issue before the Tribunal, its application for leave to intervene was denied. In relevant part, the Tribunal stated:

> "[i]t is the Director's responsibility as a representative of the public interest to investigate the proposed variation and to determine whether or not it should be opposed [...] If a potential intervenor were to come forward and satisfy the Tribunal that it had some unique knowledge of the matters at issue which would provide the Tribunal with a different perspective than the Director's, the Tribunal would be most interested. Smit has not satisfied the Tribunal that it has any unique perspective nor any facts of assistance on the question [at issue]. There is no basis to allow the intervention on this point."
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> *Washington v. Canada (Director of Investigation and Research)*, *supra* at 486-88.

16. Leave to intervene should also be denied if the proposed representations will be made by another party to the proceeding or where the substance of those representations will be

adequately considered by the Tribunal as a result of evidence tendered during the hearing or otherwise.

> *Southam Inc. v. The Director of Investigation and Research* (1997), 78 C.P.R. (3d) 315 at 319 (Comp. Trib.) ("*Southam (1997)*").

17. In applying the foregoing criteria (and in determining the appropriate scope of the intervention if permitted), Agricore United submits the Tribunal should also consider the extent to which the proposed intervention may prolong or complicate the proceeding before it. This is consistent with the direction in subsection 9(2) of the *Competition Tribunal Act* and the purpose of the new "Disclosure Track Procedure" which governs this proceeding.

18. As the Tribunal observed in *Canada Pipe,* the purpose of the Disclosure Track Procedure is to "streamline the proceedings of the Tribunal" and that "[t]he expeditious resolution of proceedings is further emphasized by s. 9(2) of the *Competition Tribunal Act* [...] which states expressly: 9(2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit".

> *Competition Tribunal, Direction to Counsel (Friday September 2, 2005) United Grain Growers Limited v. Commissioner of Competition – Procedural track for this matter.*
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> *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2004), 29 C.P.R. (4th) 530 at para. 41 (Comp. Trib.).

19. In *Chapters*, the Tribunal recognized the need for an expeditious hearing of the matter before it when it declined to permit the intervenors to submit evidence unless the parties sought to introduce further evidence in the proceedings. As McKeown J. explained, allowing the

intervenors to submit evidence would have the potential of further delaying the resolution of the matter.

> *Canada (Commissioner of Competition) v. Trilogy Retail Enterprises L.P.*, [2001] C.C.T.D. No. 11 at paras 15 and 17 (Comp. Trib.) ("*Chapters*").

C. Mission Does Not Satisfy the Test Because it Does Not Provide a Unique and Distinct Perspective on the Relevant Issue

20. Mission submits that, as a prospective purchaser of a Port Terminal divested pursuant to the Consent Agreement, it is directly affected by Agricore United's Section 106 Application. Agricore United does not dispute that Mission may be affected by the Section 106 Application, although not in a manner significantly different from other industry participants.

21. Agricore United further submits that Mission has failed to establish that it has relevant submissions to make that bring a unique or distinct perspective separate and apart from that provided by the Commissioner on the narrow issue of whether, given the changes in circumstances that led to the making of the Consent Agreement, the Consent Agreement would have been agreed to by Agricore United and the Commissioner or would have been effective in achieving the purpose intended by Agricore United and the Commissioner.

22. Mission proposes to make representations on: (i) the commercial viability of an independent grain handling port terminal in the Port of Vancouver; (ii) whether there have been significant changes in circumstances that led to the making of the Consent Agreement; (iii) the nature of grain handling agreements with the Canadian Wheat Board (the "CWB Monopoly"); (iv) the extent to which the divestiture of a Port Terminal would provide an adequate remedy and

the effects that rescinding the Consent Agreement would have on the Western Canadian grain industry; and (v) whether the divestiture of a Port Terminal would have been effective in achieving the intended purpose of the Consent Agreement given the alleged changes in circumstances.

> Request for Leave to Intervene on Behalf of Mission Terminal Inc. (26 September 2005) CT-2002-001, at parg 2(a)-(h).

23. Even if some of the representations that Mission proposes to make are relevant to the narrow issue before the Tribunal, Mission's participation as an intervenor would not assist the Tribunal in assessing whether a significant change of circumstances has occurred and whether, given such changes in circumstances, the Consent Agreement would have been agreed to by Agricore United and the Commissioner and would have been effective in achieving the purpose intended by them to any greater degree than it would if Mission were called as a witness by the Commissioner in the hearing of the Section 106 Application. It is clearly open to the Commissioner to call Mission as a witness during the hearing if Mission has relevant evidence that would advance her case.

> *Canada (Commissioner of Competition) v. Air Canada* [2001] C.C.T.D. No. 5 at para. 12 (Comp. Trib.) (Q.L).

24. As Noel J. indicated in *Southam*, "the rules respecting intervention [do not] contemplate that an intervenor be called upon to make the very case that an applicant [in most cases, the Commissioner] is called upon to make".

> *Southam (1997), supra at 319.*

25. As set out above, the issue in the Section 106 Application is whether, in light of the new circumstances existing at the time of the Section 106 Application, the Consent Agreement would have been made by Agricore United and the Commissioner. Mission cannot speak to the parties intentions and, in any event, Mission's proposed submissions do not provide a unique and distinct perspective to the issue before the Tribunal, would therefore not assist the Tribunal on the Section 106 Application, and would serve only to needlessly prolong and increase the cost of this proceeding.

26. For all of these reasons, Agricore United submits that Mission's application for leave to intervene in the Section 106 Application should be dismissed.

D. Scope of Intervention, If Allowed

27. In the event that the Tribunal decides to grant Mission leave to intervene, Agricore United submits that Mission should be limited to the participation contemplated by section 32 of the *Competition Tribunal Rules* on the specific issue or issues to which the Tribunal finds Mission may provide a unique and distinct perspective. Mission has not demonstrated that an enhanced level of participation is necessary in order for it to participate effectively in the event that its request for leave to intervene is granted and has not set out any basis for its position that it should be permitted greater scope for intervention than is contemplated in section 32 of the *Competition Tribunal Rules*.

Competition Tribunal Rules, *supra*, s. 32.

28. In this regard, Agricore United notes that, notwithstanding that it was granted leave to intervene in a fully contested discovery track proceeding under section 92 of the *Competition Act* and had requested the right to call *viva voce* evidence, examine and cross-examine witnesses and file expert evidence, the Municipality of Chatham-Kent was permitted in *Canadian Waste Services* only to (a) make representations on the relevant divestiture issues and (b) present legal arguments on competition matters that were not repetitious.

> *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, [2000] C.C.T.D. No. 10 (Comp. Trib.) (Q.L).

29. Similarly, in *Chapters*, intervention was limited to the submission of argument addressing a single issue (*i.e.*, the effectiveness of the consent order as it related to one of the remedies proposed and, in particular, the likelihood that there would be a buyer for the designated assets). The intervenors were not entitled to submit evidence unless the parties sought to introduce further evidence on this issue.

> *Chapters*, *supra* paras. 7, 16-17.

30. In the alternative, in the event that the Tribunal permits Mission an enhanced level of participation, Agricore United submits that a lesser level of participation is appropriate than the level requested by Mission.

31. Given that the Section 106 Application is governed by the Disclosure Track Procedure, Agricore United submits that it is premature to address participation by Mission in the discovery process. Pursuant to section 21 of the *Competition Tribunal Rules*, examinations for discovery are available only with leave of the Tribunal if warranted by the circumstances. The parties have not made any such applications with respect to discovery against Mission. Any such application

should be considered on its merits at the relevant time, if and when a party seeks discovery against Mission. In this regard, the Tribunal has on previous occasions found it appropriate to order discovery against intervenors.

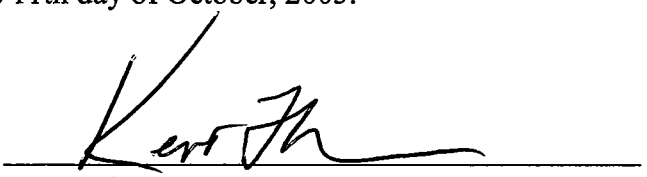
> *Canada (Director of Investigation and Research)* v. *A.C. Nielsen Company of Canada*, [1994] C.C.T.D. No. 3. (Comp. Trib.)
>
> *Canada (Commissioner of Competition)* v. *Air Canada* [2001] C.C.T.D. No. 5 (Comp. Trib.)

32. Finally, as regards expert evidence, Agricore United submits that, particularly given the efficiency-enhancing objective of the Disclosure Track Procedure, Mission should be permitted to submit expert evidence only if one or both of the parties do so.

F. Order Sought

33. Agricore United requests an order denying Mission's request for leave to intervene in this proceeding.

All of which is respectfully submitted this 11th day of October, 2005.



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TO: Mission Terminal Inc.

AND TO: The Registrar of the Competition Tribunal

AND TO: Counsel to the Commissioner of Competition

CT-2002/001

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RESPONSE OF THE APPLICANT TO THE REQUEST FOR LEAVE TO INTERVENE FILED BY MISSION TERMINAL INC.

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