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 THE CANADIAN WHEAT BOARD

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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* and the Tribunal's direction of September 2, 2005, in response to the Canadian Wheat Board's (the "CWB Monopoly") request for leave to intervene in Agricore United's section 106 application (the "Section 106 Application") and its related motion for interim relief (the "Motion"). 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 the CWB Monopoly's request for leave to intervene should be denied because the CWB Monopoly has failed to establish that it is affected by the Motion or that it has relevant submissions to make that are unique or distinct from the position of the Commissioner with respect to the issues on either the Section 106 Application or the Motion.

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, *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 the CWB Monopoly 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 the CWB Monopoly 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. The question on the Motion, as set out in the Direction on Intervention, is whether Agricore United is entitled to an extension of time to complete a divestiture under the Consent Agreement. In this regard, paragraph 48 of the Consent Agreement provides that "[t]he Commissioner and Agricore United may, by way of mutual agreement, extend any of the time periods applicable [th]erein". In addition, paragraph 49 of the Consent Agreement provides that "[i]f a decision of the Commissioner is unreasonably withheld [...] Agricore United may apply to the Competition Tribunal for approval". Thus, Agricore United submits that the only substantive issues before the Tribunal on the Motion are whether the Commissioner unreasonably withheld her consent when she refused Agricore United's request to extend the Port Terminal Initial Sale Period pending the final disposition of the Section 106 Application, and whether the Tribunal should approve the request.

Direction on Intervention, supra.

9. Agricore United submits that the CWB Monopoly is not affected by the Motion which concerns an extension pursuant to a contract between the Commissioner and Agricore United, has provided no evidence or argument as to why or in what way it would be affected by an extension of the Port Terminal Initial Sale Period, and has offered no explanation or basis whatsoever for asserting that it has a unique perspective on the issues raised by the Motion that

would assist the Tribunal in deciding whether the relief requested by Agricore United should be granted.

10. In the alternative, in the event that the Tribunal decides to grant the CWB Monopoly leave to intervene, Agricore United submits that the intervention should be limited to the participation contemplated by section 32 of the *Competition Tribunal Rules*. In this regard, the CWB Monopoly 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 were granted.

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

B. The Test for Granting Leave to Intervene

11. 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).

12. 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.

13. 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.).

14. 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]
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> *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1995), 61 C.P.R. (3d) 528 at 531 (Comp. Trib.).

15. 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)*").

16. 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."

Washington v. Canada (Director of Investigation and Research) (1998), 78 C.P.R. (3d) 479 at 484 (Comp. Trib.).

17. 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."

Washington v. Canada (Director of Investigation and Research), *supra* at 486-88.

18. 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)*").

19. 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.

20. 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.).

21. 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. CWB Monopoly Does Not Satisfy the Test

22. While Agricore United does not dispute that the CWB Monopoly may be affected by the Section 106 Application, it has not demonstrated that it is affected any differently than grain companies or grain farmers in Western Canada. In this regard, although the CWB Monopoly claims that it "is the direct representative of [approximately 70,000] Western Canadian producers of wheat and barley", each of these producers has no choice but to market its CWB Monopoly grain through the CWB Monopoly. In fact, section 45 of the *Canadian Wheat Board Act* provides, in relevant part, that "no person other than the [CWB Monopoly] shall [...] sell or agree to sell wheat or wheat products situated in one province for delivery in another province or outside Canada". Any person who contravenes this provision or otherwise fails to comply with the *Canadian Wheat Board Act* or any regulation made thereunder is, upon conviction, subject to fines and/or imprisonment.

> Request for Leave to Intervene filed on behalf of the Canadian Wheat Board, *supra* at para. 29.
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> *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24, ss. 45 and 68(3).

23. In any event, Agricore United submits that the CWB Monopoly should not be granted leave to intervene because the CWB Monopoly has failed to establish that it has relevant

submissions to make that are unique or distinct from those the Commissioner will make with respect to the issues before the Tribunal on the Section 106 Application and the Motion.

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

24. The CWB Monopoly proposes to make submissions with respect to: (a) the competitive effects of further consolidation of port terminal capacity in the Port of Vancouver; (b) material changes (or the alleged absence of changes) in the circumstances that existed at the time the Consent Agreement was entered into; (c) the extent to which divestiture would be necessary to provide an adequate remedy; and (d) the effects that rescinding the Consent Agreement and/or extending the deadline to complete the divestiture would have on the CWB Monopoly and the Western Canadian grain handling industry.

> Request for Leave to Intervene on Behalf of the Canadian Wheat Board (7 September 2005), CT-2002/001, at para. 2(c)-(g).

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. The CWB Monopoly's proposed submissions are not directly relevant to the issue before the Tribunal (*i.e.*, the intentions of the parties to the Consent Agreement), in addition to containing factual inaccuracies, and would therefore not assist the Tribunal on the Section 106 Application and will serve only to needlessly prolong and increase the cost of this proceeding. To the extent that any of the CWB Monopoly's proposed submissions may be relevant to the Commissioner's intentions, either now or at the time of the Consent Agreement, the Commissioner is uniquely and better placed (relative to the CWB) to speak to her intentions and to determine whether and how her position in this regard is

to be advanced. In short, the CWB Monopoly cannot offer a different perspective than the Commissioner on the Commissioner's intentions and, 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.

26. Similarly, with respect to the Motion, Agricore United submits that the CWB Monopoly would not offer a unique or distinct perspective from the Commissioner on whether the Commissioner's refusal to grant Agricore United an extension of time to complete the divestiture under the Consent Agreement was reasonable and the Tribunal should approve the extension. Indeed, as noted above, in its request for leave to intervene, the CWB Monopoly provides no explanation or basis whatsoever for its contention that it has a unique perspective on this issue. Having previously agreed to extensions of the Port Terminal Initial Sale Period, the Commissioner is familiar with the implications and consequences (or lack thereof) that extending the deadline would have on the Western Canadian grain handling industry. Further, only the Commissioner can speak to her rationale and reasons for refusing to grant the requested extension and the CWB Monopoly is unable to provide the Tribunal with any additional assistance in assessing the reasonableness of that refusal or the approval of the extension.

27. For all of these reasons, Agricore United submits that the CWB Monopoly's application for leave to intervene in the Section 106 Application and the Motion should be dismissed.

D. Scope of Intervention, If Allowed

28. In the event that the Tribunal decides to grant the CWB Monopoly leave to intervene, Agricore United submits that the CWB Monopoly should be limited to the participation contemplated by section 32 of the *Competition Tribunal Rules*. The CWB Monopoly 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. The CWB Monopoly's application assumes that it should be granted the same level of participation that it was granted in the Section 92 Application, which dealt with very different issues, rather than setting 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.

29. 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).

30. 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 the structural remedy proposed and 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.

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

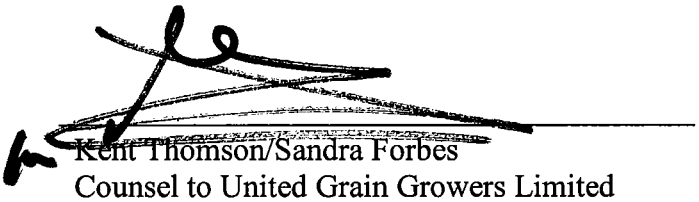
32. Given that the Section 106 Application is governed by the Disclosure Track Procedure, Agricore United submits that it is premature to address participation by the CWB Monopoly in the discovery process. Pursuant to section 21 of the *Competition Tribunal Rules*, examinations for discovery are available only with leave of the Tribunal if warranted by the circumstances. The parties have not yet made any such applications with respect to discovery against the CWB Monopoly. Any such application should be considered on its merits at the relevant time if, and when, a party seeks discovery against the CWB Monopoly.

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

F. Order Sought

34. Agricore United requests an order denying the CWB Monopoly's request for leave to intervene in this proceeding.

All of which is respectfully submitted this 9th day of September, 2005.



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TO: The Canadian Wheat Board

AND TO: The Registrar of the Competition Tribunal

AND TO: Counsel to the Commissioner of Competition

CT-2002/001

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