**PUBLIC VERSION**

**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

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**AFFIDAVIT OF STANLEY MURDOCH MACKAY**

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I, STANLEY MURDOCH MACKAY, of the City of Winnipeg, in the Province of Manitoba, MAKE OATH AND SAY AS FOLLOWS:

1. I am the Vice-President Operations at Agricore United, and have held that position since June 2005. Prior to that time, I served as Vice President Terminal Services at Agricore United, a position that I held since September 1985. As such, I have knowledge of the matters hereinafter deposed to, except where such matters are based on information and belief, and in such instances I believe them to be true.

2. I have read the Statement of Grounds and Material Facts attached hereto as Exhibit "A" (the "SGMF") and confirm that, to the best of my knowledge, information and belief, all of the facts set out therein are true. (Capitalized terms used herein and not herein defined have the meanings ascribed thereto in the SGMF.) With respect to references in the SGMF to certain Competition Tribunal proceedings in relation to the Acquisition, while I am familiar with and have been involved in such proceedings, I have relied on the filings with the Tribunal in confirming the accuracy of those references in the SGMF. In addition, except where sources are specifically identified, to the extent that the SGMF describes information about the industry generally or agreements or dealings between third parties, in confirming the accuracy of the SGMF, I have relied on my general knowledge of the grain handling industry in Western Canada, but do not have first hand knowledge of such information.

3. Attached hereto as Exhibit "B" is a Document Brief which includes all of the documents and correspondence referred to in the SGMF which are relevant to Agricore United's Motion for interim relief.

*Background*

4. As noted in the SGMF, the Consent Agreement requires that Agricore United offer to divest a Port Terminal within the Port Terminal Initial Sale Period, which is currently scheduled to expire at 12:00 noon (Winnipeg time) on August 15, 2005. Therefore, absent Agricore United and the Commissioner agreeing to a further extension or an order of the Tribunal, a Trustee will be appointed at 12:00 noon (Winnipeg time) on August 15, 2005 to seek to implement a divestiture of the UGG Terminal pursuant to the Consent Agreement. The Commissioner granted the extension to August 15, 2005 (on July 18,

2005), and a number of earlier extensions, to permit Agricore United to seek to complete a proposed transaction with Terminal One. As noted in the SGMF, Terminal One is a consortium of five farmer-owned inland grain terminals, each of which is an Independent Grain Company and a member of the Inland Terminal Association of Canada ("ITAC").

5. **[CONFIDENTIAL]**. As a result, the Applicant's counsel, Davies Ward Phillips & Vineberg LLP ("DWPV"), wrote to the Commissioner's counsel on August 9, 2005 requesting that the Commissioner extend the Port Terminal Initial Sale Period pursuant to paragraph 48 of the Consent Agreement from 12:00 noon (Winnipeg time) on August 15, 2005 to August 29, 2005 in order to allow for consideration of an anticipated revised offer from Terminal One. However, as noted in the SGMF, in a letter dated August 10, 2005, the Commissioner's counsel indicated that the Commissioner would not agree to any further extension of the Port Terminal Initial Sale Period beyond 12:00 noon (Winnipeg time) on August 15, 2005.

6. I have been personally involved in Agricore United's attempts to divest a Port Terminal from the commencement of this process. Agricore United has made diligent and good faith efforts to divest a Port Terminal since the Consent Agreement was executed in October 2002. Details of these efforts are contained in the SGMF. As part of these efforts, Agricore United has, among other things, taken all reasonable steps to conclude a sale of the UGG Terminal to Terminal One on or before 12:00 noon (Winnipeg time) on August 15, 2005. The fact that Agricore United is unable to meet this deadline stems not from any actions or inactions on the part of Agricore United, but from the inability of Terminal One to secure the volume of grain required to complete the Proposed Divestiture and delays in Terminal One subsequently completing and submitting a

revised offer. Even if a revised offer were received between now and 12:00 noon (Winnipeg time) on Monday, there would not be sufficient time for Agricore United to responsibly consider, assess and respond to such an offer.

7. **[CONFIDENTIAL]**. Given that the Terminal One group represents a significant portion of the uncommitted independent grain, the Commissioner's decision to refuse to approve the requested further extension jeopardizes the prospects for a sale of the UGG Terminal that satisfies the rationale behind the Consent Agreement. For the reasons discussed in the SGMF, and particularly if Terminal One is unable to complete a transaction, there can be no assurance that any prospective purchaser will be able to obtain sufficient grain commitments to operate the UGG Terminal on a sustainable basis as contemplated by and in a manner consistent with the purposes of the Consent Agreement.

*Request for Extension Pending Decision on Section 106 Application*

8. I am advised by DWPV that, on the morning of August 11, 2005, DWPV contacted the Commissioner's counsel and indicated that, in light of the Commissioner's August 10, 2005 refusal to further extend the Port Terminal Initial Sale Period for the purposes of a possible sale to Terminal One, Agricore United intended to, among other things, apply to the Tribunal for an order rescinding the Consent Agreement pursuant to section 106 of the Act. DWPV also requested that the Commissioner extend the Port Terminal Initial Sale Period pursuant to paragraph 48 of the Consent Agreement pending the final determination of the section 106 application. A letter formally requesting such an extension was sent to the Commissioner's counsel shortly thereafter.

9. I am advised by DWPV that the Commissioner's counsel declined to agree to any further extension of the Port Terminal Initial Sale Period in connection with the section 106 application at that time. This was confirmed in a letter to DWPV, dated August 11, 2005.

10. In light of the circumstances described herein and in the SGMF, it is, in my view, unreasonable for the Commissioner to withhold or continue to withhold her agreement to the requested extension pending the determination of the section 106 application. The SGMF sets out the changed circumstances which, in Agricore United's view, justify the recission of the Consent Agreement.

11. In addition, it is my understanding that the Commissioner has, at least to date, not challenged the proposed SWP/JRI JV, effectively a merger of their respective grain handling terminals in the Port of Vancouver. The proposed SWP/JRI JV was publicly announced on April 6, 2005 and apparently at least partially implemented in July 2005 without objection by the Commissioner, as disclosed in an article published in the Western Producer on July 21, 2005. As noted in the SGMF, any further restraints on the ability of SWP and JRI to complete the implementation of the proposed SWP/JRI JV pursuant to the SWP/JRI Consent Interim Agreement are currently scheduled to expire on September 3, 2005. Failure by the Commissioner to challenge the proposed SWP/JRI JV would imply a lack of current grounds to require a divestiture in connection with the Acquisition as the proposed SWP/JRI JV represents further consolidation in the same market. Through its counsel, DWPV, Agricore United expressed its views in this regard in letters to counsel to the Commissioner and the Bureau dated June 15 and May 30, 2005, respectively, dealing in part with the implications of the proposed SWP/JRI JV.

12. Moreover, allowing the Trustee to be appointed at a time when his very legitimacy under the Consent Agreement and his power to sell the UGG Terminal is subject to serious challenge, and at best is uncertain, will, in my view, discourage any remaining potential purchasers. **[CONFIDENTIAL]**. While Agricore United intends to seek an expedited schedule for the disposition of the section 106 application, a final determination by the Tribunal may still not occur until after the Trustee Sale Period has expired, at which time the Trustee would have no authority to make a sale in any event.

13. **[CONFIDENTIAL]**.

14. Even if Agricore United's application under section 106 of the Act is unsuccessful, approval to extend the Port Terminal Initial Sale Period pending the final determination of the application would merely delay the appointment of the Trustee until that time. It is my view that no prejudice to any of the Commissioner, Independent Grain Companies or the public interest would flow from such a delay in the appointment of the Trustee. In this regard, as noted in the SGMF, Agricore United believes that every Independent Grain Company that ships grain to the Port of Vancouver has or will have a port terminal access contract or handling agreement covering at least the next crop year ending July 31, 2006 and in some cases many years. Moreover, as described in detail in the SGMF, the access provisions included in the Consent Agreement have been in place for almost three years and have addressed any possible concerns that the Commissioner may have regarding access to port terminals in the Port of Vancouver for the reasonably foreseeable future. In addition, as noted above, subsections 69(1) and (2) of the *Canada Grain Act* require that port terminal operators receive all grain shipped to the Port of Vancouver, without discrimination, subject to certain exceptions and conditions.

15. Further, in the absence of approval to extend the Port Terminal Initial Sale Period pending the final determination of the within Application, Agricore United would very likely incur significant additional and unnecessary costs following the appointment of the Trustee, costs that will prove unnecessary if the section 106 application is successful. For example, Agricore United is required by paragraph 20 of the Consent Agreement to pay all expenses reasonably and properly incurred by the Trustee in the course of a Trustee sale and the Trustee may retain financial, legal and other professional advisors, including investment bankers pursuant to paragraph 24 of the Consent Agreement.

16. In light of the prejudice to a Trustee sale process in the midst of Tribunal proceedings seeking rescission of the very Consent Agreement pursuant to which the Trustee obtains his status and power, the merits of the section 106 application, and the absence of prejudice from the requested extension, it is in my view unreasonable and unfair for the Commissioner to continue to withhold her agreement to the requested extension of the Port Terminal Initial Sale Period pending the final determination of the section 106 application.

SWORN BEFORE ME at the City of Toronto,
in the Province of Ontario, this 11th day of
August, 2005

STANLEY MURDOCH MACKAY

Commissioner for taking Affidavits, etc.

**PUBLIC VERSION**

**CT-2002-001**

**THE COMPETITION TRIBUNAL**

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**BETWEEN:**

**UNITED GRAIN GROWERS LIMITED**

Applicant

**- and -**

**THE COMMISSIONER OF COMPETITION**

Respondent

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**AFFIDAVIT OF STANLEY MURDOCH MACKAY**

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Counsel for the Applicant

**PUBLIC VERSION**

**SCHEDULE "A"**

**CT-2002-001**

**THE COMPETITION TRIBUNAL**

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

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**STATEMENT OF GROUNDS AND MATERIAL FACTS**
**Re: Section 106 Application**

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## PART I – SUMMARY

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. On January 2, 2002, the Commissioner of Competition (the "Commissioner") filed an application with the Competition Tribunal (the "Tribunal") pursuant to section 92 of the *Competition Act* (the "Act") alleging that the Acquisition 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 "Section 92 Application"). In order to remedy the alleged substantial prevention and lessening of competition, the Commissioner requested that the Tribunal issue an order requiring that Agricore United divest all or part of a port terminal in the Port of Vancouver.

3. **[CONFIDENTIAL]**, the issues in dispute at the hearing of the Section 92 Application were confined to whether a divestiture of that portion of the Pacific Complex known as the Pacific 1 Terminal, either alone or with a portion of the Annex component of the Pacific Complex (as defined in the Statement of Grounds and Material Facts filed in connection with the Section 92 Application (the "Section 92 SGMF")), would remedy the substantial prevention and lessening of competition alleged by the Commissioner.

4. The hearing of the Section 92 Application was scheduled to commence on October 21, 2002. However, on October 17, 2002, the Commissioner and Agricore United filed and registered a consent agreement with the Tribunal pursuant to section 105 of the Act (the "Consent Agreement").

5. The Consent Agreement requires, among other things, that Agricore United offer to divest, at its option, either the UGG Terminal (as defined in the Consent Agreement) or its interest in the Pacific Complex (each a "Port Terminal" and, collectively, the "Port Terminals"). Agricore United subsequently selected the UGG Terminal for disposition.

In the event that Agricore United is unable to divest a Port Terminal within a certain period of time, the Consent Agreement provides that a Trustee (as defined in the Consent Agreement) will be appointed to carry out any required divestiture.

6. The Commissioner's objective in requiring the divestiture of a Port Terminal pursuant to the Consent Agreement was to ensure that Independent Grain Companies (as defined in the Consent Agreement) would have access to port terminal grain handling services in the Port of Vancouver at competitive rates.

7. Since October 17, 2002, the circumstances that led to the making of the Consent Agreement have changed significantly. The amount of uncommitted grain shipped to the Port of Vancouver by Independent Grain Companies in Western Canada ("independent grain") that would be available to a prospective purchaser of the UGG Terminal has diminished dramatically as a result of consolidation among grain companies in Western Canada and exclusive, long-term handling agreements entered into by Independent Grain Companies and port terminal operators in the Port of Vancouver since the Consent Agreement was executed. It has thus become clear both that a prospective purchaser will not be able to secure enough independent grain to operate the UGG Terminal as a grain terminal on a sustainable basis and that Independent Grain Companies have been able to secure long-term access to the Port of Vancouver pursuant to such handling agreements.

8. The only realistic prospect for the UGG Terminal to be used for grain handling would be an acquisition by a purchaser who enters into a handling agreement with the Canadian Wheat Board, a statutory monopoly incorporated pursuant to the provisions of the *Canadian Wheat Board Act* (the "CWB Monopoly"). A handling agreement between a purchaser of the UGG Terminal and the CWB Monopoly would, however, adversely affect the Western Canadian grain handling industry, including Independent Grain Companies, and would be inconsistent with, and undermine, the objectives of the Consent Agreement.

9. The significantly reduced volume of uncommitted independent grain demonstrates both the absence of any continuing basis for a divestiture to provide an alternative port

terminal for Independent Grain Companies in the Port of Vancouver and the inability to make an effective divestiture pursuant to the Consent Agreement under current market conditions. It also demonstrates that Independent Grain Companies continue to have access to port terminal grain handling services in the Port of Vancouver at competitive rates. In this regard, every Independent Grain Company that ships grain to the Port of Vancouver has or will have a port terminal access contract covering at least the next crop year and in some cases many years, and most independent grain is being delivered under handling agreements with terms of **[CONFIDENTIAL]**. (A crop year runs from August 1 to July 31 of the following calendar year.)

10. In the circumstances that now exist, Agricore United 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 a consent agreement contemplating the divestiture of a Port Terminal. Accordingly, Agricore United requests that the Tribunal rescind the Consent Agreement pursuant to section 106 of the Act.

## PART II – BACKGROUND TO THIS APPLICATION

### A. The Original Section 92 Application

*The Acquisition*

11. Pursuant to the terms of a Merger Agreement between UGG and Agricore dated July 30, 2001, UGG and Agricore agreed to merge by way of a court-approved plan of arrangement under section 192 of the *Canada Business Corporations Act* (the "Plan of Arrangement"). The Plan of Arrangement provided that UGG would acquire control of all business assets of Agricore, including interests in port terminal facilities in the Port of Vancouver.

12. As noted above, the Acquisition was completed on November 1, 2001.

*Commissioner's Review and Challenge of the Acquisition*

13. Following his review of the Acquisition, the Commissioner concluded that the Acquisition would likely result in a substantial prevention or lessening of competition with respect to, among other things, the purchasing and handling of grain in certain local markets in Western Canada and the provision of port terminal grain handling services in the Port of Vancouver.

*Purchasing and Handling of Grain in Certain Local Markets in Western Canada*

14. In order to remedy his concerns with respect to the purchasing and handling of grain in certain local markets in Western Canada, the Commissioner filed an application for a consent order with the Tribunal pursuant to sections 92 and 105 of the Act (the "Consent Order"). The Consent Order, which was issued by the Tribunal on February 19, 2002, required that Agricore United divest a number of primary grain elevators located in Alberta and Manitoba. In full satisfaction of its obligations under the Consent Order, Agricore United divested a total of seven primary grain elevators, the last such divestiture being completed on February 13, 2004.

*Port Terminal Grain Handling Services in the Port of Vancouver*

15. In order to remedy his concerns with respect to the provision of port terminal grain handling services in the Port of Vancouver, the Commissioner commenced the Section 92 Application. As part of the Section 92 Application, the Commissioner sought an order from the Tribunal requiring that Agricore United divest all or part of a port terminal in the Port of Vancouver.

16. There are five port terminals located in the Port of Vancouver. They are:

(a) the Cascadia Terminal ("Cascadia"), which is owned equally by Agricore United and Cargill Limited ("Cargill");

(b) the James Richardson International Limited ("JRI") Terminal, which is wholly-owned by JRI;

(c) the Pacific Elevators Limited Terminal ("PEL"), which, at the time the Consent Agreement was executed in October 2002, was owned 70% by Agricore United and 30% by Saskatchewan Wheat Pool ("SWP"). Agricore United subsequently purchased SWP's interest and now owns all of the issued and outstanding shares of PEL;

(d) the SWP Terminal, which is wholly-owned by SWP; and

(e) the UGG Terminal, which is wholly-owned by Agricore United.

17. In addition to these port terminals, Neptune Terminals and Vancouver Wharves Limited Partnership ("Vancouver Wharves") provide certain grain handling services in the Port of Vancouver. However, the Commissioner did not consider these facilities to be in the relevant market for the purposes of the Section 92 Application.

18. At the same time that the Section 92 Application was filed with the Tribunal, the Commissioner also filed a notice of application requesting the issuance of an interim consent order pursuant to section 104 of the Act (the "Section 104 Application"). On the basis of the written record, the Tribunal issued an interim consent order on January 14, 2002 (the "Interim Consent Order").

19. Pursuant to the terms of the Interim Consent Order, Agricore United was required to, among other things, maintain the Port Terminals, honour all existing contracts for the handling of grain for Independent Grain Companies and offer to handle for Independent Grain Companies a minimum of 125,000 tonnes of grain per month (1.5 million tonnes per year), by way of contracts, through the Port Terminals or, at no additional cost to the Independent Grain Companies, through terminal arrangements entered into with other terminal operators. Prior to October 2002, Agricore United estimates that Independent Grain Companies had historically shipped between approximately **[CONFIDENTIAL]** and **[CONFIDENTIAL]** tonnes of grain through the Port of Vancouver each year. The

volume of independent grain shipped through the Port of Vancouver in any given year has generally varied proportionately with the total volume of grain shipped through the Port of Vancouver during that year.

20. Pursuant to an agreement between Agricore United and the Commissioner to narrow the issues in dispute at the hearing of the Section 92 Application, a hearing was held on September 10, 2002 to determine, among other things, whether the Acquisition would likely result in a substantial lessening of competition in the provision of port terminal grain handling services in the Port of Vancouver, as alleged by the Commissioner (the "SLC Motion"). Agricore United did not, for the purpose of the SLC Motion, contest the Commissioner's allegation that the Acquisition would likely result in such a substantial lessening of competition.

21. On September 12, 2002, pursuant to the uncontested SLC Motion, the Tribunal found that the Acquisition would likely result in a substantial lessening of competition in the provision of port terminal grain handling services in the Port of Vancouver. The Tribunal also found, pursuant to the uncontested SLC Motion, that the divestiture of either the UGG Terminal or Agricore United's interest in the Pacific Complex would remedy the substantial lessening of competition, as would the divestiture of that portion of the Pacific Complex known as the Pacific 1 Terminal, either alone or with a portion of the Annex component of the Pacific Complex, provided, in the case of a divestiture of only part of the Pacific Complex, that such a divestiture satisfied certain criteria previously agreed to by Agricore United and the Commissioner.

22. The Tribunal left for determination at a later date the only remaining issue of whether the divestiture of the Pacific 1 Terminal, either alone or with a portion of the Annex component of the Pacific Complex, would satisfy such criteria. The hearing on this issue was scheduled to commence on October 21, 2002. However, on October 17, 2002, the Commissioner and Agricore United filed and registered the Consent Agreement with the Tribunal, thereby terminating the Section 92 Application.

*Requests for Leave to Intervene*

23. Requests for leave to intervene in the Section 92 Application were filed by each of the CWB Monopoly, SWP and the Inland Terminal Association of Canada ("ITAC").

24. Pursuant to the *Canadian Wheat Board Act*, the CWB Monopoly is, by law, the only purchaser of wheat and barley that is either to be exported from Canada or used for domestic human consumption. CWB Monopoly grain has accounted for approximately 65% to 75% of all grain shipped through the Port of Vancouver on an annual basis over the past five years.

25. The CWB Monopoly sought leave to argue, among other things, that the divestiture of the Pacific 1 Terminal alone was not an adequate remedy. The Tribunal granted the CWB Monopoly's request for leave to intervene on May 29, 2002.

26. SWP is a publicly-traded agribusiness which operates a number of primary elevators in Western Canada and port terminals in Vancouver and Thunder Bay. SWP sought leave to argue, among other things, that an order requiring the divestiture of Agricore United's interest in the Pacific Complex would nullify many of SWP's rights under various agreements in respect of the Pacific Complex in which Agricore United was a party. The Tribunal granted SWP's request for leave to intervene on May 29, 2002.

27. ITAC is an association whose purpose is to promote the common interests and goals of modern, efficient high-throughput inland terminals. At the time it filed a request for leave to intervene, ITAC had ten members, namely:

    (a) CMI Terminal Joint Venture ("CMI");

    (b) Gardiner Dam Terminal ("GDT");

    (c) Great Sandhills Terminal Marketing Centre Ltd. ("GST");

    (d) Mid-Sask Terminal Ltd. ("MST");

(e) North East Terminal Ltd. ("NET");

(f) North West Terminal Ltd. ("NWT");

(g) Prairie West Terminal Ltd. ("PWT");

(h) South West Terminal Ltd. ("SWT");

(i) Terminal 22 (1998) Inc. ("Terminal 22"); and

(j) Weyburn Inland Terminal Ltd. ("Weyburn").

28. Today, ITAC has these ten members as well as:

(a) Providence Grain;

(b) Westlock Terminal; and

(c) Westmor Terminal.

29. Each of the members of ITAC is an Independent Grain Company and ITAC's membership includes all of the farmer-owned Independent Grain Companies in Western Canada which together account for a significant percentage of the independent grain shipped to the Port of Vancouver. Delmar Commodities Ltd. ("Delmar Commodities"), Fill-More Seeds Inc. ("Fill-More Seeds"), Great Northern Grain ("GNG"), Louis Dreyfus Canada Ltd. ("Dreyfus"), N.M. Paterson & Sons Limited ("Paterson"), Parrish & Heimbecker, Limited ("P&H") and West Central Road & Rail ("WCRR") are other significant Independent Grain Companies in Western Canada that are not members of ITAC.

30. ITAC sought leave to address certain issues relating to the provision of port terminal grain handling services in the Port of Vancouver. The Tribunal denied ITAC's request for leave to intervene on May 29, 2002.

*Purpose of Divestiture*

31. The materials filed by the Commissioner in connection with the Section 92 Application, the Section 104 Application and the SLC Motion clearly indicate that the purpose of any divestiture of a Port Terminal by Agricore United pursuant to the Consent Agreement was to provide Independent Grain Companies with access to port terminal grain handling services in the Port of Vancouver at competitive rates. For example, in paragraph 38 of the Section 92 SGMF, the Commissioner stated that:

> [f]or [Independent Grain Companies] to compete effectively with Integrated [Grain Companies] ... it is essential that they have regular and predictable access to a port terminal.... [A]ccess is provided on an individual shipment basis in the form of terminal authorization. A terminal authorization must be obtained before a tender is submitted to the [CWB Monopoly] or, in respect of non-tendered grain, before the railways will provide rail cars for loading at a primary elevator. In order to compete, it is ... important that [Independent Grain Companies] have access to all the revenue streams associated with grain handling, such as ... terminal diversion premiums.

32. Terminal diversions premiums are per tonne payments made by grain companies that have an ownership interest in one or more of the existing port terminals ("Integrated Grain Companies") to Independent Grain Companies to attract grain to their port terminals. At the time the Consent Agreement was executed in October 2002, terminal diversion premiums generally ranged from approximately $1 to $4 per tonne. Today, terminal diversion premiums generally range from approximately **[CONFIDENTIAL]** to **[CONFIDENTIAL]** per tonne.

## B. The Consent Agreement

33. On October 17, 2002, the Commissioner and Agricore United filed and registered the Consent Agreement with the Tribunal. As discussed in more detail below, the Consent Agreement includes both divestiture and interim access provisions.

*Divestiture Provisions*

34. The Consent Agreement requires that Agricore United offer to divest, at its option, either the UGG Terminal or its interest in the Pacific Complex within the Port Terminal Initial Sale Period (as defined in the Consent Agreement). The Port Terminal Initial Sale Period would have expired on October 31, 2004 in the absence of any extensions. In this regard, at the time the Consent Agreement was executed in October 2002, Agricore United and the Commissioner recognized that, in light of the drought which severely reduced grain shipments to the Port of Vancouver during the 2001/2002 crop year and the depressed market conditions which existed at that time as a result, it would be very difficult for Agricore United to sell a Port Terminal within a short period of time. Agricore United and the Commissioner therefore agreed to a lengthy divestiture period, with the expectation that market conditions would significantly improve over the following two years.

35. The Port Terminal Initial Sale Period was extended to December 30, 2004 **[CONFIDENTIAL]**. In addition, Agricore United and the Commissioner mutually agreed to a number of additional extensions pursuant to paragraph 48 of the Consent Agreement in light of what they believed to be reasonable prospects for a possible divestiture. The Port Terminal Initial Sale Period is now currently scheduled to expire at 12:00 noon (Winnipeg time) on August 15, 2005 in the absence of Agricore United and the Commissioner agreeing to a further extension or an order of the Tribunal. However, as discussed in more detail below, in a letter dated August 10, 2005, the Commissioner's counsel indicated that the Commissioner would not agree to any further extension of the Port Terminal Initial Sale Period beyond 12:00 noon (Winnipeg time) on August 15, 2005.

36. If Agricore United has not divested a Port Terminal within the Port Terminal Initial Sale Period, absent an extension of time or a variation or rescission of the Consent Agreement, a Trustee will be appointed to seek to implement a divestiture pursuant to the Consent Agreement. **[CONFIDENTIAL]**.

37. The Consent Agreement also provides that Agricore United is permitted to elect, at least 90 days before the expiry of the Port Terminal Initial Sale Period, whether the Trustee will be entitled to divest the UGG Terminal or Agricore United's interest in the Pacific Complex. On August 31, 2004, Agricore United elected that the Trustee would (if necessary) be entitled to divest the UGG Terminal.

38. **[CONFIDENTIAL]**.

*Interim Access Provisions*

39. Pursuant to the Consent Agreement, until such time as a Port Terminal has been divested, Agricore United is required to honour all existing contracts for the handling of grain for Independent Grain Companies in the Port of Vancouver and offer to handle for Independent Grain Companies a minimum of 125,000 tonnes of grain per month (1.5 million tonnes per year), by way of contracts, through the Port Terminals or, at no additional cost to the Independent Grain Companies, through terminal arrangements entered into with other port terminal operators in the Port of Vancouver.

40. In addition to Agricore United's access obligations under the Consent Agreement, subsection 69(1) of the *Canada Grain Act* provides that, subject to certain exceptions, "the operator of every licensed [port] terminal elevator ... shall, at all reasonable hours on each day on which the elevator is open, without discrimination and in the order in which grain arrives and is lawfully offered at the elevator, receive into the elevator all grain so lawfully offered for which there is, in the elevator, available storage accommodation of the type required by the person by whom the grain is offered". Similarly, subsection 69(2) of the *Canada Grain Act* provides that "[t]he [Canadian Grain Commission (the "CGC")] may, by order, on such conditions as it may specify, authorize or require the operator of a licensed terminal elevator ... to receive grain lawfully offered for storage ... at the elevator otherwise than as required by subsection (1)".

41. The Consent Agreement also provides that new contracts between Agricore United and Independent Grain Companies are to be based on reasonable commercial terms consistent

with past practice. Prices for the handling of Independent Grain Companies' grain under any new contracts are to be based on Agricore United's tariffs as filed with the CGC. Diversion premiums negotiated with Independent Grain Companies are to be kept confidential, but in any event shall be at least $2 per tonne. Any non-CWB Monopoly tariff increase or any diversion premium decrease (CWB Monopoly or non-CWB Monopoly grain) from these initial levels must be commercially reasonable.

42. Any disputes as to price, tariffs, diversion premiums or other terms are to be settled by way of an arbitration procedure as outlined in Schedule "C" to the Consent Agreement. During any arbitration procedure, Agricore United must, in accordance with the terms of the Consent Agreement, continue to provide port terminal services to the Independent Grain Company that initiated the arbitration.

43. The access provisions included in the Consent Agreement have now been in place for almost three years. Under these access provisions and prevailing market conditions, Independent Grain Companies have not encountered any difficulty in securing access to port terminals in the Port of Vancouver at competitive rates. Agricore United has continued to honour all existing contracts for the handling of grain for Independent Grain Companies. Agricore United has also entered into **[CONFIDENTIAL]** new handling agreements with Independent Grain Companies since the Consent Agreement was executed on October 17, 2002. The diversion premiums payable under each of these new handling agreements **[CONFIDENTIAL]**.

44. **[CONFIDENTIAL]**.

45. Similarly, since the Consent Agreement was executed on October 17, 2002, Agricore United has renewed its handling agreements with **[CONFIDENTIAL]**, while Cascadia, which is owned equally by Agricore United and Cargill, has renewed its handling agreement with **[CONFIDENTIAL]**. As with the new contracts noted above, the diversion premiums payable under each of these renewed contracts are **[CONFIDENTIAL]**.

46. In addition, since the Consent Agreement was executed in October 2002, Agricore United has not received any complaints from any Independent Grain Companies with respect to price, tariffs, diversion premiums or any other terms of access included in the Consent Agreement.

47. Finally, to the best of Agricore United's knowledge, Independent Grain Companies have not made any complaints to the Competition Bureau (the "Bureau") in connection with Agricore United's behaviour under the access provisions of the Consent Agreement.

## C. Proposed Merger of the Vancouver Port Terminals of Saskatchewan Wheat Pool and James Richardson International Limited

48. On April 6, 2005, SWP and JRI announced their agreement to jointly operate their port terminals in the Port of Vancouver under the name Pacific Gateway Terminal (the "SWP/JRI JV"). According to their press release announcing the proposed SWP/JRI JV, "[t]he agreement, which is subject to regulatory approval, provides for joint administration and operation of the two port terminals. A new business corporation owned equally by [SWP] and JRI will be established to act as a joint venture terminal operator and agent for the two companies. [SWP] and JRI will each continue to own their respective facilities and employees will remain with the parent companies."

49. On July 5, 2005, the Commissioner, SWP and JRI filed a consent interim agreement with the Tribunal (the "SWP/JRI Consent Interim Agreement") requiring that SWP and JRI take all steps necessary to ensure that they operate independently in respect of the marketing of grain handling services to certain Independent Grain Companies during the 60-day term of the SWP/JRI Consent Interim Agreement, which expires on September 3, 2005. According to the SWP/JRI Consent Interim Agreement, the Commissioner had not completed her review of the proposed SWP/JRI JV as of the time the SWP/JRI Consent Interim Agreement was filed with the Tribunal. Agricore United understands that the Commissioner's review of the proposed SWP/JRI JV is ongoing.

50. While the Commissioner has apparently not completed her analysis regarding the effect of the proposed SWP/JRI JV on competition in the Port of Vancouver, a failure to

challenge the SWP/JRI JV in the current market conditions would imply a lack of current grounds to require a divestiture of a Port Terminal by Agricore United pursuant to the Consent Agreement.

## PART III – AGRICORE UNITED'S EFFORTS TO DIVEST A PORT TERMINAL

51. Agricore United has made diligent and good faith efforts to divest a Port Terminal. In this regard, shortly after the Consent Agreement was executed in October 2002, Agricore United had discussions with representatives of **[CONFIDENTIAL]** to determine if any of these companies would be interested in purchasing one of the Port Terminals pursuant to the Consent Agreement. Each of these companies subsequently indicated that it was not interested in purchasing a Port Terminal at that time.

52. Agricore United also contacted a number of merchant bankers, soliciting proposals with respect to the sale of a Port Terminal. In September 2003, Agricore United retained Scotia Capital Inc. ("Scotia Capital") to assist with the divestiture of the UGG Terminal. Scotia Capital is the investment banking division of The Scotiabank Group and has extensive experience and expertise in the acquisition and disposition of businesses in many industries throughout Canada.

53. Together, Agricore United and Scotia Capital drafted a Confidential Information Memorandum, which they subsequently provided to a number of prospective purchasers in order to assist such prospective purchasers in assessing the acquisition opportunity and determine whether such prospects had any interest in acquiring the UGG Terminal. The prospective purchasers identified by Agricore United and Scotia Capital were: **[CONFIDENTIAL]**.

54. The fact that Agricore United was offering to divest the UGG Terminal pursuant to the Consent Agreement was widely-known, including throughout the Western Canadian grain handling industry. Newspaper articles discussing the requirement for a divestiture pursuant to the Consent Agreement appeared, for example, in *The Western Producer* and in the *Manitoba Co-operator*. In addition, a public version of the Consent Agreement

itself was posted on the Tribunal's public website shortly after the Consent Agreement was registered with the Tribunal on October 17, 2002. As a result of this publicity, some prospective purchasers of the UGG Terminal (other than those noted above) contacted Agricore United directly.

55. Expressions of interest were received from each of **[CONFIDENTIAL]** (which was not one of the entities identified by Agricore United and Scotia Capital). Agricore United subsequently attempted to negotiate a divestiture of the UGG Terminal with each of **[CONFIDENTIAL]**. Agricore opted not to pursue negotiations with either **[CONFIDENTIAL]**.

56. Agricore United understands that each of **[CONFIDENTIAL]** opted not to submit expressions of interest for the UGG Terminal because they concluded that they would not be able to attract sufficient volumes of grain to ensure the ongoing viability of the facility. **[CONFIDENTIAL]** opted not to submit an expression of interest for the UGG Terminal because it had previously decided to exit the Western Canadian grain handling industry. Agricore United has no knowledge as to why **[CONFIDENTIAL]** opted not to submit expressions of interest for the UGG Terminal.

## PART IV – PROPOSED SALE TO TERMINAL ONE

### A. Overview of Terminal One

57. Terminal One represents a consortium of five farmer-owned inland grain terminals operating in Saskatchewan, namely GST, NET, NWT, PWT and SWT. As noted above, each of these companies is an Independent Grain Company and a member of ITAC.

### B. Agreement with Terminal One

58. **[CONFIDENTIAL]**.

59. **[CONFIDENTIAL]**.

60. **[CONFIDENTIAL].**

**C. [CONFIDENTIAL]**

61. **[CONFIDENTIAL].**

62. **[CONFIDENTIAL].**

63. **[CONFIDENTIAL].**

64. **[CONFIDENTIAL].**

65. In order for Agricore United and its board of directors to have the opportunity to fully consider any revised offer for the UGG Terminal put forward by Terminal One and, if necessary, deal with any issues that might arise, Agricore United's counsel requested that the Commissioner consent to an extension of the Port Terminal Initial Sale Period from 12:00 noon (Winnipeg time) on August 15, 2005 to August 29, 2005. In this regard, in the letter to the Commissioner's counsel dated August 9, 2005, Agricore United's counsel indicated that Agricore United's board of directors would not be able to consider any such offer before August 18, 2005. However, in a letter dated August 10, 2005, the Commissioner's counsel indicated that the Commissioner would not agree to any further extension of the Port Terminal Initial Sale Period beyond 12:00 noon (Winnipeg time) on August 15, 2005.

## PART V – CHANGES IN CIRCUMSTANCES

### A. Introduction

66. Since the time that the Consent Agreement was executed in October 2002, the circumstances that led to the making of the Consent Agreement have changed significantly. In this regard, it has become clear that no prospective purchaser will be able to secure enough independent grain to operate the UGG Terminal as a grain terminal on a sustainable basis as a result of consolidation among grain companies in Western

Canada and exclusive, long-term handling agreements entered into by Independent Grain Companies and port terminal operators in the Port of Vancouver since the Consent Agreement was executed. It has also become clear that most Independent Grain Companies have secured long-term access to a port terminal in the Port of Vancouver, clearly indicating that a divestiture of a Port Terminal is not necessary to fulfil the objectives of the Consent Agreement. Each of the relevant changes is discussed below.

## B. Available Volume of Independent Grain and Access to the Port of Vancouver

67. Only about 25 grain handling companies need access to port terminal grain handling services in the Port of Vancouver. All of these companies, however, currently have access to port terminal grain handling services in the Port of Vancouver, either because they have an ownership interest in one or more of the existing port terminals or because they have handling agreements in place with Integrated Grain Companies. Agricore United, SWP, JRI and Cargill each have an ownership interest in one or more port terminals in the Port of Vancouver. Those without an ownership interest in a port terminal, such as Dreyfus, P&H and Paterson, have handling agreements in place. Some operators of inland grain handling terminals also have joint venture agreements with the Integrated Grain Companies. For example, Cargill has an equity interest in each of NET, SWT and Terminal 22.

68. At and before the time the Consent Agreement was executed in October 2002, handling agreements between Integrated Grain Companies and Independent Grain Companies for the handling of grain in the Port of Vancouver were typically negotiated on a year-to-year basis or for terms no longer than three years. Since that time, long-term handling agreements have become more common. **[CONFIDENTIAL]**.

69. As discussed in more detail below, a significant volume of independent grain is now committed to the Vancouver port terminal operators (other than Agricore United) under long-term handling agreements. As a result of its investigations of the grain handling industry, including both the Acquisition and the proposed SWP/JRI JV discussed above,

Agricore United expects that the Bureau has obtained copies of most or all of the handling agreements between port terminal operators and Independent Grain Companies for the handling of independent grain in the Port of Vancouver and information concerning the volume of grain shipped to the Port of Vancouver pursuant to such agreements. These agreements and the volumes of grain shipped to the Port of Vancouver pursuant to them are directly relevant to a determination of the issues arising in connection with the within Application. Accordingly, Agricore United is requesting an order from the Tribunal compelling the Commissioner to provide the Applicant with copies of all handling agreements in her possession between port terminal operators and Independent Grain Companies for the handling of independent grain in the Port of Vancouver that are or were in effect on or after August 1, 2001, for the purposes of the within Application, along with the volumes of grain shipped to the Port of Vancouver pursuant to such agreements on an annual basis since August 1, 2001 and such other relevant information as Agricore United may subsequently request.

70. **[CONFIDENTIAL]** illustrate that there is no longer enough uncommitted independent grain available to a prospective purchaser of the UGG Terminal to allow for an effective divestiture of the UGG Terminal which satisfies the objective of the Consent Agreement.

*Total Volume of Independent Grain*

71. As indicated in Schedule "A" to this Statement of Grounds and Material Facts, Independent Grain Companies shipped approximately **[CONFIDENTIAL]** of grain to the Port of Vancouver during the 2004/2005 crop year. (This figure for 2004/2005 does not include the volume of grain shipped to the port of Vancouver by ConAgra, which, as discussed below, was recently acquired by JRI.) However, for the reasons discussed below, a significant volume of this independent grain has proven to be unavailable to move to any purchaser of the UGG Terminal, even if the purchaser offers attractive terms to the Independent Grain Companies.

72. In addition to the independent grain shipped to the Port of Vancouver by the Independent Grain Companies identified in Schedule "A" of this Statement of Grounds and Material

Facts, Agricore United understands that **[CONFIDENTIAL]** companies such as **[CONFIDENTIAL]** have shipped or arranged for the shipment of grain through the Port of Vancouver in the past and/or could ship or arrange for the shipment of grain through the Port of Vancouver in the future. There is, however, no guarantee that these companies, or others like them, will in fact ship or arrange for the shipment of any grain through the Port of Vancouver in the future and, even assuming that they do so, that such grain would be available to any purchaser of the UGG Terminal.

*Long-Term Handling Agreements*

73. Since the Consent Agreement was executed in October 2002, a number of important Independent Grain Companies have secured for themselves long-term access to a Vancouver port terminal by means of an exclusive, long-term handling agreement with SWP, JRI or Cascadia. At the same time, because such agreements are exclusive and long-term, the Independent Grain Companies in question have committed to send all their Vancouver-destined grain to SWP, JRI and Cascadia, as the case may be, for the duration of these agreements.

74. As indicated in Schedule "A" to this Statement of Grounds and Material Facts, Agricore United estimates that the volume of independent grain committed to SWP, JRI and Cascadia under these exclusive, long-term handling agreements totalled approximately **[CONFIDENTIAL]** of the approximately **[CONFIDENTIAL]** shipped by Independent Grain Companies to the Port of Vancouver during the 2004/2005 crop year.

75. **[CONFIDENTIAL]**. As a result, a significant volume of independent grain is committed under these agreements and unavailable to a purchaser of a Port Terminal at least until these long-term agreements expire. **[CONFIDENTIAL]**.

*Cargill Joint Venture Agreements*

76. In addition to the independent grain that is currently unavailable to a purchaser of a Port Terminal as a result of the exclusive, long-term handling agreements referred to above, a significant volume of independent grain is committed to Cargill **[CONFIDENTIAL]**. (Producer cars refer to rail cars allocated directly to farmers (who may load the grain on specified railway sidings) by the CGC, in conjunction with the CWB Monopoly, pursuant to section 87 of the *Canada Grain Act*.)

77. **[CONFIDENTIAL]**. The independent grain shipped to the Port of Vancouver **[CONFIDENTIAL]** appears to be unavailable to a purchaser of a Port Terminal at this time and for the foreseeable future.

*[CONFIDENTIAL] – Producer Cars*

78. **[CONFIDENTIAL]**.

79. In any event, there should be no concern about access of producer cars to Vancouver port terminals as producer cars have guaranteed access to such terminals pursuant to section 87 of the *Canada Grain Act*.

*Paterson*

80. **[CONFIDENTIAL]**.

81. **[CONFIDENTIAL]**.

82. As indicated in Schedule "A" to this Statement of Grounds and Material Facts, Paterson shipped approximately **[CONFIDENTIAL]** of grain to the Port of Vancouver during the 2004/2005 crop year. **[CONFIDENTIAL]**.

*JRI's Acquisition of ConAgra*

83. On May 18, 2005, JRI announced that it had acquired four high-throughput country elevators from ConAgra, which, prior to the acquisition, was a large Independent Grain Company as defined in the Consent Agreement.

84. JRI's acquisition of ConAgra further reduces the volume of independent grain available to any purchaser of the UGG Terminal. In this regard, ConAgra shipped approximately **[CONFIDENTIAL]** of grain to the Port of Vancouver during the 2003/2004 crop year.

*P&H's Acquisition of Mainline Terminal*

85. While P&H remains an Independent Grain Company, its acquisition of Mainline Terminal Ltd. earlier this year reflects further consolidation among Independent Grain Companies in Western Canada over the past three years, leaving fewer Independent Grain Companies available for a prospective purchaser of the UGG Terminal.

*Other Independent Grain*

86. **[CONFIDENTIAL]**. As indicated in Schedule "A" to this Statement of Grounds and Material Facts, these Independent Grain Companies shipped approximately **[CONFIDENTIAL]** of grain to the Port of Vancouver during the 2004/2005 crop year. Accordingly, it is now clear that a purchaser of a Port Terminal cannot be assured of obtaining any grain from these **[CONFIDENTIAL]** Independent Grain Companies.

*Available Grain*

87. **[CONFIDENTIAL]**.

88. As indicated in Schedule "A" of this Statement of Grounds and Material Facts, these Independent Grain Companies shipped approximately **[CONFIDENTIAL]** of grain to the Port of Vancouver during the 2004/2005 crop year. There is, however, no guarantee that all of this independent grain would move to a purchaser of a divested Port Terminal.

89. The independent grain shipped to the Port of Vancouver by **[CONFIDENTIAL]** (producer cars) would also appear to be reasonably available to a purchaser of the UGG

Terminal. In this regard, **[CONFIDENTIAL]**. There is, however, no guarantee that all of this independent grain would move to a purchaser of a divested Port Terminal, especially given that the shipments of this grain are allocated by the CGC.

90. Moreover, as noted above, while Agricore United understands that **[CONFIDENTIAL]** companies such as **[CONFIDENTIAL]** have shipped or arranged for the shipment of grain through the Port of Vancouver in the past and/or could ship or arrange for the shipment of grain through the Port of Vancouver in the future, there is no guarantee that they will in fact ship or arrange for the shipment of any grain through the Port of Vancouver in the future and, even assuming that they do so, that such grain would be available to any purchaser of the UGG Terminal. In any event, none of these **[CONFIDENTIAL]** companies originate their own grain in Western Canada. Accordingly, any grain that these **[CONFIDENTIAL]** companies ship or arrange to be shipped through the Port of Vancouver would have to be obtained from grain handling companies in Western Canada.

91. Even assuming that all of the grain described in paragraphs 87 to 90 above is currently available to a purchaser of the UGG Terminal, it is significantly less grain than Agricore United and the Commissioner in October 2002 reasonably expected to be available to a prospective purchaser of a Port Terminal and is significantly less than the volume that would be required to operate the UGG Terminal on a sustainable basis going forward. **[CONFIDENTIAL]**.

*Possible Handling Agreement with the CWB Monopoly*

92. In light of the foregoing, the only remaining realistic possibility for the UGG Terminal to be used for grain handling following a divestiture pursuant to the Consent Agreement would be an acquisition by a purchaser who enters into a handling agreement with the CWB Monopoly. While such an agreement may be beneficial for the purchaser and the CWB Monopoly, it would distort the market and adversely affect all grain handling companies in Western Canada, including Integrated Grain Companies and Independent Grain Companies, both of which would lose significant revenue. Further, such a

divestiture would not address the objective of the Consent Agreement, namely ensuring that Independent Grain Companies will have access to port terminal grain handling services in the Port of Vancouver at competitive rates, including diversion premiums. A divestiture into a CWB Monopoly handling agreement would also not provide an additional Vancouver port terminal to handle independent grain.

93. Integrated Grain Companies would lose the cleaning, elevation and storage revenue associated with handling grain that was destined to their port terminals but subsequently diverted by the CWB Monopoly to the purchaser of the UGG Terminal pursuant to a handling agreement with the CWB Monopoly.

94. Independent Grain Companies would lose the diversion premiums that they otherwise would have received from the Integrated Grain Companies in respect of grain that they originate which is diverted by the CWB Monopoly to a purchaser of the UGG Terminal. In this regard, as noted above, the Commissioner has previously determined, and stated in filings with the Tribunal, that the payment of diversion premiums to Independent Grain Companies by port terminal operators is important for the ability of Independent Grain Companies to compete for grain originations in the country. The Commissioner has also stated that the loss of diversion premiums would raise serious issues regarding the ongoing ability of Independent Grain Companies to compete for grain originations at country elevators in Western Canada.

95. Similarly, in its materials requesting leave to intervene in the Section 92 Application, the CWB Monopoly indicated that "[t]he ability of [an Independent Grain Company] to compete for the farmers' grain in Western Canada depends on ... the level of diversion payments paid out to [Independent Grain Companies] in return for the processing of their originations at port". The CWB Monopoly also indicated that it was concerned that there would be a "lessening of competition in the country if the diversion payments currently offered by terminals to [Independent Grain Companies] are reduced or eliminated".

## C. Continued Excess Capacity

96. The port terminals in the Port of Vancouver are characterized by chronic, long-term excess capacity. In this regard, it was widely predicted 10 to 15 years ago that the Canadian West Coast (Vancouver and Prince Rupert) export volumes would grow to about 25 million tonnes per year, with approximately 18 million to 20 million of this amount expected to be shipped through the Port of Vancouver. Following these predictions, port terminal operators on the Canadian West Coast took a number of steps to enable their terminals to handle greater volumes, including making technological improvements to increase the speed of unloading grain from rail cars and loading vessels and negotiating a seven-day work week with the relevant labour unions.

97. The projected volumes did not materialize. Instead, according to the CWB Monopoly, annual Canadian West Coast grain export projections are now at about 15 million to 18 million tonnes, with annual grain exports through the Port of Vancouver projected to be about 12 million to 15 million tonnes. These projections are significantly below the volumes of grain that the port terminals in the Port of Vancouver are capable of handling on an annual basis.

98. In addition, assuming that the Commissioner allows the proposed SWP/JRI JV to proceed, the excess capacity in the Port of Vancouver will likely increase further in the future. In this regard, in their press release announcing the proposed SWP/JRI JV, SWP and JRI indicated that "[t]he joint venture ... will improve operating efficiencies and increase productivity and throughput potential through specialization of each facility, which will result in better rail car utilization and shipping capacity".

99. Excess capacity creates a strong incentive for port terminal operators to vigorously compete for any available independent grain. The vigorous competition for any available independent grain is reflected by, among other things, the fact that Integrated Grain Companies have entered into long-term handling agreements with Independent Grain Companies and the fact that the terminal diversion premiums being paid to Independent Grain Companies under such agreements have increased since the Consent Agreement was executed in October 2002.

## PART VI – THE PARTIES WOULD NOT HAVE ENTERED INTO THE CONSENT AGREEMENT UNDER CURRENT CIRCUMSTANCES

100. In the circumstances that now exist, Agricore United would not have entered into the Consent Agreement or any consent agreement contemplating the divestiture of a Port Terminal. Given the lack of independent grain available to a prospective purchaser, without any assurance of a reasonable price, the prospects for a fair sale would be too remote for Agricore United or any other owner of a port terminal to agree to such a sale, and the prospects for challenging the Commissioner's alleged substantial prevention or lessening of competition are greatly enhanced in light of subsequent market developments. Moreover, given the likely inability of a purchaser to secure a sufficient volume of independent grain and the fact that Independent Grain Companies have secured long-term access to port terminals in the Port of Vancouver, in Agricore United's submission the Commissioner would not, on any reasonable basis, have entered into a consent agreement contemplating the divestiture of a Port Terminal. In other recent cases in which a divestiture was apparently not feasible, the Commissioner accepted behavioural remedies, such as the consent agreement between the Commissioner, British Columbia Railway Company and Canadian National Railway Company relating to rail service in certain parts of British Columbia, including the Port of Vancouver, and filed with the Tribunal on July 2, 2004. Accordingly, Agricore United requests that the Tribunal rescind the Consent Agreement pursuant to section 106 of the Act.

## PART VII – EXTENSION OF THE PORT TERMINAL INITIAL SALE PERIOD

### A. Background

101. The Consent Agreement requires that Agricore United offer to divest a Port Terminal within the Port Terminal Initial Sale Period, which is currently scheduled to expire at 12:00 noon (Winnipeg time) on August 15, 2005. Therefore, absent Agricore United and the Commissioner agreeing to a further extension or an order of the Tribunal, a Trustee will be appointed at 12:00 noon (Winnipeg time) on August 15, 2005 to seek to implement a divestiture of the UGG Terminal pursuant to the Consent Agreement. The

Commissioner granted the extension to August 15, 2005, and a number of earlier extensions, to permit Agricore United to seek to complete a proposed transaction with Terminal One. As noted above, Terminal One is a consortium of five farmer-owned inland grain terminals, each of which is an Independent Grain Company and a member of ITAC. 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 [in the Consent Agreement]".

102. **[CONFIDENTIAL]**. Agricore United's counsel subsequently wrote to the Commissioner's counsel on August 9, 2005 requesting that the Commissioner extend the Port Terminal Initial Sale Period pursuant to paragraph 48 of the Consent Agreement from 12:00 noon (Winnipeg time) on August 15, 2005 to August 29, 2005 in order to allow for consideration of an anticipated revised offer from Terminal One. However, as noted above, in a letter dated August 10, 2005, the Commissioner's counsel indicated that the Commissioner would not agree to any further extension of the Port Terminal Initial Sale Period beyond 12:00 noon (Winnipeg time) on August 15, 2005.

103. Agricore United has made diligent and good faith efforts to divest a Port Terminal since the Consent Agreement was executed in October 2002. As part of these efforts, Agricore United has, among other things, taken all reasonable steps to conclude a sale of the UGG Terminal to Terminal One on or before 12:00 noon (Winnipeg time) on August 15, 2005. The fact that Agricore United is unable to meet this deadline stems not from any actions or inactions on the part of Agricore United, **[CONFIDENTIAL]**.

104. **[CONFIDENTIAL]**. Given that the Terminal One group represents a significant portion of the uncommitted independent grain, the Commissioner's decision to refuse to approve the requested further extension jeopardizes the prospects for a sale of the UGG Terminal that satisfies the rationale behind the Consent Agreement. For the reasons discussed above, and particularly if Terminal One is unable to complete a transaction, there can be no assurance that any prospective purchaser will be able to obtain sufficient grain

commitments to operate the UGG Terminal on a sustainable basis as contemplated by and in a manner consistent with the purposes of the Consent Agreement.

**B. Request for Extension Pending Decision on Section 106 Application**

105. On the morning of August 11, 2005, Agricore United's counsel contacted the Commissioner's counsel and indicated that, in light of the Commissioner's August 10, 2005 refusal to further extend the Port Terminal Initial Sale Period for the purposes of a possible sale to Terminal One, Agricore United intended to, among other things, apply to the Tribunal for an order rescinding the Consent Agreement pursuant to section 106 of the Act. Agricore United's counsel also requested that the Commissioner extend the Port Terminal Initial Sale Period pursuant to paragraph 48 of the Consent Agreement pending the final determination of the within Application. A letter formally requesting such an extension was sent to the Commissioner's counsel shortly thereafter.

106. The Commissioner's counsel declined to agree to any further extension of the Port Terminal Initial Sale Period in connection with the section 106 application at that time. This was confirmed in a letter to Agricore United's counsel, dated August 11, 2005.

107. In light of the circumstances described herein, it is unreasonable for the Commissioner to withhold or continue to withhold her agreement to the requested extension pending the determination of the section 106 application. Agricore United is therefore applying to the Tribunal pursuant to paragraph 49 of the Consent Agreement for approval to extend the Port Terminal Initial Sale Period pending the final determination of the within Application. In this regard, paragraph 49 of the Consent Agreement provides that "[i]f the Commissioner's approval is sought pursuant to this Agreement and such approval is not granted, or if a decision of the Commissioner is unreasonably delayed or withheld, Agricore United may apply to the Tribunal for approval".

108. The merits of Agricore United's section 106 application are relevant to the request for an extension. The test that will be applied on a contested section 106 application to rescind a consent agreement was discussed by the Tribunal in its recent decision in *RONA Inc.* v.

*The Commissioner of Competition*. The facts set out in this Statement of Grounds and Material Facts satisfy the test set out in *RONA*. The Tribunal therefore has the jurisdiction to rescind the Consent Agreement. In this regard, for the reasons discussed above, the circumstances that led to the making of the Consent Agreement have changed significantly since the Consent Agreement was executed in October 2002. Moreover, in the circumstances that now exist, Agricore United would not have entered into the Consent Agreement. Similarly, Agricore United submits that, in the circumstances that now exist, the Commissioner also would not, on any reasonable basis, have entered into the Consent Agreement.

109. In addition, the Commissioner has, at least to date, not challenged the proposed SWP/JRI JV, effectively a merger of their respective grain handling terminals in the Port of Vancouver. The proposed SWP/JRI JV was announced on April 6, 2005 and apparently at least partially implemented in July 2005 without objection by the Commissioner, as disclosed in an article published in *The Western Producer* on July 21, 2005. As noted above, any further restraints on the ability of SWP and JRI to complete the implementation of the proposed SWP/JRI JV pursuant to the SWP/JRI Consent Interim Agreement are currently scheduled to expire on September 3, 2005. Failure by the Commissioner to challenge the proposed SWP/JRI JV would imply a lack of current grounds to require a divestiture in connection with the Acquisition as the proposed SWP/JRI JV represents further consolidation in the same market. The Applicant expressed its views in this regard in letters to counsel to the Commissioner and the Bureau dated June 15 and May 30, 2005, respectively, dealing in part with the implications of the proposed SWP/JRI JV.

110. If the Consent Agreement is rescinded, the Trustee will have no status or power to perform any functions under the Consent Agreement, including to sell the UGG Terminal. Given the strength of Agricore United's case for rescission of the Consent Agreement, it would be unreasonable for the Commissioner not to agree to extend the Port Terminal Initial Sale Period pending the final determination of the within

Application to avoid the appointment of a trustee whose functions, duties and powers will be eliminated if Agricore United's section 106 application is successful.

111. Moreover, allowing the Trustee to be appointed at a time when his very legitimacy under the Consent Agreement and his power to sell the UGG Terminal is subject to serious challenge, and at best is uncertain, will discourage potential purchasers. **[CONFIDENTIAL]**. While Agricore United intends to seek an expedited schedule for disposition of the within Application, a final determination by the Tribunal may still not occur until after the Trustee Sale Period has expired, at which time the Trustee would have no authority to make a sale in any event.

112. **[CONFIDENTIAL]**.

113. Even if Agricore United's application under section 106 of the Act is unsuccessful, approval to extend the Port Terminal Initial Sale Period pending the final determination of the within Application would merely delay the appointment of the Trustee until that time. No prejudice to any of the Commissioner, Independent Grain Companies or the public interest would flow from such a delay in the appointment of the Trustee. In this regard, as noted above, Agricore United believes that every Independent Grain Company that ships grain to the Port of Vancouver has or will have a port terminal access contract or handling agreement covering at least the next crop year ending July 31, 2006 and in some cases many years. Moreover, the access provisions included in the Consent Agreement have been in place for almost three years and have addressed any possible concerns that the Commissioner may have regarding access to port terminals in the Port of Vancouver for the reasonably foreseeable future. In addition, as noted above, subsections 69(1) and (2) of the *Canada Grain Act* require that port terminal operators receive all grain shipped to the Port of Vancouver, without discrimination, subject to certain exceptions and conditions.

114. Further, in the absence of approval to extend the Port Terminal Initial Sale Period pending the final determination of the within Application, Agricore United would very likely incur significant additional and unnecessary costs following the appointment of the

Trustee, costs that will prove unnecessary if the application is successful. For example, Agricore United is required by paragraph 20 of the Consent Agreement to pay all expenses reasonably and properly incurred by the Trustee in the course of a Trustee sale and the Trustee may retain financial, legal and other professional advisors, including investment bankers, pursuant to paragraph 24 of the Consent Agreement.

115. In light of the prejudice to a Trustee sale process in the midst of Tribunal proceedings seeking recission of the very Consent Agreement pursuant to which the Trustee obtains his status and power, the considerable merit of the section 106 application, and the absence of prejudice from the requested extension, it is unreasonable for the Commissioner to continue to withhold her agreement to the requested extension of the Port Terminal Initial Sale Period pending the final determination of the within Application, and the Tribunal should approve the requested extension.

## PART VIII – ORDER SOUGHT

116. The Applicant respectively requests the following relief:

(a) an order pursuant to section 106 of the Act rescinding the Consent Agreement;

(b) approval pursuant to paragraph 49 of the Consent Agreement extending the Port Terminal Initial Sale Period pending the final determination of the within Application;

(c) an order compelling the Commissioner to provide the Applicant with copies of all handling agreements in her possession between port terminal operators and Independent Grain Companies for the handling of independent grain in the Port of Vancouver that are or were in effect on or after August 1, 2001, for the purposes of the within Application, along with the volumes of grain shipped to the Port of Vancouver pursuant to such agreements on an annual basis since August 1, 2001 and such other relevant information as Agricore United may subsequently request;

(d) an order awarding costs in favour of the Applicant; and

(e) such further and other final or interim orders requested by the Applicant and as deemed just by the Tribunal.

**DATED AT TORONTO**, this 11th day of August 2005.

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AND TO: **Commissioner of Competition**
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# Schedule "A"

| Independent Grain Companies Shipping to Vancouver | Tonnage | | Vancouver Port Terminal |
|---|---|---|---|
| | 2004/2005 Crop Year | Status*** | |
| CMI Terminal | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| Fill-More Seeds | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| Gardiner Dam | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| Great Northern Grain* | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| Great Sandhills Terminal** | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| Louis Dreyfus* | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| Mid-Sask Terminal* | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| North East Terminal | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| North West Terminal* | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| P&H* | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| Paterson | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| Prairie West Terminal | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| Providence Grain | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| South West Terminal (including Prod. Cars) | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| Terminal 22 | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| West Central Road & Rail (Prod. Cars)** | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| Westlock Terminal | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| Westmor Terminal | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| Weyburn Inland Terminal | [CONFIDENTIAL] | [CONFIDENTIAL] | [CONFIDENTIAL] |
| **Total** | [CONFIDENTIAL] | | |

* Estimates by Agricore United.

** **[CONFIDENTIAL]**.

*** **[CONFIDENTIAL]**.

**PUBLIC VERSION**

**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

---

**EXHIBIT "B" TO THE AFFIDAVIT OF STANLEY MURDOCH MACKAY SWORN AUGUST 11, 2005**

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Counsel for the Applicant

| Tab | Document |
|---|---|
| 1. | Notice of Application pursuant to Section 92 of the *Competition Act* (Port Terminals) |
| 2. | Consent Agreement between the Commissioner of Competition and United Grain Growers Limited in relation to the Acquisition of Agricore Cooperative Ltd. by United Grain Growers Limited dated October 17, 2002 (Port Terminals) |
| 3. | Notice of Application for Interim Consent Order (Port Terminals) |
| 4. | Interim Consent Order dated January 14, 2002 (Port Terminals) |
| 5. | Findings and Determinations of the Competition Tribunal pursuant to Section 92 of the *Competition Act* (Port Terminals) |
| 6. | Request for Leave to Intervene on Behalf of the Canadian Wheat Board (Port Terminals) |
| 7. | Press Release – "Pool and JRI Create Joint Venture to Operate Their Vancouver Port Terminals" dated April 6, 2005 |
| 8. | News Release – "Terminals Operate While Review Moves Forward" dated July 21, 2005 |
| 9. | Consent Interim Agreement among the Commissioner of Competition, Saskatchewan Wheat Pool and James Richardson International Limited |
| 10. | **[CONFIDENTIAL]** |
| 11. | **[CONFIDENTIAL]** |
| 12. | Letter from Christopher Margison to Graham Law dated August 9, 2005 |
| 13. | Letter from Sandra Forbes to Graham Law dated August 11, 2005 |
| 14. | Letter from John Bodrug to Graham Law dated June 15, 2005 |
| 15. | **[CONFIDENTIAL]** |

# Tab 1

CT - 2002-001

**THE COMPETITION TRIBUNAL**

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

**IN THE MATTER OF** an application by the Commissioner of Competition under section 92 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:**

**COMMISSIONER OF COMPETITION**
**(applicant)**

- and -

**UNITED GRAIN GROWERS LIMITED**
**(respondent)**



[redacted]

**NOTICE OF APPLICATION**

**TAKE NOTICE THAT:**

1. Pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), the Commissioner of Competition (the "Commissioner") will make an application, as outlined in the Statement of Grounds and Material Facts attached hereto, to the Competition Tribunal (the "Tribunal") for:

(a) an order or orders against the Respondents pursuant to section 92 of the Act requiring the Respondent to divest, at the Respondent's option:

(i) all of its interests in the Pacific Elevators Limited ("Pacific") grain terminal at the Port of Vancouver (as more fully described in paragraph 21 of the Statement of Grounds and Material Facts), Western Pool Terminals Limited ("WPTL") and the Loan Agreement between Pacific,

WPTL and Alberta Wheat Pool dated January 11, 1996; or

(ii) UGG's grain terminal at the Port of Vancouver (as more fully described in paragraph 21 of the Statement of Grounds and Material Facts); and

(b) such further orders as may be appropriate.

**AND TAKE NOTICE THAT** if you do not file a response to this application with the Registrar of the Tribunal within 30 days of the date on which this application is served on you, the Tribunal may, upon *ex parte* application of the Commissioner, make the order the order sought by the Commissioner in this application.

Dated at Hull, Quebec, December 19, 2001

per:

Konrad von Finckenstein, Q.C.
Commissioner of Competition

**ADDRESSES FOR SERVICE OF THE APPLICANT:**

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Arsalaan Hyder
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**TO:** Registrar, Competition Tribunal
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Ottawa, Ontario
K1A 0C9

**AND TO:** Davies Ward Phillips & Vineberg LLP
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Attention: Kent Thomson
John Bodrug

Counsel for the Respondent

**PUBLIC**

**STATEMENT OF GROUNDS AND MATERIAL FACTS**

## I. INTRODUCTION

1. The Commissioner of Competition (the "Commissioner") brings this application pursuant to sections 92 and 104 of the *Competition Act* (the "Act") on the grounds that the acquisition by United Grain Growers Limited ("UGG") of Agricore Cooperative Ltd. ("Agricore") on November 1, 2001 (the "Acquisition") is likely to prevent or lessen competition substantially in the market for port terminal grain handling services in the Port of Vancouver.

2. UGG and Agricore have been carrying on business as Agricore United since November 1, 2001 (hereinafter the Respondent will be referred to as "Agricore United"). On December 17, 2001 a separate application relating to this same transaction was brought pursuant to section 92 and 105 of the Act to remedy the substantial lessening or prevention of competition alleged by the Commissioner in: (1) the purchasing and handling of grain in certain local markets in Western Canada; and (2) canola oil-seed purchasing and processing in Canada.

## II. THE PARTIES

3. The Applicant is the Commissioner, appointed under section 7 of the Act and charged with the administration of the Act.

4. The Respondent, Agricore United, which has its head office in Winnipeg, Manitoba, provides a wide range of goods and services to farmers in Western Canada and also markets agricultural commodities domestically and internationally.

5. Prior to the Acquisition, UGG operated four distinct but related businesses: (1) grain handling and marketing at both the port terminal and primary grain elevator level, (2) agro-business (crop inputs) supplies and services, (3) farm business publications and (4) livestock services.

6. Prior to the Acquisition, Agricore provided a wide range of goods and services to farmers in Western Canada. Specifically, Agricore operated four distinct but related businesses: (1) grain handling and marketing at both the port terminal and primary grain elevator level, (2) agro-business (crop inputs) supplies and services, (3) farm business publications and (4) agri-food processing. Agricore was a one hundred percent farmer owned cooperative.

## III. THE TRANSACTION

7. Pursuant to the terms of a Merger Agreement between UGG and Agricore dated July 30, 2001, UGG and Agricore agreed to merge by way of a court-approved plan of arrangement ("Plan of Arrangement") under section 192 of the *Canada Business Corporations Act*. The Plan of Arrangement provided that UGG would acquire control of all business assets of Agricore. These assets included:

   (a) whole or partial interests in port terminal facilities in Vancouver, Prince Rupert and Thunder Bay;

   (b) whole or partial interests in Western Canadian primary grain elevator facilities;

   (c) agro-business interests (crop inputs supplies and services); and

   (d) a 16.67% interest in CanAmera Foods Limited Partnership ("CanAmera").

8. As noted above, the transaction was completed on November 1, 2001.

## IV. DETAILS OF THE INQUIRY

9. On or about June 11, 2001, the parties advised the Commissioner of the proposed merger transaction. However, examination of the transaction, pursuant to section 92 of the Act did not commence until July 30, 2001, when the matter was made public by the parties.

10. The statutory pre-merger long-form notification filings of the parties, pursuant to section 114 of the Act, were completed on August 9, 2001.

11. An inquiry into this merger was commenced by the Commissioner on September 6, 2001, pursuant to section 10 of the Act. On the same day Bureau staff met with counsel for UGG to re-iterate that the merger raised serious competitive concerns. The Bureau's concerns had initially been expressed to UGG in a letter dated August 3, 2001.

12. The Acquisition combines the two largest grain handling companies in Alberta and Manitoba and resulted in Agricore United having market shares in primary elevator grain handling in excess of 50% in several markets in Manitoba and Alberta. In port terminal grain handling services at the Port of Vancouver, the merged entity will have a market share with approximately 63% of the licensed storage capacity.

13. The preliminary examination and the inquiry into the Acquisition has included the following:

    (a) a review of pre-merger long-form notification information provided by UGG and Agricore under section 114 of the Act;

    (b) a review of information provided voluntarily by UGG and Agricore, including competitive analyses;

    (c) members of the investigative team meeting with and obtaining information from competitors and government agencies in Western Canada, as well as touring both primary and port

grain handling facilities;

(d) over 30 interviews, either in person or by telephone, with market participants, including customers, farmers, competitors, suppliers and government departments and agencies;

(e) a review of written submissions and reports from various third parties, including market participants;

(f) meetings and discussions with UGG counsel as well as representatives of both UGG and Agricore, either in-person or by telephone, to provide and obtain information about the Acquisition and to discuss emerging issues;

(g) through the Federal Court of Canada, the issuance of orders for the production of records and written return of information to the parties to the Acquisition;

(h) through the Federal Court of Canada, the issuance of orders for the production of records and/or written return of information to 18 third-party competitors in, or suppliers to, the Western Canadian grain-handling industry; and

(i) telephone discussions with representatives of the US Federal Trade Commission who had reviewed mergers in the grain handling industry in the United States.

14. Concerns expressed through the Commissioner's market contacts regarding the Acquisition include:

(a) the likelihood of a substantial increase in the handling costs of grain at primary elevators in local markets with high post-merger market shares;

(b) the likelihood of a substantial increase in farmers' transportation costs realized through a decrease in hauling allowances offered to farmers for the delivery of grain to primary

elevators in local markets with high post-merger market shares;

(c) the likelihood of a substantial decrease in the prices offered for non-Canadian Wheat Board grains at primary elevators in local markets with high post-merger market shares;

(d) the likelihood of a substantial increase in the handling costs of grain at port terminal facilities at the Port of Vancouver realized in part through a reduction in the diversion premiums (described in paragraph 35) offered to third party grain handling companies for port terminal grain deliveries;

(e) the likelihood of a substantial decrease in the prices offered for canola seed; and

(f) the likelihood of a substantial increase in the price of products derived from canola oil seed processing.

## V. COMPETITIVE EFFECTS OF THE MERGER

### SUMMARY

15. The Acquisition is likely to substantially lessen or prevent competition in the following markets:

    (a) port terminal grain handling services in Vancouver, British Columbia;

    (b) local primary grain handling services in certain local markets in Alberta and Manitoba; and

    (c) domestic canola seed purchasing and processing.

16. The issues raised in paragraph 15 (b) and (c) are addressed in the Consent Application that the Commissioner filed with the Tribunal on December 17, 2001. This application is limited to the issue raised in the paragraph 15 (a).

## PORT OF VANCOUVER GRAIN TERMINALS

### *Industry Overview*

Introduction

17. The grain industry in Western Canada has a number of elements and various participants. They include:

    (a) farmers, who produce grain;

    (b) grain handling companies such as Agricore United (and prior to the Acquisition, UGG and Agricore) who purchase grain from farmers, either as agents of the Canadian Wheat Board ("CWB") or on their own account, at the grain handling companies' primary grain elevators which are located across the Prairies. There are two kinds of primary elevators - traditional wooden elevators and high through-put elevators ("HTPs"). HTPs have substantially greater capacity than traditional elevators.

    (c) the CWB, which is, by law, the only purchaser of wheat and barley, that is either to be exported from Canada or used for domestic human consumption. Grain meeting that description is referred to as "CWB grain", while all other grain is referred to as "non-CWB grain" (hereinafter, where no distinction is required between CWB grain and non-CWB grain, it will be referred to simply as "grain"). Grain handling companies merchandise all non-CWB grain;

    (d) the railways (i.e., Canadian National Railway and the Canadian Pacific Railway) both of which transport CWB and non-CWB grain from primary elevators to, among other places, port terminals located in Vancouver, Prince Rupert and Thunder Bay;

    (e) port terminals, where grain from the Prairies is delivered for storage, in some cases

"cleaning," and ultimately, shipping. Certain grain handling companies, such as Agricore United, have ownership interests in primary elevators and port terminals in Vancouver. These companies are hereinafter called "Integrated Graincos". Other grain handling companies own only primary elevators. These companies are hereinafter called "Non-Integrated Graincos"; and

(f) ocean-going vessels onto which grain is loaded for export.

18. Grain from Western Canada that is to be exported outside of North America is shipped to ports at Vancouver, British Columbia; Prince Rupert, British Columbia; Thunder Bay, Ontario; and Churchill, Manitoba. Largely due to transportation costs and the location of customers, each port constitutes a relevant geographic market. In the 1998-99 and 1999-00 crop years the Port of Vancouver received approximately 55% of total grain exports received at all Canadian ports.

19. Western Canadian farmers produced approximately 48 million tonnes of grains, oilseeds and specialty crops in the 1999-00 crop year. Approximately 33.125 million tonnes of these crops were brought to markets in Canada and offshore through primary elevators owned by grain handling companies. Approximately 25 million tonnes were exported from Canada in the 1999-00 crop year. Of that 25 million tonnes, approximately 3 million tonnes were shipped by rail to the US, and the balance was shipped through Canadian ports.

20. The size of the draw area for a port grain terminal is much larger than for primary elevators. The draw areas for port terminals are determined primarily by relative freight costs as between different ports and the location of export demand. The dividing line between east and west moving grain has tended to shift eastward in recent years in response to the increase in export demand from Asian countries. In certain circumstances, the CWB and grain companies ship grain to Vancouver from as far away as Manitoba.

Canadian West Coast Port Terminal Facilities

21. On the West Coast, there are five port grain terminals in Vancouver and one at Prince Rupert. In Vancouver the terminals are as follows:

    (a) Cascadia terminal with 282,830 tonnes of licensed storage capacity. Cargill Limited ("Cargill") and Agricore United each own 50% of Cascadia;

    (b) Pacific Elevators Limited terminal ("Pacific") with 199,150 tonnes of licensed storage capacity. Agricore United has a 70% interest in Pacific while Saskatchewan Wheat Pool ("SWP") owns 30% of Pacific;

    (c) SWP terminal, with a licensed storage capacity of 237,240 tonnes, is wholly owned and operated by SWP;

    (d) James Richardson International Limited ("JRI") terminal, with licensed storage capacity of 108,000 tonnes, is wholly owned and operated by JRI; and

    (e) UGG terminal, with licensed storage capacity of 102,070 tonnes, is wholly owned and operated by UGG.

    Appendix "A" to this Statement identifies the locations of the foregoing port grain terminals. Figure I in Appendix "A" is a map of Burrard Inlet where all five terminals are located, while Figure II shows the terminal locations in relation to the Greater Vancouver Region.

22. The Prince Rupert Grain Ltd. ("PRG") terminal, with licensed storage capacity of 209,510 tonnes, is operated under a co-tenancy agreement wherein pre-merger Agricore had a 30.3% interest, SWP had a 31.3% interest, UGG had a 14.6% interest, Cargill had a 12.9% interest and JRI had a 10.9% interest. The interests held by the co-tenants are reviewed and adjusted annually, if required, to reflect the volumes each "tenant" ships through the terminal. Although the PRG

terminal is modern and highly efficient, in recent years it has only been open a portion of the year. This, in large part, is due to the fact that its owners all have an equity interest in Vancouver terminals and earn greater revenues on grain moving through their Vancouver facilities where they are not required to split revenues with a number of other facility owners. As a result, the PRG terminal is generally used as an overflow facility for the Vancouver grain terminals.

Regulatory Environment

23. The grain handling industry is regulated by the Canadian Grain Commission ("CGC") and the Canadian Wheat Board ("CWB") pursuant to the *Canada Grain Act* and the *Canadian Wheat Board Act*, respectively.

***Canadian Grain Commission***

24. The CGC is responsible for ensuring that grain produced in Canada meets certain quality standards. CGC inspectors monitor grain quality and enforce standards in respect of the grain delivered to port grain terminals. In order to respond to different customer demands for specific quality characteristics of grain (primarily wheat) the CGC has, pursuant to section 16 of the *Canada Grain Act*, established in excess of 100 "segregations", each of which must be handled and stored separately. Segregations are made on the basis of factors such as: the type of grain, the grade of grain and its protein content.

25. Pursuant to section 50 of the *Canada Grain Act*, tariffs for each service offered at any port grain elevator must be filed annually with the CGC. However, the CGC is not required to approve the tariffs before they come into force and there is no complaint mechanism under the *Canada Grain Act* which would permit shippers to challenge tariffs filed with the CGC. The CGC does not have any regulatory oversight relating to the payment of diversion premiums.

26. Pursuant to subsection 69(1) of the *Canada Grain Act*, licensed terminal elevators, including those

at the Port of Vancouver, are required to "receive into the elevator all grain so lawfully offered for which there is, in the elevator, available storage accommodation of the type required by the person by whom the grain is offered." Subsection 69(2) of that Act empowers the CGC to require the operator of a licensed terminal elevator to receive grain offered for storage or transfer at the elevator. However, the issue of available storage accommodation is one that can be difficult to assess at any given time.

***Canadian Wheat Board***

27. The CWB is by law the sole purchaser and seller of CWB grains (i.e., wheat and barley for export and domestic human consumption). Grain handling companies purchase CWB grains from farmers as agents of the CWB at prices fixed periodically by the CWB. The majority of all non-CWB grains (i.e., grains such as canola, peas and lentils) are purchased at primary elevators by grain handling companies on their own accounts at market prices.

28. The CWB recently adopted a tendering system pursuant to which grain handling companies can tender to supply grain and ship it to a specified port grain terminal destination. Rail cars are provided to the grain company that submits the "winning" tender. During the current crop year, the CWB will put out to tender a minimum of 25% of its grain handling requirement to grain handling companies, rising to a minimum of 50% for the 2002-03 crop year. The allocation of rail cars for CWB non-tendered requirements among the grain handling companies is based on: (1) an 18-week running average of CWB grain through-put at each primary elevator; and (2) the balance of outstanding CWB quota from farmers who last delivered to the grain company's elevators and are assumed to continue to do so.

Car Pooling

29. Prior to October 2000, there was "rail car pooling" ("pooling") at the Port of Vancouver. Pooling, which involved the co-mingling of grain cars shipped to Vancouver by grain handling companies, was introduced in the 1970s. At that time, a train load of grain arriving at the Port could have been made up of rail cars that had been shipped by various grain handling companies. Rather than requiring the railway to make multiple stops at various port grain terminals, pooling allowed the railway to deliver or "spot" the entire train at a single terminal.

30. In April 2000, the grain companies terminated the pooling arrangement with regard to canola and in October 2000, pooling with respect to CWB grain was terminated at the request of the railways in order to increase the efficient use of their rail cars.

Terminal Authorization

31. Currently, prior to the loading of rail cars at a primary elevator for delivery to a port, grain handling companies must obtain terminal authorization from a port grain terminal. The railway delivers rail cars to the terminal specified in the terminal authorization. However, in unforseen circumstances when the authorized terminal cannot accept the grain, alternative arrangements may be made to have the grain delivered to an alternative terminal. Terminal authorization to ship product to port may be denied if the port grain terminal is at capacity and is unable to accommodate further "unloads" of grain.

Incentives/Rebates

***Rail Rebates and Demurrage***

32. In the Prairies, a Multi-Car Incentive ("MCI") rebate is offered by the railways to grain handling companies in order to maximize the efficiency of the rail transport by encouraging the use of 25, 50 or 100 rail car units. MCI rebates are offered by the railways to grain handling companies

based on their ability to provide the railways, within a set period of time following the delivery of empty rail cars, loaded blocks of 25, 50 or 100 rail cars for transport from individual primary elevators. In order to obtain the rebate, the loaded block of cars, whether 25, 50 or 100, must also be unloaded at the designated port within a fixed period of time following delivery. Since the supply of grain cars can be a bottleneck in the system, the loading and unloading time limits are intended to expedite the handling of rail cars so as to minimize their turnaround time. The MCI rebate scheme is set out in the following table:

| **Rail Incentives** | | **Incentive Conditions** | |
|---|---|---|---|
| Rail Car Block | Rail Incentive | Load Time | Unload Time |
| 25 to 49 | $1 per tonne | 10 Hours | 48 Hours |
| 50 to 99 | $4 per tonne | 10 Hours | 48 Hours |
| 100 | $6 per tonne | 24 Hours | 48 Hours |

33. If rail cars delivered to a port grain terminal are not unloaded within a specified time period, grain terminal operators risk being charged demurrage by the railways.

34. Rail car demurrage was contractually established by the railways several years ago, but has only recently been more strictly enforced. Terminal operators are now penalized for any failure to unload cars (for which it has issued a terminal authorization) within 48 hours of the railway delivering the cars to the terminal. A demurrage charge of $50 per day per car is assessable for delays.

***Diversion Premiums***

35. The Integrated Graincos (i.e., grain handling companies that have an ownership interest in a port terminal) offer per tonne payments which can be referred to as "diversion premiums", to Non-Integrated Graincos. These diversion premiums are confidential and range from approximately $1 to $4 per tonne. The amount of the port terminal diversion premiums offered in the Port of Vancouver has tended to fluctuate over the years, however during the last crop year they have

declined significantly.

36. If Integrated Graincos do not have sufficient grain in their "pipeline" (i.e., from farmers, through their primary elevators on the Prairies and in transit by rail to Vancouver), to optimize their potential handle at their port grain terminals, they can use diversion premiums to attract grain shipped to Vancouver by Non-Integrated Graincos and earn the elevation, storage and cleaning (when required) fees on that grain. Since an increasing number of primary grain elevators on the Prairies have cleaning facilities, port grain terminals currently only clean approximately 50% of the total grain volume received for shipping.

37. [ ]

38. For Non-Integrated Graincos to compete effectively with Integrated Graincos, especially under the new CWB tendering regime, it is essential that they have regular and predictable access to a port terminal. As noted above, access is provided on an individual shipment basis in the form of terminal authorization. A terminal authorization must be obtained before a tender is submitted to the CWB or, in respect of non-tendered grain, before the railways will provide rail cars for loading at a primary elevator. In order to compete, it is also important that Non-Integrated Graincos have access to all the revenue streams associated with grain handling, such as, country elevation, cleaning, MCI rebates and terminal diversion premiums.

***Product Market***

39. The relevant product market is port terminal grain handling services.

40. Port terminal grain handling services is a distinct product market without practical substitutes for the shipment of grain to international customers. Port grain terminals differ from other port off-loading facilities in their physical characteristics, means of production, uses and pricing.

***Geographic Market***

41. The relevant geographic market is the Port of Vancouver, British Columbia.

42. Since the mid-1980s, Canada's traditional grain markets have shifted from Europe to Asia, which has resulted in a larger portion of grain shipments going through Canadian West Coast terminals, as opposed to Thunder Bay and Churchill. Largely due to transportation costs and the location of customers, each port constitutes a relevant geographic market. Due to shifting demand in recent years, increasing amounts of Western Canadian grain have been shipped to the West Coast for export. Vancouver became Canada's main grain export port in the early 1990s. Today the level of port shipments at Vancouver is approximately twice the level at Thunder Bay.

43. The terminal at Prince Rupert is not in the same geographic market as the Vancouver terminals. The additional 300 kilometre distance which must be travelled to reach Prince Rupert as compared to Vancouver is reflected in higher rail costs. The net rail transportation cost to Prince Rupert is approximately $2 to $3 per tonne higher than for Vancouver. The cost of rail transportation to Vancouver ranges from about $28-$45 per tonne. Therefore the cost of transporting grain from the Prairies to Prince Rupert is 6% to 9% higher than to Vancouver.

44. As noted in paragraph 25, the operators of grain terminals are required to file tariffs with the CGC. The licensed terminal tariffs for receiving, elevating and loading out wheat (including Durum) in Vancouver are:

| Crop Year | UGG | JRI | Pacific | SWP | Cascadia |
|---|---|---|---|---|---|
| | ($ per tonne) | ($ per tonne) | ($ per tonne) | ($ per tonne) | ($ per tonne) |
| 1993-94 | 5.80 | 5.80 | 5.80 | 5.80 | 5.80 |
| 1994-95 | 5.91 | 5.80 | 6.15 | 5.92 | 6.15 |
| 1995-96 | 6.33 | 6.04 | 6.33 | 6.33 | 6.33 |
| 1996-97 | 6.58 | 6.71 | 6.57 | 6.58 | 6.57 |
| 1997-98 | 6.80 | 6.85 | 6.71 | 6.78 | 6.71 |
| 1998-99 | 7 | 7.00 | 7.00 | 6.78 | 6.95 |
| 1999-00 | 7.00 | 7.00 | 7.00 | 7.00 | 7.00 |
| 2000-01 | 7.00 | 7.00 | 7.14 | 7.00 | 7.14 |
| 2001-02 | 7.2 | 7.25 | 7.28 | 7.28 | 7.28 |

**Note**: Tariffs are subject to change during the crop year.

45. In addition to the elevation charges, cleaning fees are approximately $3.50/tonne and storage fees are approximately 6¢/day per tonne. Since the five terminals' current tariffs are virtually identical, price competition amongst port grain terminals is primarily through diversion premiums given to Non-Integrated Graincos.

46. The tariff for the 2001-02 crop year for elevation of wheat (including durum) at the PRG terminal is $7.28 per tonne. To be price competitive with Vancouver, PRG terminal would have to offer a discount of $2 to $3 per tonne (to account for the rail cost differential), and match any diversion premium offered in Vancouver. This circumstance makes it difficult for PRG terminal to be price competitive with the Vancouver terminals.

47. The amount of grain shipped through the PRG terminal in the 2000-01 crop year was approximately 2.2 million tonnes, which represents a decrease in grain volume of 33% from the previous year.

48. The co-owners of PRG terminal are the same five terminal companies that own the 5 terminals in the Port of Vancouver. They prefer to use their Vancouver facilities because they earn greater revenues there relative to revenues earned at Prince Rupert. In addition, the opening of the PRG terminal requires unanimous approval from all 5 owners. Over the past three crop years, the facility

has been closed approximately one third of the time.

49. For all these reasons, PRG terminal cannot be relied upon to discipline a small but significant price increase for port grain terminal grain handling services in Vancouver.

***Market Shares/ Concentration***

50. At each of the 5 Vancouver port grain terminals, there is a high correlation between the amount of licensed storage capacity and the volume of grain handled. The capacity and handle for the 5 terminals in the 1999-00 crop year, as well as relative market shares, is presented in the table below:

| **Terminals** | **Ownership Interests** | **Shipments** | | **Storage Capacity** | |
|---|---|---|---|---|---|
| | | **Tonnes** | **Market Share** | **Tonnes** | **Market Share** |
| **Cascadia** | **50%- Agricore 50%- Cargill** | [ ] | [ ] | **282,830** | **30.4%** |
| **UGG** | **100%-UGG** | [ ] | [ ] | **102,070** | **11%** |
| **Pacific** | **70%- Agricore 30%-SWP** | [ ] | [ ] | **199,150** | **21.4%** |
| SWP | 100%- SWP | [ ] | [ ] | 237,240 | 25.5% |
| JRI | 100%- JRI | [ ] | [ ] | 108,000 | 11.6% |
| **Total** | | 13,233,754 | 100% | 929,290 | 100% |
| **Combined UGG/Agricore** | | [ ] | [ ] | **584,050** | **62.8%** |

51 Absent a divestiture, Agricore United would have a post-merger market share of over [ ]%. In the Vancouver port terminal grain handling market, the top four port grain terminals (i.e. Cascadia, Pacific, SWP and JRI) account for [ ]% of the total grain handling volume, with the UGG terminal

handling the remaining [ ]% of the volume. The post-merger levels of concentration in the Vancouver port terminal grain handling market are well above the thresholds for concerns relating to both unilateral and interdependent exercise of market power as set out in the Commissioner's *Merger Enforcement Guidelines*.

52. Pre-merger, through its UGG port terminal, the Respondent owned approximately 11% of the available grain terminal storage capacity at the Port of Vancouver. With the acquisition of the Pacific and Cascadia port terminals, the Respondent will have a whole, or at least 50% ownership interest in three of the five existing Vancouver port grain terminal facilities.

53. In the view of the Commissioner, Agricore United's 70% interest in Pacific provides it with *de jure* control of the terminal. Agricore United's 50% interest in Cascadia, while bordering on *de jure* control, clearly meets the "significant interest" test as outlined in the *Merger Enforcement Guidelines*. In light of these interests, pre-merger Agricore's market share at the Port of Vancouver was approximately 50%, [ ] measured by [ ] storage capacity.

54. If Agricore United is permitted to keep the UGG, Pacific and Cascadia terminals, it will control about 63% of the total available grain handling capacity at the Port of Vancouver.

55. The approximate post-merger Herfindahl-Hirschman Index ("HHI") for port terminal grain handling in Vancouver would be about 2,868, with an increase in the HHI of 760 points resulting from the Acquisition. An assessment of the market shares and concentration is only the starting point in an examination of the likely effects of a merger on competition, other relevant factors must also be considered.

***Section 93 Factors***

Acceptable Substitutes

***PRG***

56. The terminal facility at Prince Rupert, British Columbia is not in the same geographic market as the five terminals in Vancouver. The net rail transportation cost to Prince Rupert is approximately $2 to $3 per tonne higher than for Vancouver.

***Direct Rail Exports to the US***

57. Direct grain shipments to the US by rail are a potential substitute for port grain terminals in Vancouver. Shipments to the US include durum and milling wheat for processing in US mills. In the period from 1993-94 to 1999-00 these shipments fluctuated from approximately 1.9 million tonnes to 3.4 million tonnes. For the 1999-00 crop year it was approximately 3 million tonnes. These shipments represented a maximum of 15% of total grain volumes for those grain types. A significant increase in rail shipments to the US cannot be relied upon to discipline the anti-competitive effects arising from the Acquisition in the Port of Vancouver because of the overall transportation cost disadvantage that Western Canada suffers relative to local US producers. In addition, the purchase decisions of these US buyers are based on factors over and above small but significant changes in grain prices, such as supply and demand conditions in their selling markets.

***US Port Terminals***

58. U.S. port grain terminals in the Pacific North West are not an acceptable substitute for port grain terminal services in Vancouver. Rail rates are approximately $20 per tonne higher from Western Canada to Portland or Seattle as compared to Vancouver. In addition, there are significant differences between Canadian and U.S. ports with respect to grading, cleaning and inspection requirements. There is also an issue of losing quality control when shipping through US ports.

Canada's reputation for grain is based not only on high quality but also the consistency of quality. Canadian grain exported from domestic ports must pass federal inspection (CGC export standards) with respect to quality.

59. In addition to the foregoing, using US port terminals raises a second issue. As noted above in paragraph 24, Canadian grain is segregated by grade, protein and other factors. US port terminals do not employ the same number of segregations and therefore are not fully capable of handling Canadian grain exports.

***Neptune Bulk Terminals and Vancouver Wharves***

60. There are two bulk handling terminals at the Port of Vancouver, namely, Neptune Bulk Terminals ("Neptune") and Vancouver Wharves. Neptune has to date been providing limited grain handling services at the Port of Vancouver and in 2001 completed the conversion of one of their berths to better able them to handle specialty crops and other grains. Vancouver Wharves opened its facility for specialty crops in 2000. Neither of these terminals are dedicated grain facilities since both handle a variety of commodities. With respect to grain products they primarily handle specialty crops, and have the potential this year to handle approximately [ ]% of the total grain volume received at the Port of Vancouver. However, they still face operational limitations in that they can only receive grain on a direct hit basis (i.e. from rail cars directly on to vessels) due to very limited storage capacity and an inability to blend and clean grains. As a result of the precise logistics required in such an operation (i.e. 'just in time delivery', vessel availability, etc.), these facilities are not regarded as acceptable substitutes as evidenced by their low market share.

<u>Barriers to Entry</u>

61. The barriers to entry into port terminal grain handling services market in Vancouver are very high.

62. Capital costs for construction of a new terminal facility are estimated to be in the range of $100-

$300 million, depending on the size of the terminal. The numerous wheat segregations established by the CGC in response to demands for specific protein content and other quality measures, impose a need for considerable storage capacity which is costly to construct.

63. There is little or no land available upon which a new grain handling terminal could be built in Vancouver. Although Roberts Bank (located south of Vancouver) has been considered as a possible location for a grain handling terminal, its poor soil conditions would significantly increase the cost of construction. Concern has also been raised over the potential for grain contamination from the nearby coal terminal.

64. As a result of the lack of suitable land in Vancouver and the need for rail and ocean vessel berth access, the potential for new entry is very remote. Entry in the foreseeable future (i.e. 3 to 5 years) is very unlikely.

65. Regulation is also a barrier to entry. It would take approximately 2 years to obtain the approvals required to construct a terminal in the Port of Vancouver.

Removal of a Vigorous and Effective Competitor

66. Agricore has been a strong competitor to UGG in providing grain handling services at the Port of Vancouver.

67. Absent a divestiture, the Acquisition will result in significantly less choice for Non-Integrated Graincos to ship their grain. This would allow Agricore United to exercise market power, resulting in higher handling fees and lower diversion premiums.

Effective Remaining Competition

68. If UGG is permitted to retain Agricore's interests in port grain terminals at the Port of Vancouver, the only non-Agricore United terminals available for use by Non-Integrated Graincos will be the

JRI and SWP terminals. In light of the post-merger market share of Agricore United in the Port of Vancouver the two remaining terminals would not have sufficient capacity to be effective competitors for the purposes of eliminating the substantial lessening of competition arising from the Acquisition.

Foreign Competition

69. As discussed in paragraph 57, direct rail shipments to US markets are not effective competition for the purposes of eliminating the anti-competitive effects arising from the Acquisition. Furthermore, US port grain terminal facilities do not compete effectively for Canadian export grain shipments for the reasons set out in paragraph 58 and 59.

***Other Factors***

Interdependence

70. Pre-merger, there existed in the Port of Vancouver the potential for the exercise of interdependent market power as a result of the ownership linkages in 3 of the 5 terminals. However, post-merger, there is an even greater likelihood of exercise of interdependent market power because of the ownership structure in Vancouver's port grain terminals. As a result of the Acquisition, Agricore United is linked with Cargill by virtue of their joint ownership of the Cascadia terminal (50% Agricore, 50% Cargill) and SWP as a result of their respective interests in the Pacific terminal (70% Agricore United, SWP 30%). In other words, post merger, 4 of the 5 terminals owners in the Port of Vancouver are linked. JRI remains the only non-linked facility in the Port of Vancouver. However, JRI is linked with the other four companies through its ownership interest in the PRG terminal.

Impact on Competition at Primary Elevators

71. The horizontal competition concerns arising from the Acquisition with respect to the Prairies are

dealt with in the Commissioner's application of December 17, 2001. The Commissioner believes that the vertical relationship between primary elevators and port grain terminals can raise additional competition concerns on the Prairies.

72. Due to the relationship between grain handling in the country and grain handling at the Port of Vancouver, the ability of Agricore United to exercise market power in Vancouver will also have anti-competitive effects in local primary grain handling markets across Western Canada. Ultimately, by controlling terminal authorization at terminals representing 63% of total grain handling storage capacity in the Port of Vancouver or by reducing or eliminating diversion premiums, Agricore United would be able to have a direct impact on the competitiveness of Non-Integrated Graincos on the Prairies.

73. Prior to the introduction of the CWB tendering system (as discussed in paragraph 28), the CWB allocated its grain handling requirements among the grain handling companies based on their historical market shares. Under that system, port terminal access was guaranteed. However, given its historical orientation, the system made it difficult for integrated grain handling companies to increase their port grain terminal handle through an increase in their Prairie originations. To increase their port handle, the integrated companies had to pay Non-Integrated Graincos diversion premiums in order to attract their grain. There existed an incentive to pay diversion premiums in order to attract additional business to a port grain terminal because they have a high ratio of fixed to variable cost. Now, with the advent of CWB tendering, integrated companies are able to increase the volume of their own originations in the Prairies and increase their handle without obtaining additional volumes of grain from the Non-Integrated Graincos. As a consequence, the integrated companies may have relatively less incentive to provide the Non-Integrated Graincos with terminal authorization or to share in port grain terminal revenue (through diversion premiums).

74. If they are unable to obtain terminal authorizations for Vancouver, non-integrated companies will be unable to ship grain to that port. This would, in time, exhaust their primary elevator storage

capacity on the Prairies. As a result, they will no longer be able to compete for grain on the Prairies. In addition, if they are denied diversion premiums at the Port of Vancouver, Non-Integrated Graincos will lose the flexibility this revenue stream previously afforded them in competing for grain originations in the Prairies.

***Anti-competitive Effects***

75. The Respondent's acquisition of Agricore's interests in the Pacific and Cascadia port terminals at the Port of Vancouver will likely result in a substantial lessening of competition in the market for Vancouver port terminal grain handling services.

76. If Agricore United is permitted to retain all of Agricore's interests in port terminals, it will likely be able to exercise market power over port terminal grain handling services at Vancouver and over primary grain handling services on the Prairies. UGG's acquisition of Agricore's port grain terminals in Vancouver will substantially lessen competition for port terminal grain handling services by enabling Agricore United to unilaterally increase prices and/or lower diversion premiums. UGG's acquisition of Agricore will result in a substantial lessening of competition by making it more likely that the few port terminal grain handling companies remaining post merger will engage in interdependent behavior and will increase prices or depress diversion premiums.

## VIII. RELIEF SOUGHT

77. In paragraph 78, the Commissioner requests that the Tribunal make a divestiture order to remedy the substantial lessening of competition otherwise likely to result from the Acquisition. The Commissioner submits that any divestiture that satisfies the following four conditions is sufficient to remedy the substantial lessening of competition otherwise likely to result from the Acquisition:

(a) the divestiture must be to an entity that does not have any direct or indirect interest in a Vancouver port grain terminal (other than Neptune or Vancouver Wharves);

(b) the acquiring entity must be independent of Agricore United;

(c) the facility divested must result in the acquiror being able to operate on a stand alone basis independent of the other port grain terminal operators similar to, for example, the stand alone basis on which UGG's Vancouver port grain terminal operates today; and

(d) the divestiture must enable the acquiror to handle at least 2.2 million tonnes of any combination of grain, oil seeds and specialty crops per annum in the Port of Vancouver on a commercially competitive basis.

78. The Commissioner further requests the following relief:

(a) an order or orders against the Respondent pursuant to section 92 of the Act requiring the Respondent to divest, at the Respondent's option:

(i) its interest in Pacific and Western Pool Terminals Limited ("WPTL") and its interest in the Loan Agreement between Pacific, WPTL and Alberta Wheat Pool dated January 11, 1996 together which comprises all of Pacific; or

(ii) UGG's grain terminal in Vancouver; or

(b) such further and other orders as may be appropriate.

79. In the Commissioner's view, the remedies described in paragraph 78 (a) (i) and (ii) meet the conditions set out in paragraph 77.

## IX. PROCEDURAL

80. The Commissioner requests that the hearing of this application be held in Winnipeg, Manitoba, and that the proceeding be conducted in the English language.

**PUBLIC**

81. For purposes of this application, service of all documents on the Commissioner can be served on:

Mr. John L. Syme
Mr. Arsalaan Hyder
Department of Justice
Competition & Consumer Law Division
Industry Canada
50 Victoria Street
Place du Portage
Phase I, 22nd Floor
Hull, Quebec
K1A 0C9
Telephone (819) 953-3901
Facsimile (819) 953-9267

Counsel for the Commissioner of Competition

DATED at Hull, Quebec this day of December, 2001.

Konrad von Finckenstein, Q.C.
Commissioner of Competition
Place du Portage, Phase 1
21st Floor – 50 Victoria Street
Hull, Quebec
K1A 0C9

# APPENDIX "A"

**Figure I**

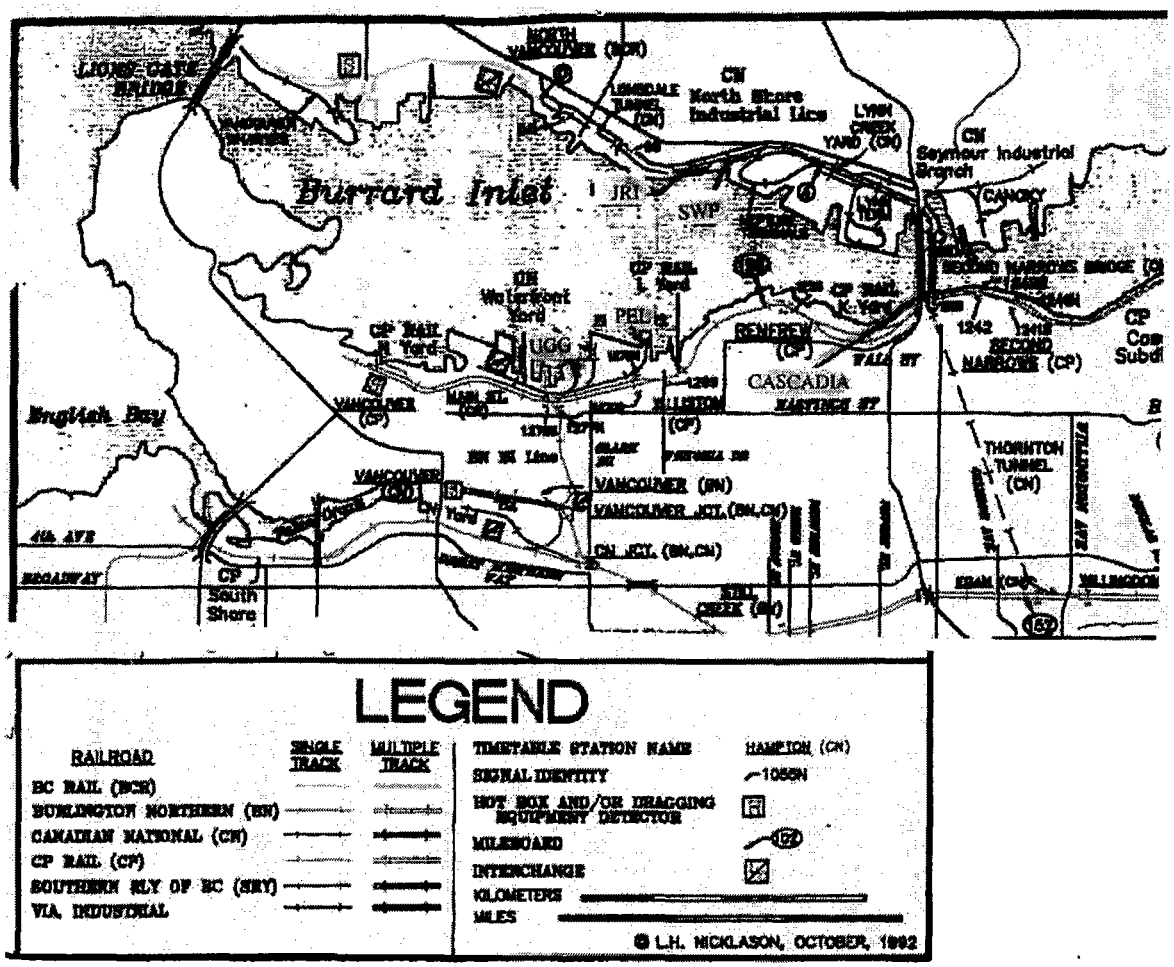
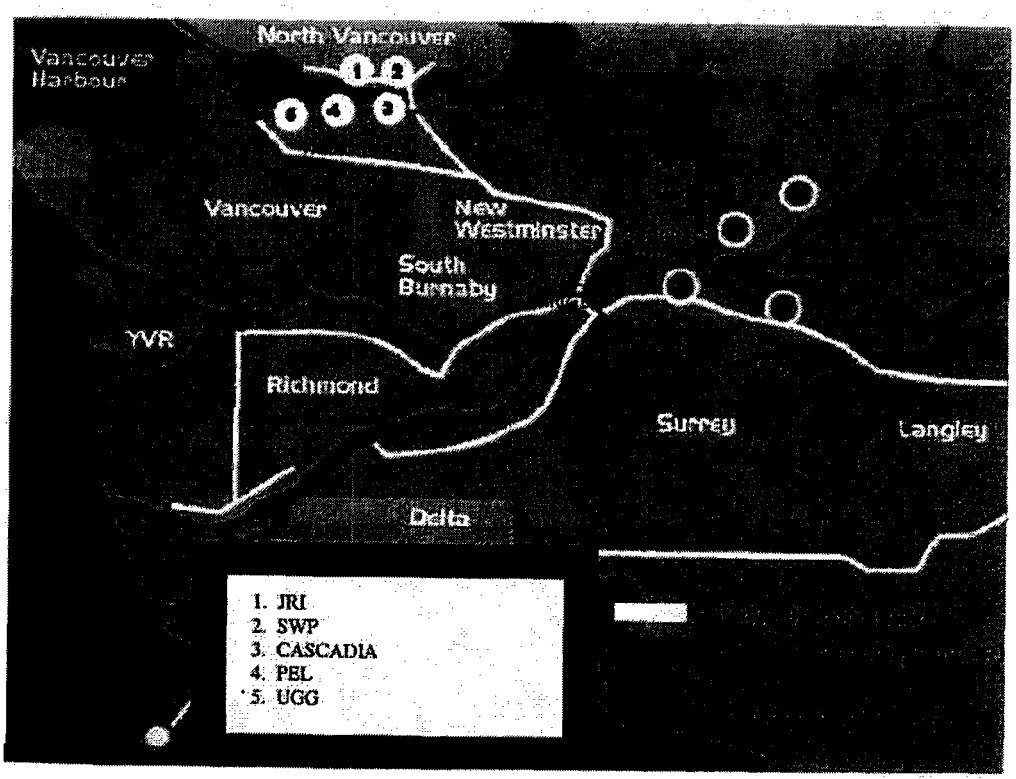



**Figure II**



# Tab 2

**PUBLIC VERSION**

**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 for an order by the Commissioner of Competition under section 92 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.

#105A



**BETWEEN:**

**COMMISSIONER OF COMPETITION**

Applicant

**- AND -**

**UNITED GRAIN GROWERS LIMITED**

Respondent

**- AND -**

**THE CANADIAN WHEAT BOARD**

Intervenor

**CONSENT AGREEMENT BETWEEN THE COMMISSIONER OF COMPETITION AND UNITED GRAIN GROWERS LIMITED IN RELATION TO THE ACQUISITION OF AGRICORE COOPERATIVE LTD. BY UNITED GRAIN GROWERS LIMITED**

**WHEREAS** United Grain Growers Limited ("UGG") acquired Agricore Cooperative Ltd. ("Agricore") on November 1, 2001 (the "Acquisition") and subsequently began carrying on business as Agricore United;

**AND WHEREAS** the Commissioner of Competition has alleged that the Acquisition is likely to result in a substantial lessening of competition ("SLC") in the provision of port terminal grain handling services at the Port of Vancouver and has filed an application before the Competition Tribunal under section 92 of the *Competition Act* (the "Act"), R.S.C. 1985, c. C-35, as amended, for an order requiring the divestiture by UGG of its interest in one of two port terminal facilities in the Port of Vancouver;

**AND WHEREAS** the UGG Terminal and the Pacific Complex are the subject of an interim consent order (the "Interim Consent Order") issued by the Competition Tribunal on January 14, 2002;

**AND WHEREAS** at the request of the Commissioner and UGG, the Competition Tribunal made certain findings and determinations on September 12, 2002, including that:

(a) the Acquisition causes an SLC as alleged by the Commissioner and, for the purposes of this proceeding, not contested by the Respondent, without the need for further evidence to establish an SLC or elements of an SLC; and

(b) the divestiture by the Respondent of either the UGG Terminal or the PEL Interest (as therein defined), as requested by the Commissioner in the Notice of Application, is sufficient to address the SLC;

**AND WHEREAS** the Commissioner declares himself satisfied that the Agreement set out herein will be sufficient to avoid the SLC in the provision of port terminal grain handling services at the Port of Vancouver resulting from the Acquisition;

**AND WHEREAS** in order to finally resolve the above-mentioned section 92 application, Agricore United and the Commissioner hereby agree as follows:

**Definitions**

1. For the purposes of this Agreement, the following definitions shall apply:

(a) "Acquisition" means the acquisition by UGG of the port terminal grain handling operations of Agricore in the Port of Vancouver pursuant to an agreement dated as of July 30, 2001;

(b) "Agreement" means this consent agreement entered into by UGG and the Commissioner;

(c) "Agricore" means Agricore Ltd., a corporation continued under the provisions of the *Canada Business Corporations Act* (Canada), R.S.C. 1985, c. C-44, as amended, and the successor to Agricore Cooperative Ltd.;

(d) "Agricore United" means, following the Closing Date, United Grain Growers Limited, a corporation existing under the provisions of the *United Grain Growers Act* (Canada), a Special Act of the Parliament of Canada, and affiliates thereof, and carrying on business as "Agricore United";

(e) "Closing Date" means November 1, 2001;

(f) "Commissioner" means the Commissioner of Competition appointed pursuant to section 7 of the Act;

(g) "Competition Tribunal" means the Competition Tribunal established pursuant to the *Competition Tribunal Act* (Canada), R.S.C. 1985, c. 19 (2nd Supp.), as amended;

(h) "Confidential Information" means competitively sensitive or proprietary information relating to the Port Terminals not independently known to Persons other than Agricore United, including, without limiting the generality of the foregoing, customer lists, price lists, marketing methods or other trade secrets that relate to the Port Terminals;

(i) "CWB" means the Canadian Wheat Board, an organization established under *The Canada Wheat Board Act* (Canada) R.S.C., c. C-12, as amended;

(j) "Divest" means to implement a Divestiture;

(k) "Divestiture" means the sale, transfer, assignment, redemption or other disposition (including, with the approval of the Commissioner, an asset swap arrangement), necessary to ensure that Agricore United does not retain, directly or indirectly, except as permitted herein or upon the consent of the Commissioner, any right, title, control, interest, liability or obligation in respect of any of the assets to be Divested inconsistent with the intent of this Agreement, other than obligations in respect of any representations, warranties and covenants included in any agreement between Agricore United and the Purchaser of the relevant Port Terminal as permitted by this Agreement;

(l) "Full Capacity Operation" means a circumstance where terminal authorizations issued by the relevant terminal, which permit a Person to deliver grain to that terminal, equal available capacity at that terminal;

(m) "Independent Grain Companies" means those grain handling companies with no ownership interest in a port terminal in Vancouver and with no affiliation with an

owner of a port terminal in Vancouver. For the purpose of this definition, a grain handling company is affiliated with a port terminal owner if it has a 20% or more direct or indirect shareholding or ownership interest in the port terminal owner, or if a port terminal owner, other than Agricore United, has a 20% or more direct or indirect shareholding or ownership interest in the grain handling company;

(n) "Interim Consent Order" means the interim consent order issued by the Competition Tribunal on January 14, 2002;

(o) "Pacific Complex" means the Pacific Elevators Limited port terminal facility located at 1803 Stewart Street, Vancouver B.C. V5L 5G1 and more particularly described in Schedule "A";

(p) "Person" means any natural person, corporation, association, firm, partnership or other business or legal entity;

(q) "Port Terminal Divestiture Option" has the meaning set out in Schedule "A";

(r) "Port Terminal Initial Sale Period" has the meaning set out in Confidential Schedule "B";

(s) "Port Terminals" means, subject to Schedule "A", the UGG Terminal and the Pacific Complex and "Port Terminal" means either one of them;

(t) "Purchaser" means the Person(s) or entity(ies) who purchase(s) a Port Terminal pursuant to this Agreement;

(u) "Trustee" means the Person appointed trustee pursuant to paragraphs 14 or 15 of this Agreement to effect the Divestiture of a Port Terminal, if necessary;

(v) "UGG Terminal" means the UGG port terminal located at 1155 Stewart Street, Vancouver, BC V6A 4H4; and

(w) "UGG" means, prior to the Closing Date, United Grain Growers Limited, a corporation existing under the provisions of the *United Grain Growers Act* (Canada), a Special Act of the Parliament of Canada.

**Application**

2. The provisions of this Agreement shall apply to:

(a) Agricore United (including United Grain Growers Limited and Agricore Ltd.);

(b) each division, subsidiary or other Person controlled by Agricore United and each officer, director, employee, agent or other Person acting for or on behalf of Agricore United with respect to any matter referred to in this Agreement;

(c) the successors and assigns of Agricore United, and all other Persons acting in concert or participating with them with respect to any matter referred to in this Agreement who shall have received actual notice of this Agreement;

(d) the Trustee and each employee, agent or other Person acting for or on behalf of such Trustee with respect to any matter referred to in this Agreement; and

(e) a proposed Purchaser and each employee, agent or other Person acting for or on behalf of such proposed Purchaser with respect to any matter referred to in this Agreement.

**Port Terminal Divestiture Option**

3. Agricore United shall offer to Divest one of the Port Terminals within the Port Terminal Initial Sale Period.

4. If a Port Terminal has not been Divested within the Port Terminal Initial Sale Period, then the Divestiture of a Port Terminal shall be carried out by the Trustee in accordance with the procedure set out herein.

**Divestiture Procedure**

5. Divestiture of the Port Terminal, whether by Agricore United or the Trustee, shall be completed on the following terms:

(a) by way of disposition of the Port Terminal for use as a going concern;

(b) to one or more arm's length Purchasers who:

(i) shall use the Port Terminal for the same purpose it was used prior to the Closing Date; and

(ii) shall have the managerial, operational and financial capability to operate the Port Terminal as contemplated in sub-paragraph 5(b)(i) above.

6. Any Person making a *bona fide* inquiry of Agricore United, its agent or the Trustee regarding the possible purchase by that Person or its principal of a Port Terminal shall be notified that the sale is being made pursuant to this Agreement and provided with a copy of this Agreement, with the exception of the provisions hereof which are confidential as set out in Confidential Schedule "B".

7. Following the Port Terminal Initial Sale Period and subject to paragraph 12 below, any prospective Purchaser that demonstrates its *bona fide* interest in purchasing a Port Terminal shall:

(i) be furnished with all pertinent information regarding the relevant Port Terminal; and

(ii) be permitted to make such reasonable inspection of the relevant Port Terminal and of all financial, operational or other documents and information as may be relevant to the Divestiture, except for any documents which shall in the future be made the subject of an order of confidentiality of the Competition Tribunal.

8. Agricore United shall not, without the consent of the Commissioner, provide financing for all or any part of any Divestiture under this Agreement which would permit Agricore United to influence or control, directly or indirectly, the relevant Port Terminal after the Divestiture.

9. **[Confidential].**

10. Agricore United shall allow the Purchaser of a Port Terminal an opportunity to employ those persons employed primarily in relation to the Port Terminal (the "Employees") as follows:

(a) not later than 14 days, or such other period as may be agreed upon by the Purchaser and Agricore United, before the date of the Divestiture of the Port Terminal, Agricore United shall, to the extent permissible under applicable laws, (i) provide to the Purchaser a list of all the Employees, (ii) allow the Purchaser an

opportunity to interview the Employees for purposes of determining whether or not to offer them employment, and (iii) allow the Purchaser to inspect the personnel files and other documentation relating to the Employees; and

(b) Agricore United shall, to the extent permissible under applicable laws, (i) not offer any incentive to any Employee to decline employment with the Purchaser, (ii) remove any contractual impediments with Agricore United that may deter any Employee from accepting employment with the Purchaser, including, but not limited to, any non-compete or confidentiality provisions of employment relating specifically to the Port Terminal that would affect the ability of the Employee to be employed by the Purchaser, (iii) not interfere with the employment by the Purchaser of any Employee, and (iv) continue employee benefits offered by Agricore United until the Divestiture has been completed, including regularly scheduled raises and bonuses, and regularly scheduled vesting of all pension benefits.

11. Nothing in paragraph 10 of this Agreement is intended to diminish any of Agricore United's or a Purchaser's obligations under any applicable labour laws or relevant collective bargaining agreements.

12. Access by a prospective Purchaser to the information and assets identified in paragraph 7 of this Agreement shall be conditional on the execution of a customary confidentiality agreement containing, among other things, non-solicitation terms relating to personnel and suppliers.

13. Agricore United shall advise the Commissioner in writing every 60 days during the Port Terminal Initial Sale Period of the progress of its efforts to accomplish the implementation of a Port Terminal Divestiture Option, including a description of contacts or negotiations and the identity of all parties contacted and prospective Purchasers who have come forward, all with reasonable detail. The Commissioner has the right to request additional information from Agricore United regarding the progress of its efforts to implement a Port Terminal Divestiture Option and Agricore United shall respond to any such requests within a reasonable time having regard to the nature of the request.

**Trustee Sale**

14. If a Port Terminal Divestiture Option has not been implemented within the Port Terminal Initial Sale Period, the Commissioner shall appoint a trustee. The Commissioner shall select a trustee, subject to the consent of Agricore United (which shall not be unreasonably withheld), at least 120 days before the expiry of the Port Terminal Initial Sale Period, and the Trustee shall, upon the expiry of the Port Terminal Initial Sale Period, be responsible for implementing a Port Terminal Divestiture Option in accordance with the requirements set out in this Agreement, including Confidential Schedule "B". If Agricore United and the Commissioner fail to agree on the selection of a trustee, the Competition Tribunal, on the application of the Commissioner or Agricore United, shall appoint the trustee.

15. If the Commissioner reasonably concludes that any Trustee appointed pursuant to this Agreement has ceased to act or failed to act diligently or otherwise in accordance with this Agreement, the Commissioner shall, subject to the consent of Agricore United (which shall not be unreasonably withheld), forthwith appoint a substitute Trustee. If Agricore United reasonably concludes that any Trustee appointed pursuant to this Agreement has ceased to act or failed to act

diligently or otherwise in accordance with this Agreement, and the Commissioner has not appointed a substitute Trustee, Agricore United may apply to the Competition Tribunal for the appointment of a substitute Trustee. If Agricore United and the Commissioner fail to agree on the selection of a substitute Trustee, the Competition Tribunal, on the application of the Commissioner or Agricore United, shall appoint a substitute Trustee.

16. Agricore United shall assist the Trustee in accomplishing the Divestiture. Consistent with Confidential Schedule "B" hereto, in connection therewith, following the Port Terminal Initial Sale Period, Agricore United shall provide any prospective Purchaser that demonstrates its *bona fide* interest in purchasing a Port Terminal with full access to all information and assets as set out in paragraph 7 of this Agreement. The Trustee shall have full and complete access, as is reasonable in the circumstances, to the personnel, books, records and facilities of the relevant Port Terminal and Agricore United shall take no action to interfere with or impede the Trustee's accomplishment of the Divestiture.

17. Agricore United shall not object to a Divestiture proposed by the Trustee on any grounds other than the Trustee's malfeasance, gross negligence, bad faith or breach of this Agreement.

18. Agricore United shall hold the Trustee harmless against any losses, claims, damages or liabilities arising out of, or in connection with, the performance of the Trustee's duties under this Agreement except to the extent that such liabilities, losses, damages or claims result from the Trustee's malfeasance, gross negligence, bad faith or breach of this Agreement.

19. The Trustee shall have such other powers as the Competition Tribunal may grant to the Trustee upon the application of Commissioner or Agricore United.

20. All expenses reasonably and properly incurred by the Trustee in the course of the Trustee sale shall be paid by Agricore United and the proceeds of any Trustee sale shall be paid to Agricore United or as Agricore United may direct.

21. The Trustee shall implement a Port Terminal Divestiture Option at the price and on the terms and conditions most favourable to Agricore United then reasonably available. **[Confidential]**

22. The Trustee shall execute a customary confidentiality agreement and shall not communicate any Confidential Information except to the extent required by this Agreement.

23. After the expiry of the Port Terminal Initial Sale Period and until the end of the term of the Trustee's appointment, only the Trustee shall have the full power and authority to implement the relevant Port Terminal Divestiture Option on such terms as are required by this Agreement.

24. The Trustee shall have the full power and authority to retain, on usual and reasonable commercial terms, financial, legal and other professional advisers, including investment bankers, that may be reasonably necessary or advisable in advising and assisting the Trustee in implementing a Port Terminal Divestiture Option.

25. After the Trustee's appointment becomes effective, the Trustee shall, every 30 days, file reports with the Commissioner and Agricore United, setting forth the Trustee's efforts to accomplish the Divestiture, all with reasonable detail. The Commissioner has the right to ask for additional information from the Trustee regarding the Divestiture and the Trustee shall respond within a reasonable time having regard to the nature of the request.

**Commissioner's Approval**

26. The implementation of a Port Terminal Divestiture Option is subject to the approval of the Commissioner in writing, which shall be based on the criteria outlined in paragraph 5 of this Agreement and shall be obtained in accordance with the notification procedure set out in paragraphs 28 to 31 of this Agreement.

27. The Commissioner may, in addition to the criteria set out in paragraph 5 of this Agreement, also take into account the likely impact of the Divestiture on competition in that market in deciding whether or not to approve the Divestiture.

**Notification**

28. Agricore United or the Trustee, whichever is then responsible for effecting the Divestiture required herein, shall notify the Commissioner in writing of any proposed Divestiture. If the Trustee is responsible, it shall similarly notify Agricore United. Such notice shall be given at or before the time a binding offer that is acceptable to Agricore United or the Trustee, as the case may be, is received and the notice shall include:

(a) the identity of the proposed Purchaser;

(b) the details of the proposed transaction;

(c) information concerning whether the proposed Purchaser would satisfy the terms of paragraphs 5 and 27 of this Agreement;

(d) an update of the last report provided pursuant to paragraph 13 of this Agreement or paragraph 25 of this Agreement, as the case may be; and

(e) the agreement of the proposed Purchaser that it will respond as soon as possible to a request by the Commissioner for additional information regarding the proposed Divestiture.

29. Within ten (10) days after receipt of the notice referred to in paragraph 28 above, the Commissioner and, where the notice has been provided by the Trustee, Agricore United, may request additional information concerning the proposed Divestiture, the proposed Purchaser and any other potential Purchaser. Where the Commissioner requests additional information, Agricore United, the Trustee or the proposed Purchaser, as the case may be, shall provide the additional information within ten (10) days of the receipt of the request, unless the Commissioner agrees in writing to extend the time. Where Agricore United requests additional information, the Trustee shall provide the additional information within ten (10) days of the receipt of the request, unless Agricore United agrees in writing to extend the time.

30. Within fifteen (15) days after receipt of the notice pursuant to paragraph 28 of this Agreement or, if the Commissioner and/or Agricore United have requested additional information pursuant to paragraph 29 above, within fifteen (15) days after receipt of the said information:

(a) the Commissioner shall notify, in writing, Agricore United and, where appropriate, the Trustee, if the Commissioner objects to the proposed Divestiture on one or more of the grounds set out in paragraphs 5 and/or 27 of this Agreement; and

(b) in the case of a Divestiture proposed by the Trustee, Agricore United shall notify, in writing, the Commissioner and the Trustee if Agricore United objects to the

proposed Divestiture on one or more of the grounds set out in paragraph 17 of this Agreement.

31. If:

(a) the Commissioner fails to object as contemplated by paragraph 30 of this Agreement or if the Commissioner notifies, in writing, Agricore United and, where appropriate, the Trustee, that the Commissioner does not object; and

(b) Agricore United fails to object as contemplated by paragraph 30 of this Agreement or if Agricore United notifies, in writing, the Commissioner and, where appropriate, the Trustee, that Agricore United does not object,

then the Divestiture may be completed.

32. Where the Commissioner or Agricore United has objected to a proposed Divestiture, that Divestiture shall not be completed without the approval of the Competition Tribunal.

33. Agricore United or the Trustee, as the case may be, shall notify the Commissioner forthwith after a Divestiture required by this Agreement has been completed.

**Maintenance of the Port Terminals**

34. The Commissioner confirms, that based on all the information currently available to him, that he has no reason to believe that Agricore United has violated any provision of the Interim Consent Order, including those provisions regarding the maintenance of the UGG Terminal and the Pacific Complex. Agricore United agrees that, until the implementation of a

Port Terminal Divestiture Option by Agricore United or the Trustee, Agricore United shall take such steps as are necessary to maintain the competitive viability of both the UGG Terminal and the Pacific Complex and shall not dispose of any material assets of the UGG Terminal or the Pacific Complex.

35. Without limiting the generality of the foregoing, until the implementation of a Port Terminal Divestiture Option by Agricore United or the Trustee, Agricore United shall provide such sales, managerial, administrative, operational and financial support as is necessary in the ordinary course of business to promote the continued effective operation of the UGG Terminal and the Pacific Complex in accordance with standards similar to those existing prior to the Closing Date.

36. Except as set out in paragraphs 39 to 43 below, until the implementation of a Port Terminal Divestiture Option by Agricore United or the Trustee, Agricore United shall not, without prior approval from the Commissioner (such approval not to be unreasonably withheld), enter into or withdraw from any material contracts or arrangements relating to the UGG Terminal or the Pacific Complex, make any material changes to such operations, or terminate any current employment, salary or benefit agreements for any management personnel employed in relation to either the UGG Terminal or the Pacific Complex.

37. For greater certainty, notwithstanding paragraphs 34 to 36, Agricore United may temporarily shut down the UGG Terminal or the Pacific Complex and may temporarily lay-off personnel employed in relation to either the UGG Terminal or the Pacific Complex in response to material changes in shipments through the Port of Vancouver caused by drought, poor crop quality, labour disputes, acts of God, action or failure to act of any government or governmental

regulatory authority, accident, fire, flood, or other event beyond the control of Agricore United or for the purpose of performing routine maintenance on either the UGG Terminal or the Pacific Complex. Notice of any temporary shut-down or lay-off shall be provided to the Commissioner in writing.

38. Until the implementation of a Port Terminal Divestiture Option by Agricore United or the Trustee, Agricore United shall honour all existing contracts for the handling of grain for Independent Grain Companies. In addition, Agricore United shall offer to handle for Independent Grain Companies in the aggregate a minimum of 125,000 tonnes of grain per month (1.5 million tonnes per year), by way of contracts, through either the UGG Terminal or the Pacific Complex or through terminal arrangements entered into by Agricore United with other terminals. Where Agricore United enters into a terminal arrangement for the handling of an Independent Grain Company's grain with a third party, there shall be no additional cost to the Independent Grain Company as a result of the use of such third party's facility beyond that contemplated in paragraph 40 below.

39. Until the implementation of a Port Terminal Divestiture Option by Agricore United or the Trustee, new contracts for the handling of Independent Grain Companies' grain shall be based on reasonable commercial terms consistent with past practice, and shall include: (1) a contract term that ends on a date certain, provided that the Independent Grain Company shall have an option to terminate the contract upon either (i) a Trustee being appointed pursuant to this Agreement to Divest one of the Port Terminals, or (ii) a Divestiture of one of the Port Terminals, (2) a commitment by the Independent Grain Company that Agricore United will handle all of its Vancouver volume for the duration of the contract, and (3) renegotiation or arbitration in the event of major regulatory change. Agricore United may terminate such an

agreement if the Independent Grain Company does not ship all of its Vancouver volume during the term of the contract through Agricore United.

40. Until the implementation of a Port Terminal Divestiture Option by Agricore United or the Trustee, prices for the handling of Independent Grain Companies' grain under any new contract shall be based on Agricore United's tariffs as filed with the Canadian Grain Commission under the *Canada Grain Act* (Canada) and Agricore United shall pay a diversion premium of at least $2 per tonne. Diversion premiums negotiated between Agricore United and an Independent Grain Company shall remain confidential. Any non-CWB tariff increase or any diversion premium decrease (CWB or non-CWB grain) from these initial levels must be commercially reasonable.

41. In the event that bottlenecks, bountiful crop production or other causes create a situation of Full Capacity Operation at a port terminal facility designated to handle Independent Grain Companies' grain in respect of a given period (the "Relevant Period"), a terminal authorization for any given Independent Grain Company's grain will be issued in an amount equal to **(A÷B) x C**

**where:**

**A** = the relevant Independent Grain Company's shipment of grain through the Port of Vancouver for the last three completed months before the Relevant Period;

**B** = the total shipments of grain through the Port of Vancouver for the last three completed months before the Relevant Period; and

**C** = the available capacity at the designated port terminal facility for the Relevant Period.

In the event that an Independent Grain Company's terminal authorizations are reduced pursuant to this provision, all shippers to that terminal will have their terminal authorizations reduced on the same basis.

42. Until the implementation of a Port Terminal Divestiture Option by Agricore United or the Trustee, any disputes as to compliance with the commitments in paragraphs 38 to 41 as to price, tariffs, diversion premiums or other terms shall be settled by way of an arbitration procedure as outlined in Schedule "C" that is consistent with existing commercial practice and with terms of reference that have regard to market conditions and structure, capacity utilization, costs of operation, reasonable rate of return on investment and regulatory framework. During any arbitration procedure, Agricore United shall continue to provide port terminal services to the Independent Grain Company that initiated the arbitration.

43. Notwithstanding any other provision of this Agreement, Agricore United shall have no obligation to deal with an Independent Grain Company that defaults in payment or breaches other material terms of its contract with Agricore United.

44. Agricore United shall provide a copy of this Agreement to the Manager of Vancouver Operations and Agricore United shall direct such manager and any servants or agents of the parties operating and managing the UGG Terminal and the Pacific Complex to do so in accordance with the terms of this Agreement.

**Compliance Inspection**

45. For the purpose of determining or securing compliance with this Agreement, subject to any valid claim to a legally recognized privilege, and upon written request, Agricore United shall permit any duly authorized representative of the Commissioner:

(a) upon a minimum of two (2) business days notice to Agricore United, access during office hours of Agricore United to inspect and copy all relevant books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Agricore United relating to compliance with this Agreement; and

(b) upon a minimum of five (5) business days notice to Agricore United, and without restraint or interference from Agricore United, to interview relevant directors, officers or employees of Agricore United on matters in the possession or under the control of Agricore United relating to compliance with this Agreement. Such directors, officers or employees may have counsel present at these interviews.

**Notices**

46. Notices, reports or other communications required or permitted pursuant to this Agreement shall be in writing and shall be considered to be given if dispatched by confirmed personal delivery or facsimile transmission to the address or facsimile number below:

(a) If to the Commissioner:

The Commissioner of Competition
Competition Bureau
Industry Canada
Place du Portage
Phase I, 50 Victoria Street
Hull, Quebec
K1A 0C9

Attention: John Campion
John L. Syme
Melanie Aitken
Arsalaan Hyder

Fax: (819) 953-9267

(b) If to Agricore United:

Agricore United
201 Portage Avenue
TD Centre
Winnipeg, Manitoba
R3C 3A7

Attention: Christopher Martin

Fax: (204) 944-2299

With a copy to:

Davies Ward Phillips & Vineberg LLP
Suite 4400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Attention: Kent Thomson
Sandra Forbes
John Bodrug

Fax: (416) 863-0871

**Term of Consent Agreement**

47. This Agreement shall remain in effect until a Divestiture contemplated by this Agreement has occurred or is no longer required hereunder.

**General**

48. The Commissioner and Agricore United may, by way of mutual agreement, extend any of the time periods applicable herein.

49. If the Commissioner's approval is sought pursuant to this Agreement and such approval is not granted, or if a decision of the Commissioner is unreasonably delayed or withheld, Agricore United may apply to the Competition Tribunal for approval.

50. In the event of a dispute as to the interpretation or application of this Agreement, the Commissioner, the Trustee or Agricore United shall be at liberty to apply to the Competition Tribunal for an order interpreting any of the provisions of this Agreement.

51. It is understood that Agricore United does not agree with all of the allegations by the Commissioner in relation to this proceeding.

52. This Agreement constitutes the entire agreement between the Commissioner and Agricore United with respect to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral. Registration of this Agreement, in accordance with section 105 of the Act, terminates the Interim Consent Order.

53. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which taken together shall constitute one and the same instrument. In the event of any discrepancy between the English and French versions of this Agreement, the English version shall prevail.

**DATED** this 17th day of October, 2002.

**UNITED GRAIN GROWERS LIMITED**

(signed) Konrad von Finckenstein
Commissioner of Competition

by (signed) Brian Hayward

## SCHEDULE "A"

**Port Terminal Divestiture Option**: means, at Agricore United's option, the Divestiture of one of the following:

Option 1: all of the issued and outstanding shares of Pacific Elevators Limited ("PEL") and all of the issued and outstanding shares in Western Pool Terminals Ltd. ("WPTL") or all of the assets owned by PEL and WPTL; **or**

Option 2: the UGG Terminal.

If Agricore United has not implemented one of the Port Terminal Divestiture Options before the expiry of the Port Terminal Initial Sale Period, the Trustee may choose to Divest either Option 1 or Option 2 unless, prior to the expiry of the Port Terminal Initial Sale Period, Agricore United gives notice, at least 90 days before the expiry of the Port Terminal Initial Sale Period, that it elects that the Port Terminal in Option 1 or 2 as the case may be, be Divested by the Trustee, in which case the Trustee shall Divest the Port Terminal selected by Agricore United. If Agricore United selects Option 1, Agricore United can specify whether the Divestiture will occur by way of a share or asset sale.

Once a Divestiture is implemented, or the Trustee has obtained the right to Divest a Port Terminal in accordance with paragraph 14 of this Agreement, the remaining Port Terminal ceases to be a "Port Terminal" for the purposes of this Agreement.

PUBLIC VERSION

# CONFIDENTIAL SCHEDULE "B"

## SCHEDULE "C"

## ARBITRATION PROCEDURES

1. **Initiation of Arbitration Proceedings**

(a) If any party to a port terminal handling agreement (the "PTH Agreement") wishes to have any matter under the PTH Agreement arbitrated in accordance with the provisions of the PTH Agreement, it shall give notice to the other party hereto specifying particulars of the matter or matters in dispute and proposing the name of the person it wishes to be the single arbitrator. Within 15 days after receipt of such notice, the other party to the PTH Agreement shall give notice to the first party advising whether such party accepts the arbitrator proposed by the first party. If such notice is not given within such 15 day period, the other party shall be deemed to have accepted the arbitrator proposed by the first party. Failing agreement of the parties on a single arbitrator within such 15 day period, either party may apply to a judge of the Manitoba Queen's Bench for the appointment of a single arbitrator. The arbitrator, whether agreed on by the parties or appointed by the Court (the "Arbitrator"), shall have the qualifications set out in paragraph (b).

(b) The Arbitrator shall be at arm's length from all parties and as to the five year period prior to the Arbitration shall not be a member of any accounting or legal firm or firms who advise or who have advised any of the parties, nor shall the Arbitrator be an individual who has been retained by any of the parties.

2. **Submission of Written Statements**

(a) Within 15 business days of the appointment of the Arbitrator, the party initiating the Arbitration (the "Claimant") shall send to the other party (the "Respondent") a Statement of Claim setting out in sufficient detail the facts and any contentions of law on which it relies, and the relief that it claims.

(b) Within 15 business days of the receipt of the Statement of Claim, the Respondent shall send to the Claimant a Statement of Defence stating in sufficient detail which of the facts and contentions of law in the Statement of Claim it admits or denies on what grounds and on what other facts and contentions of law the Respondent relies.

(c) Within 10 business days of receipt of the Statement of Defence, the Claimant may send the Respondent a Statement of Reply.

(d) All Statements of Claim, Defence and Reply shall be accompanied by copies of all essential documents on which the party concerned relies and which have not previously been submitted by any party, and (where practicable) by any relevant samples.

(e) After submission of all the Statements, the Arbitrator will give directions for further conduct of the arbitration, which shall include meetings and hearings conducted in conformity with the Rules set forth below.

3. **Meetings and Hearings**

(a) Meetings and hearings of the Arbitrator shall take place in the City of Winnipeg, Manitoba or in such other place as the Claimant and the Respondent shall agree upon in writing and such meetings and hearings shall be conducted in the English language unless otherwise agreed by such parties and the Arbitrator. Subject to the foregoing, the Arbitrator may fix the date, time and place of meetings and hearings in the arbitration, and will give all the parties adequate notice of these provided the arbitration shall commence within 30 days after the exchange of the Statements. Subject to any adjournments, which the Arbitrator allows, the final hearing will be continued on successive working days until it is concluded.

(b) All meetings and hearings will be in private unless the parties otherwise agree.

(c) Any party may attend any meetings and hearings personally and/or be represented at any meetings or hearings by legal counsel or other representative.

(d) Each party may examine, cross-examine and re-examine, as the Arbitrator shall deem appropriate, all witnesses at the arbitration.

(e) The Arbitrator may appoint one or more experts to report to him or her on specific issues to be determined by the Arbitrator. The expert shall be at arm's length from all parties and as to the five year period prior to the arbitration shall not be a member of any accounting or legal firm or firms who advise or who have advised any of the parties, nor shall the expert be an individual who has been retained by any of the parties. The Arbitrator may require a party to give such expert(s) any relevant information, or to provide access to any relevant documents, goods, materials or other property for the expert's inspection. If a party so requests or if the Arbitrator considers it necessary, such expert(s) shall, after delivery of his or her written or oral report, participate in a hearing where the parties have the opportunity to put questions to him or her and to present expert witnesses in order to testify on the points in issue.

4. **The Decision**

(a) The Arbitrator will make a decision in writing and, unless both the parties otherwise agree, will set out reasons for his or her conclusions and findings in the decision.

(b) The Arbitrator will send the decision to the parties as soon as practicable after the conclusion of the final hearing, but in any event no later than 60 days thereafter, unless that time period is extended for a fixed period by the Arbitrator on written notice to each party because of illness or other cause beyond the Arbitrator's control.

(c) The decision shall be final and binding on the parties and shall not be subject to any appeal or review procedure provided that the Arbitrator has followed these

Rules provided herein in good faith and has proceeded in accordance with the principles of natural justice.

5. **Jurisdiction and Powers of the Arbitrator**

(a) By submitting to arbitration under these Rules, the parties shall be taken to have conferred on the Arbitrator the jurisdiction and powers set out in clause 5(b) below, each of which is to be exercised at the Arbitrator's discretion subject only to these Rules and the relevant law with the object of ensuring the just, expeditious, economical and final determination of the dispute referred to arbitration.

(b) The Arbitrator shall have jurisdiction to:

(i) Determine any question of law arising in the arbitration;

(ii) Determine any question as to the Arbitrator's jurisdiction;

(iii) Determine any question of good faith, dishonesty or fraud arising in the dispute;

(iv) Order any party to furnish further details of that party's case, in fact or in law, or to produce any documents, goods, materials or other property relevant to any fact or law at issue in the arbitration;

(v) Proceed in the arbitration notwithstanding the failure or refusal of any party to comply with these Rules or with the Arbitrator's orders or directions, or to attend any meeting or hearing, but only after giving that party written notice that the Arbitrator intends to do so;

(vi) Receive and take into account such written or oral evidence tendered by the parties as the Arbitrator determines is relevant, whether or not strictly admissible in law;

(vii) Make one or more interim awards, including without limitation, interim awards to secure all or part of any amount in dispute in the arbitration and injunctive relief;

(viii) Hold meetings and hearings, and make a decision (including a final decision);

(ix) Order the parties to produce to the Arbitrator, and to each other for inspection, and to supply copies of, any documents or classes of documents in their possession or power which the Arbitrator determines to be relevant; and

(x) Order the preservation, storage, sale or other disposal of any property or thing under the control of any of the parties.

(c) In addition, the Arbitrator shall have such further jurisdiction and powers as may be allowed by the *Arbitration Act* of Manitoba, as amended or substituted from time to time.

(d) Notwithstanding the parties' intention that the Arbitrator be able to act free of Court proceedings as set forth herein, the parties consent to the decision of the Arbitrator being entered in any Court having jurisdiction for the purposes of enforcement.

6. **Arbitration Costs**

The Arbitrator's fees and all expenses and disbursements incurred by the Arbitrator in the conduct of the arbitration shall be shared equally between the parties. Expenses and disbursements, including without limitation, legal fees and expenses, travel costs and photocopying incurred by a party for its own participation in the arbitration shall be for the account of such party. The Arbitrator shall not be empowered to award costs to either party.

7. **Confidentiality**

All statements and evidence submitted for the arbitration, the decision of the Arbitrator, the fact of the arbitration itself and all other aspects regarding the arbitration shall be kept strictly confidential except as otherwise required by applicable law.

# Tab 3

CT - 2002 - 001

**THE COMPETITION TRIBUNAL**

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

**IN THE MATTER OF** an application by the Commissioner of Competition under section 104 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:**

**COMMISSIONER OF COMPETITION**
**(applicant)**

- and -

**UNITED GRAIN GROWERS LIMITED**
**(respondent)**

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## NOTICE OF APPLICATION FOR INTERIM ORDER

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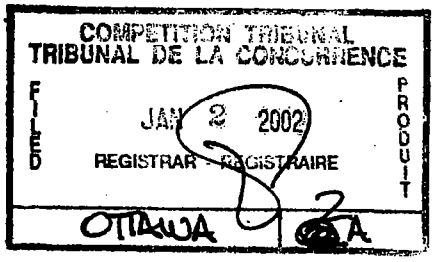
**TAKE NOTICE THAT:**

1. Pursuant to section 104 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), the Applicant, the Commissioner of Competition, will make an application, on consent of the Respondent, to the Competition Tribunal (the "Tribunal") for:

(a) an Interim Order pursuant to section 104 of the Act in the form of the Draft Consent Interim Order attached hereto; and,

(b) such further or other order as the Applicant and the Respondent, on consent, may advise and the Tribunal considers appropriate.

**AND TAKE NOTICE THAT:**



2. In support of this application, the Applicant will rely upon its application pursuant to sections 92 of the Act, the Draft Consent Interim Order, the affidavit of David Ouellet dated December 19, 2001, attached hereto at tab 1, the Applicant's Memorandum of Argument on Interim Relief attached hereto at tab 2, and the Consent of the parties to this application, attached hereto at tab 3, all filed herein and such other material as may be filed or counsel may advise.

3. The name and the address of the person with respect to whom an Interim Consent Order is sought is United Grain Growers Limited, carrying on business as Agricore United, TD Centre, 201 Portage Ave., Winnipeg, Manitoba, R3C 3A7.

4. The Applicant and the Respondent request, in accordance with Rules 68 and 72 of the *Competition Tribunal Rules* and Rule 8 of the *Federal Court Rules*, that the service requirements of the *Competition Tribunal Rules* be dispensed with, as between the Applicant and Respondent.

5. The Commissioner requests that if a hearing of this application is necessary that it be held in Ottawa, Ontario, and that the proceeding be conducted in the English language.

Dated at Hull, Quebec, December 19, 2001

Konrad von Finckenstein, Q.C.
Commissioner of Competition

**ADDRESSES FOR SERVICE OF THE APPLICANT:**

John L. Syme
Arsalaan Hyder
Counsel for the Commissioner of Competition
Department of Justice
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Hull, Quebec
K1A 0C9

Telephone: (819) 997-3325
Facsimile: (819) 953-9267

**TO:** Registrar, Competition Tribunal
90 Sparks Street, 6th Floor
Ottawa, Ontario
K1A 0C9

**AND TO:** Davies Ward Phillips & Vineberg LLP
Suite 4400
1 First Canadian Place
Toronto, ON
M5X 1B1
Telephone: (416) 863-0900
Fax: (416) 863-0871

Attention: Kent Thomson
John Bodrug

Counsel for the Respondent

CT - 2002-001

**THE COMPETITION TRIBUNAL**

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

**IN THE MATTER OF** an application by the Commissioner of Competition under section 104 of the *Competition Act*;

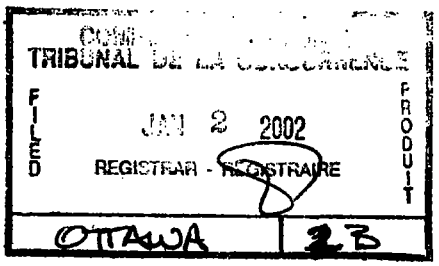
**AND IN THE MATTER OF** the acquisition by United Grain Growers Limited of Agricore Cooperative Ltd., a company engaged in the grain handling business.

**BETWEEN:**

**COMMISSIONER OF COMPETITION**
**(applicant)**

- and -

**UNITED GRAIN GROWERS LIMITED**
**(respondent)**

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**AFFIDAVIT OF DAVID OUELLET**

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**I, David Ouellet** of the City of Ottawa, Province of Ontario, Public Servant, MAKE OATH AND SAY:

1. I am a Senior Competition Law Officer at the Competition Bureau, Mergers Branch.

2. I have worked as a Competition Law Officer at the Competition Bureau since 1975, and have worked in the Mergers Branch from January 1994 to the present.

3. I have led two investigations of mergers arising in connection with the grain handling industry since 1997. The first proposed merger, in 1997, was an unsuccessful attempt by Alberta Wheat Pool ("AWP") and Manitoba Pool Elevators Limited ("MPE") to jointly

acquire United Grain Growers Limited ("UGG"). The second merger, in November 1998, was the amalgamation of AWP and MPE to form Agricore Cooperative Ltd. ("Agricore").

4. On or about June 11, 2001, UGG advised the Commissioner of Competition ("Commissioner") of the then proposed merger transaction. On July 30, 2001, UGG and Agricore publicly announced that their Boards of Directors had unanimously agreed on a merger plan whereby the companies would merge and carry on business as Agricore United. The proposed merger was approved by Agricore's shareholders and member delegates on August 30, 2001.

5. UGG and Agricore completed the statutory long-form pre-merger notification filings, pursuant to section 114 of the *Competition Act* ("Act"), on August 9, 2001. The applicable waiting period under section 123 of the Act is 42 days, which expired on September 20, 2001.

6. I was the Senior Officer assigned to this matter in June 2001, when the Commissioner was first apprised of the proposed merger.

7. Based on my prior knowledge of the grain handling industry and the specific facts relevant to this proposed transaction, as well as in light of discussions with market participants and industry experts, I was of the view that a merger of UGG and Agricore raised serious competition concerns in certain local primary grain handling markets in Alberta and Manitoba, as well as in the grain handling port terminal market in Vancouver, British Columbia. These competitive concerns, which warranted a thorough investigation and careful consideration of potential remedies, were conveyed to counsel for the parties by the Senior Deputy Commissioner of Competition at an early stage in the merger review.

8. I assembled an investigative team consisting of two other competition law officers, an enforcement support officer, and an economist from the Economic Policy and Enforcement Division of the Competition Bureau. An inquiry was commenced by the Commissioner on September 6, 2001, under section 10 of the Act. I requested, and was assigned, legal counsel from the Competition Law Division of the Department of Justice. I also identified and retained an industry expert, two agricultural economists and an industrial organization economist to assist in the Bureau's investigation. One agricultural economist, in conjunction with our industry expert, focussed primarily on potential competition issues relating to primary grain handling in Western Canada, while the other agricultural economist primarily examined competition issues relating to port terminal grain handling.

9. The investigation also identified a competition issue with respect to domestic canola processing. CanAmera Foods Limited Partnership ("CanAmera"), with a market share of about 45%, and Archer Daniels Midland Company ("ADM"), with a market share of approximately 20%, are the largest processors in the canola processing market in Canada. Pre-merger Agricore had a 16.67% ownership stake in CanAmera which entitled it to Board representation and access to sensitive commercial and competitive information. Pre-merger ADM had a 42% ownership position in UGG, while post merger it has a 19% ownership interest in Agricore United which could, at ADM's option and subject to certain conditions, ultimately rise to 45%. Post-merger ADM has the right to nominate two representatives to the Agricore United Board of Directors. ADM also has the right to nominate one of four members to the Grain Operations Committee established by UGG. Further, the agreement establishing the committee provides that ADM shall have "...substantial influence over the operating units of UGG that procure, transport and market grain...". Through its Board representation and the Grain Operations Committee, ADM could receive competitive information concerning the operations of CanAmera as well as have the opportunity to influence CanAmera and take competitive advantage of commercially sensitive information which could result in a substantial lessening of

competition.

10. The preliminary examination and the inquiry into the proposed transaction has included the following:

(a) a review of pre-merger long-form notification information provided by UGG and Agricore under section 114 of the Act;

(b) a review of information provided voluntarily by UGG and Agricore, including competitive analyses;

(c) an extensive "field trip" in Western Canada during which members of the investigative team met with and obtained information from competitors and government agencies, as well as touring certain primary and port grain handling facilities;

(d) over 30 interviews, either in person or by telephone, with market participants, including farmers, competitors, suppliers and government departments and agencies;

(e) a review of written submissions and reports from various third parties, including market participants;

(f) meetings and discussions with UGG counsel and representatives of both UGG and Agricore, either in-person or by telephone, to provide and obtain information about the proposed transaction and to discuss emerging issues;

(g) through the Federal Court of Canada, the issuance of orders, under section 11 of the Act, for the production of records and written returns of information to the parties to the merger;

(h) through the Federal Court of Canada, the issuance of orders, under section 11 of the Act, for the production of records and/or written returns of information to 18 third-party competitors in, or suppliers to, the Western Canadian grain-handling industry; and

(i) telephone discussions with representatives of the US Federal Trade

Commission who had reviewed mergers in the grain handling industry in the United States.

11. Concerns expressed through the Commissioner's market contacts regarding the merger include:

(a) the likelihood of a substantial increase in the handling costs of grain at primary elevators in local markets with high post-merger market shares;

(b) the likelihood of a substantial increase in farmers' transportation costs realized through a decrease in hauling allowances offered to farmers for the delivery of grain to primary elevators in local markets with high post-merger market shares;

(c) the likelihood of a substantial decrease in the prices offered for non-Canadian Wheat Board grains at primary elevators in local markets with high post-merger market shares;

(d) the likelihood of a substantial increase in the handling costs of grain at port terminal facilities at the Port of Vancouver realized in part through a reduction in the diversion premiums offered to third party grain handling companies for port terminal grain deliveries;

(e) the likelihood of a substantial increase in the price of products derived from canola oil seed processing; and

(f) the likelihood of a substantial decrease in the prices offered for canola seed.

12. Based upon information obtained and analysed in the investigation process, I formed the view that the only effective remedy that would eliminate the likely substantial lessening of competition resulting from the proposed acquisition of Agricore by UGG with respect to primary grain handling in certain local markets in Western Canada and in the Port of Vancouver grain terminal market, would be the divestiture of primary grain handling

facilities in the Peace River and Edmonton areas in Alberta and in the Dutton Siding/ Dauphin area in Manitoba, as well as, the divestiture of a grain terminal facility in the Port of Vancouver. I also formed the view that to address ADM's potential influence on CanAmera, it would be necessary to establish a confidentiality arrangement which would: preclude ADM from gaining access to any non-public information concerning CanAmera; deny ADM officers or employees the right to membership on Canamera's Board of Directors; and exclude canola oil seed processing from the scope of the Agricore United Grain Operations Committee's mandate.

13. On November 1, 2001, the Competition Bureau issued a press release announcing that it would challenge the acquisition of port terminal assets held by Agricore in the Port of Vancouver and would make an application to the Competition Tribunal seeking a divestiture of a port terminal at Vancouver. The press release also indicated that the Competition Bureau and UGG had come to an agreement on a divestiture package of grain elevators in Alberta and Manitoba, as well as, on confidentiality requirements regarding the merged entity's post-merger ownership interest in CanAmera, and would file a second application with the Competition Tribunal for a Consent Order seeking the Competition Tribunal's approval of the agreement.

14. I believe that the Statement of Grounds and Material Facts accurately reflects the findings of the Bureau's investigation.

15. As set out in paragraph 1 of the Commissioner's Application for Interim Order in this matter, the Commissioner applies for a Consent Interim Order to ensure that non-integrated grain handling companies (i.e. without an ownership interest in a grain terminal in Vancouver) have ongoing access to grain terminal services in the Port of Vancouver, pending the Tribunal's determination of the Commissioner's Application.

16. I believe that without the Consent Interim Order, there will be irreparable harm to non-

16. I believe that without the Consent Interim Order, there will be irreparable harm to non-integrated grain handling companies. In particular, the Respondent would be in a position to take actions that could adversely affect the ability of those companies to compete for grain on the prairies, either by limiting access to the most important port grain handling market in Canada, namely Vancouver, or by reducing or eliminating revenue streams flowing from grain handling in the Port of Vancouver.

17. I verily believe that that the Consent Interim Order is necessary to preserve competitiveness in the relevant markets. I also verily believe that the form of the Consent Interim Order proposed by the Commissioner will achieve that purpose.

**SWORN BEFORE ME**, at the City of Hull, )
in the Province of Quebec, )
this 19th day of December 2001. )
)

Hélène Chartrand

**COMMISSIONER OF OATHS**

Commissaire à l'assermentation
HÉLÈNE CHARTRAND
# 133 930
District de Hull, P.Q.

D. Ouellet

**DAVID OUELLET**

CT - 2002-001

**THE COMPETITION TRIBUNAL**

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

**IN THE MATTER OF** an application by the Commissioner of Competition under section 104 of the *Competition Act*;

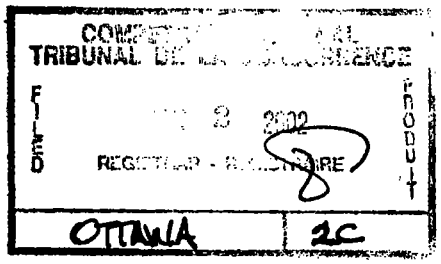
**AND IN THE MATTER OF** the acquisition by United Grain Growers Limited of Agricore Cooperative Ltd., a company engaged in the grain handling business.

**BETWEEN:**

**COMMISSIONER OF COMPETITION**
**(applicant)**

- and –

**UNITED GRAIN GROWERS LIMITED**
**(respondent)**

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**APPLICANT'S MEMORANDUM OF ARGUMENT ON INTERIM RELIEF**

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1. This Memorandum is filed in connection with the Commissioner of Competition's application pursuant to s. 104 of the *Competition Act* (the "Act") for a Consent Interim Order (the "Consent Interim Order Application"), pending the final determination of the Commissioner's application for an order pursuant to section 92 of the Act (the "Application").

2. In a merger transaction which closed on November 1, 2001 (the "Acquisition"), the Respondent acquired, among other things, certain port terminal assets of Agricore Cooperative Ltd. ("Agricore"). Those assets included Agricore's interest in the Pacific grain handling terminal and the Cascadia grain handling terminal, both of which are located in the Port of Vancouver.

3. In the Application, the Applicant seeks an order requiring the Respondent to divest, at its option, either the Pacific terminal or the UGG terminal.

4. In this Consent Interim Order Application, the Commissioner seeks an interim order requiring that in the period between the issuance of the Draft Interim Consent Order and the Tribunal's disposition of the Application, the Respondent:

- take such steps as are necessary to maintain the competitive viability of the Pacific and UGG terminals, including providing such sales, managerial, administrative, operational and financial support as is necessary in the ordinary course of business to promote the continued effective operation of those terminals; and

- take certain steps to ensure that grain handling companies without an interest in Vancouver port terminal facilities ("Non-integrated Graincos") continue to have access to port terminal grain handling services at the Port of Vancouver.

**THE LAW**

**A. Interim Orders**

5. Subsection 104(1) of the Act provides:

> 104 (1) Where an application has been made for an order under this Part, other than an interim order under section 100, the Tribunal, on application by the Commissioner, may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

6. As noted above, the Applicant has made an application for an order pursuant to sections 92 of the Act.

7. It is submitted that, having regard to all of the circumstances, the principles ordinarily considered by superior courts in granting interlocutory or injunctive relief warrant the making of the proposed Consent Interim Order.

8. The Supreme Court of Canada has set out the principles to be considered by courts when

granting interlocutory or injunctive relief. It is submitted that prior to granting interlocutory relief, the Tribunal should be satisfied that:

(a) there is a serious issue to be determined;

(b) in the absence of an interim consent order, irreparable harm is likely to result; and

(c) the balance of convenience favours issuing the interlocutory relief.

> ***RJR-Macdonald Inc.v. Canada (Attorney General),*** [1994] 1 S.C.R. 314, at 334; ***Manitoba (Attorney General) v. Metropolitan Stores Ltd.,*** [1987] 1 S.C.R. 110; ***American Cyanamid Co v. Ethicon Ltd.,*** [1975] A.C. 396.

9. This three-part test has been applied by the Tribunal in determining an application for an interim order under section 104 of the Act.

> ***Canada (Director of Investigation and Research) v. Southam Inc.,*** (1991) 36 C.P.R. (3d) 22 (C.T.).

## B. The Consent Order Process

10. Section 105 of the Act provides:

> 105. Where an application is made to the Tribunal under this Part for an order and the Commissioner and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal may make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested.

11. When proceedings are brought on consent, the Tribunal has stated that its role is to determine only whether the consent order meets a minimum test. The Tribunal further treats the Applicant's proposal with initial deference and will assume at the outset that the proposed consent order will meet its stated objectives.

> ***Director of Investigation and Research v. Bank of Montreal et al.,*** 68 C.P.R. (3d) 527 at 537.

## ARGUMENTS

### A. Serious Issue

12. It is submitted in assessing whether an applicant for injunctive relief has raised a serious issue in the proceeding in respect of which relief is sought, the threshold to be met is a low one. It is further submitted that in this context, the Tribunal must make a preliminary assessment of the merits of the case in order to determine whether there is a serious question to be tried, as opposed to a frivolous and vexatious claim.

***RJR-Macdonald, supra,*** at pp. 337 and 338.

13. The Applicant has conducted a thorough review of the Acquisition.

**Affidavit of D. Ouellet,** paras. 8-11

14. It is submitted that the issues raised in the Application are neither frivolous nor vexatious and meet the first part of the test for the issuance of an interim order.

### B. Irreparable Harm

15. It is submitted that in assessing irreparable harm where the applicant is a public authority, the issue of the public interest is to be considered not only as a factor in the balance of convenience, but also as an aspect of irreparable harm to the interests of the authority. The onus on the public authority is low where the promotion of compliance with a statutory scheme is at issue.

***RJR-Macdonald, supra,*** at p. 346.

16. It is submitted that irreparable harm will occur in this case in the absence of an interim order. The Pacific and UGG terminals compete in a geographic market with another terminal elevator located at the Port of Vancouver and owned by the Respondent.

17. It is submitted that in the absence of an interim order, the Respondent's decision-making regarding the Pacific and UGG terminals may be affected by its interest in its other, competing terminal. This, in turn, could affect the competitive viability of the Pacific and UGG terminals and, ultimately, have an impact, effectiveness of a Tribunal order that one of those terminals be divested. Moreover, in the absence of an interim order, the Respondent would be in a position to take actions that could adversely affect the ability of Non-integrated Graincos to compete for grain on the prairies, either by limiting access to the most important port grain handling market in Canada, namely Vancouver, or by reducing or eliminating revenue streams flowing from grain handling in the Port of Vancouver.

**C. Balance of Convenience**

18. It is submitted that the balance of convenience is clearly in favour of granting of the proposed Interim Consent Order in this case, in that the public interest in maintaining and encouraging competition outweighs any inconvenience or harm to the Respondent that may result from that order, as evidenced by the Consent of the Respondent to the interim order.

**RELIEF SOUGHT**

19. The Applicant and the Respondent have agreed that pending the final determination of the Application by the Tribunal, a Consent Interim Order in the form attached to the Notice of Application should issue. The Applicant therefore seeks, pursuant to s. 92 and s. 105 of the Act, the issuance of the Consent Interim Order attached hereto.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

**DATED** at Hull, Quebec, this 19th day of December, 2001.

John L. Syme
Counsel to the Commissioner of Competition
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Hull, Quebec KIA OC9

**ADDRESSES FOR SERVICE ON THE APPLICANT:**

Department of Justice
Place du Portage, Phase 1
50 Victoria Street, 22"d Floor
Hull, Quebec
KIA OC9

Attention: Mr. John Syme
Mr. Arsalaan Hyder

Counsel for the Commissioner of Competition

Telephone: (819) 953-3901
Facsimile: (819) 953-9267

**TO:** Registrar, Competition Tribunal
90 Sparks Street, 6th Floor
Ottawa, Ontario
KIA OC9

**AND TO:** Davies Ward Phillips & Vineberg LLP
Suite 4400
1 First Canadian Place
Toronto, ON
M5X IB1

Telephone: (416)863-0900
Fax: (416)863-0871

Attention: Kent Thomson
John Bodrug

Counsel for the Respondents

CT – 2002-001

**THE COMPETITION TRIBUNAL**

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

IN THE MATTER OF an application by the Commissioner of Competition under section 92 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:

**COMMISSIONER OF COMPETITION**

(applicant)

- and –

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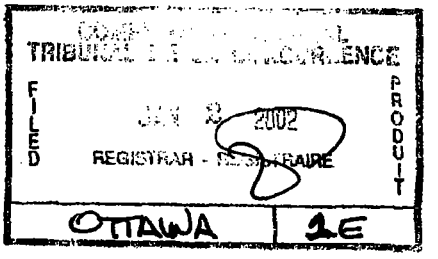


**DRAFT INTERIM CONSENT ORDER**

[1] **FURTHER** to the December 19, 2001 application of the Commissioner of Competition (the "Commissioner") pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act") for an order directing the Divestiture of certain assets and certain other remedies in respect of the merger between Agricore Cooperative Ltd. and United Grain Growers Limited, the merged entities which have been carrying on business as "Agricore United" as of November 1, 2001;

[2] **AND FURTHER** to the application of the Commissioner for an interim consent order pursuant to sections 92 and 104 of the Act directing that certain assets encompassed by the Merger be maintained and preserved pending the hearing and final determination of the application pursuant to section 92 of the Act;

[3] **AND UPON READING** the notice of application dated December 19, 2001, the motion for a interim consent order, the draft interim consent order, the affidavit of David Ouellet dated December 19, 2001, and the consent of the parties, filed herein;

[4] **AND UPON THE DETERMINING** that this is an appropriate case for the issuance of an interim consent order pursuant to sections 92 and 104 of the Act;

[5] **AND UPON CONSIDERING THAT** the Commissioner and Agricore United have reached an agreement which is reflected in this interim order;

[6] **AND IT BEING UNDERSTOOD** that nothing in this application shall be taken as an admission now or in the future by Agricore United or the Commissioner of any facts,

submissions or legal arguments for any other purposes, including any further application under sections 92, 104 or 106 of the Act;

**THE TRIBUNAL ORDERS THAT:**

**Definitions**

[7] For the purposes of this order, the following definitions shall apply:

(a) "Agricore" means Agricore Ltd., a corporation continued under the provisions of the *Canada Business Corporations Act* (Canada);

(b) "Agricore United" means, following the Closing Date, United Grain Growers Limited, a corporation existing under the provisions of the *United Grain Growers Act* (Canada), a Special Act of the Parliament of Canada, and affiliates thereof, and carrying on business as "Agricore United";

(c) "Closing Date" means November 1, 2001;

(d) "Commissioner" means the Commissioner of Competition appointed pursuant to section 7 of the Act;

(e) "CWB" means the Canadian Wheat Board, an organization established under *The Canada Wheat Board Act* (Canada);

(f) "Divest" means to implement a Divestiture;

(g) "Divestiture" means the sale, transfer, assignment, redemption or other disposition (including, with the approval of the Commissioner, an asset swap arrangement) necessary to ensure that Agricore United does not retain, directly or indirectly, except as permitted upon the consent of the Commissioner, any right, title, control, interest, liability or obligation in respect of any of the assets to be Divested inconsistent with the intent of this order, other than obligations in respect of any representations, warranties and covenants included in any agreement between Agricore United and the Purchaser(s) of the Port Terminal as permitted by this order;

(h) "Full Capacity Operation" means a circumstance where terminal authorizations issued by the relevant terminal, which permit a Person to deliver grain to that terminal, equal available capacity at that terminal;

(i) "Independent Grain Companies" means those grain handling companies with no ownership interest in a port terminal in Vancouver and with no affiliation with an owner of a port terminal in Vancouver. For the purpose of this order, a grain handling company is affiliated with a port terminal owner if it has a 20% or more direct or indirect shareholding or ownership interest in the port terminal owner, or if a port terminal owner, other than Agricore United, has a 20% or more direct or indirect shareholding or ownership interest in the grain handling company;

(j) "Merger" means the merger of the port terminal grain handling operations of Agricore and UGG in the Port of Vancouver pursuant to the acquisition of Agricore by UGG pursuant to the Merger Agreement dated as of July 30, 2001;

(k) "Pacific Terminal" means the Pacific Elevators Limited port terminal facility, more particularly described in Schedule "A";

(l) "Person" means any natural person, corporation, association, firm, partnership or other business or legal entity;

(m) "Port Terminal Divestiture Option" has the meaning set out in Schedule "A";

(n) "Port Terminals" means, subject to Schedule "A", the UGG Terminal and the Pacific Terminal;

(o) "Purchaser" means the Person(s) or entity(ies) who purchase(s) a Port Terminal;

(p) "UGG Terminal" means the UGG port terminal located at 1155 Stewart Street, Vancouver, BC V6A 4H4; and

(q) "UGG" means, prior to the Closing Date, United Grain Growers Limited, a corporation existing under the provisions of the *United Grain Growers Act* (Canada), a Special Act of the Parliament of Canada.

**Application**

[8] The provisions of this order shall apply to:

(a) Agricore United;

(b) each division, subsidiary or other Person controlled by Agricore United and each officer, director, employee, agent or other Person acting for or on behalf of Agricore United with respect to any matter referred to in this order; and

(c) the successors and assigns of Agricore United and all other Persons acting in concert or participating with them with respect to any matter referred to in this order who shall have received actual notice of this order.

**Maintenance of the Port Terminals**

[9] During the term of this order, Agricore United shall take such steps as are necessary to maintain the competitive viability of both the UGG Terminal and the Pacific Terminal and shall not dispose of any material assets of the UGG Terminal or the Pacific Terminal.

[10] Without limiting the generality of the foregoing, during the term of this order, Agricore United shall provide such sales, managerial, administrative, operational and financial support as is necessary in the ordinary course of business to promote the continued effective operation of the UGG Terminal and the Pacific Terminal in accordance with standards similar to those existing prior to the Closing Date.

[11] Except as set out in paragraphs 13 to 16 below, during the term of this order, Agricore United shall not, without prior approval from the Commissioner (such approval not to be unreasonably withheld), enter into or withdraw from any material contracts or arrangements relating to the UGG Terminal or the Pacific Terminal, make any material changes to such operations, or terminate any current employment, salary or benefit

agreements for any management personnel employed in relation to either the UGG Terminal or the Pacific Terminal.

[12] During the term of this order, Agricore United shall honour all existing contracts for the handling of grain for Independent Grain Companies. In addition, Agricore United shall offer to handle for Independent Grain Companies in the aggregate a minimum of 125,000 tonnes of grain per month (1.5 million tonnes per year), by way of contracts, through either the UGG Terminal or the Pacific Terminal or through terminal arrangements entered into by Agricore United with other terminals. Where Agricore United enters into a terminal arrangement for the handling of an Independent Grain Company's grain with a third party, there shall be no additional cost to the Independent Grain Company as a result of the use of such third party's facility beyond that contemplated in paragraph [14] below.

[13] During the term of this order, new contracts for the handling of Independent Grain Companies' grain shall be based on reasonable commercial terms consistent with past practice, and shall include: (1) a contract term that ends on a date certain, provided that the Independent Grain Company shall have an option to terminate the contract upon either (i) a trustee being appointed pursuant to an order of the Tribunal to divest one of the Port Terminal Divestiture Options, or (ii) a Divestiture of one of the Port Terminal Divestiture Options, (2) a commitment by the Independent Grain Company that Agricore United will handle all of its Vancouver volume for the duration of the contract, and (3) renegotiation or arbitration in the event of major regulatory change. Agricore United may

terminate such an agreement if the Independent Grain Company does not ship all of its Vancouver volume during the term of the contract through Agricore United.

[14] During the term of this order, prices for the handling of Independent Grain Companies' grain under any new contract shall be based on Agricore United's tariffs as filed with the Canadian Grain Commission under the *Canada Grain Act* (Canada) and Agricore United shall pay a diversion premium of at least $2 per tonne. Diversion premiums negotiated between Agricore United and an Independent Grain Company shall remain confidential. Any non-CWB tariff increase or any diversion premium decrease (CWB or non-CWB grain) from these initial levels must be commercially reasonable.

[15] In the event that bottlenecks, bountiful crop production or other causes create a situation of Full Capacity Operation at a port terminal facility designated to handle Independent Grain Companies' grain in respect of a given period (the "Relevant Period"), a terminal authorization for any given Independent Grain Company's grain will be issued in an amount equal to **(A÷B) x C**

**where:**

**A** = the relevant Independent Grain Company's shipment of grain through the Port of Vancouver for the last three completed months before the Relevant Period;

**B** = the total shipments of grain through the Port of Vancouver for the last three completed months before the Relevant Period; and

**C** = the available capacity at the designated port terminal facility for the Relevant Period.

In the event that an Independent Grain Company's terminal authorizations are reduced pursuant to this provision, all shippers to that terminal will have their terminal authorizations reduced on the same basis.

[16] During the term of this order, any disputes as to compliance with the commitments in paragraphs 13 to 16 as to price, tariffs, diversion premiums or other terms shall be settled by way of an arbitration procedure as outlined in Schedule "B" that is consistent with existing commercial practice and with terms of reference that have regard to market conditions and structure, capacity utilization, costs of operation, reasonable rate of return on investment and regulatory framework. During any arbitration procedure, Agricore United shall continue to provide port terminal services to the Independent Grain Company that initiated the arbitration.

[17] Notwithstanding any other provision of this order, Agricore United shall have no obligation to deal with an Independent Grain Company that defaults in payment or breaches other material terms of its contract with Agricore United.

[18] Agricore United shall provide a copy of this order to the Manager of Vancouver Operations and Agricore United shall direct such manager and any servants or agents of the parties operating and managing the UGG Terminal and the Pacific Terminal to do so in accordance with the terms of this order.

[19] During the term of this order, Agricore United may, with the approval of the Commissioner, implement one of the Port Terminal Divestiture Options.

**Compliance Inspection**

[20] For the purpose of determining or securing compliance with this order, subject to any valid claim to a legally recognized privilege, and upon written request, Agricore United

shall permit any duly authorized representative of the Commissioner:

(a) upon a minimum of 2 business days notice to Agricore United, access during office hours of Agricore United to inspect and copy all relevant books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Agricore United relating to compliance with this order; and

(b) upon a minimum of 5 business days notice to Agricore United, and without restraint or interference from Agricore United, to interview relevant directors, officers or employees of Agricore United on matters in the possession or under the control of Agricore United relating to compliance with this order. Such directors, officers or employees may have counsel present at those interviews.

**Notices**

**[21]** Notices, reports or other communications required or permitted pursuant to this order shall be in writing and shall be considered to be given if dispatched by confirmed personal delivery or facsimile transmission to the address or facsimile number below:

(a) If to the Commissioner:

The Commissioner of Competition
Competition Bureau
Industry Canada
Place du Portage
Phase I, 50 Victoria Street
Hull, Quebec K1A 0C9

Attention: John L. Syme
Arsalaan Hyder

Fax: (819) 953-9267

(b) If to Agricore United:

201 Portage Avenue
TD Centre
Winnipeg, Manitoba
R3C 3A7

Attention: Christopher Martin

Fax: (204) 944-2299

With a copy to:

Davies Ward Phillips & Vineberg LLP
Suite 4400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Attention: Kent Thomson
John Bodrug

Fax: (416) 863-0871

**General**

**[22]** If the Commissioner's approval is sought pursuant to this order and such approval is not granted, or if a decision of the Commissioner is unreasonably delayed or withheld, Agricore United may apply to the Competition Tribunal for approval.

**[23]** In the event of a dispute as to the interpretation or application of this order, or breach of this order by Agricore United, the Commissioner or Agricore United shall be at liberty to apply to the Competition Tribunal for a further order.

**Term of Interim Order**

**[24]** This order shall remain in effect until a further order of the Competition Tribunal or completion of a Port Terminal Divestiture Option, whichever occurs first.

DATED at Ottawa, this day of , 2001.

SIGNED on behalf of the Tribunal by the presiding judicial member.

by _____
Name

**SCHEDULE "A"**

**Port Terminal Divestiture Option**: means, at Agricore United's option, the Divestiture of one of the following:

Option 1: all of Agricore United's shares in Pacific Elevators Limited ("PEL") and Western Pool Terminals Ltd. ("WPTL") and its interest in the Loan Agreement between PEL, WPTL and Alberta Wheat Pool dated January 11, 1996 (the "Pacific Terminal"); or

Option 2: the UGG Terminal.

Once a Divestiture is implemented, the remaining Port Terminal ceases to be a "Port Terminal" for the purposes of this order.

## SCHEDULE "B"

## ARBITRATION PROCEDURES

1. **Initiation of Arbitration Proceedings**

(a) If any party to a port terminal handling agreement (the "Agreement") wishes to have any matter under this Agreement arbitrated in accordance with the provisions of the Agreement, it shall give notice to the other party hereto specifying particulars of the matter or matters in dispute and proposing the name of the person it wishes to be the single arbitrator. Within 15 days after receipt of such notice, the other party to the Agreement shall give notice to the first party advising whether such party accepts the arbitrator proposed by the first party. If such notice is not given within such 15 day period, the other party shall be deemed to have accepted the arbitrator proposed by the first party. Failing agreement of the parties on a single arbitrator within such 15 day period, either party may apply to a judge of the Manitoba Queen's Bench for the appointment of a single arbitrator. The arbitrator, whether agreed on by the parties or appointed by the Court (the "Arbitrator"), shall have the qualifications set out in paragraph (b).

(b) The Arbitrator shall be at arm's length from all parties and as to the five year period prior to the Arbitration shall not be a member of any accounting or legal firm or firms who advise or who have advised any of the parties, nor shall the Arbitrator be an individual who has been retained by any of the parties.

2. **Submission of Written Statements**

(a) Within 15 business days of the appointment of the Arbitrator, the party initiating the arbitration (the "Claimant") shall send to the other party (the "Respondent") a Statement of Claim setting out in sufficient detail the facts and any contentions of law on which it relies, and the relief that it claims.

(b) Within 15 business days of the receipt of the Statement of Claim, the Respondent shall send to the Claimant a Statement of Defence stating in sufficient detail which of the facts and contentions of law in the Statement of Claim it admits or denies on what grounds and on what other facts and contentions of law the Respondent relies.

(c) Within 10 business days of receipt of the Statement of Defence, the Claimant may send the Respondent a Statement of Reply.

(d) All Statements of Claim, Defence and Reply shall be accompanied by copies of all essential documents on which the party concerned relies and which have not previously been submitted by any party, and (where practicable) by any relevant samples.

(e) After submission of all the Statements, the Arbitrator will give directions for further conduct of the arbitration, which shall include meetings and hearings conducted in conformity with the Rules set forth below.

3. **Meetings and Hearings**

(a) Meetings and hearings of the Arbitrator shall take place in the City of Winnipeg, Manitoba or in such other place as the Claimant and the Respondent shall agree upon in writing and such meetings and hearings shall be conducted in the English language unless otherwise agreed by such parties and the Arbitrator. Subject to the foregoing, the Arbitrator may fix the date, time and place of meetings and hearings in the arbitration, and will give all the parties adequate notice of these provided the Arbitration shall commence within 30 days after the exchange of the Statements. Subject to any adjournments, which the Arbitrator allows, the final hearing will be continued on successive working days until it is concluded.

(b) All meetings and hearings will be in private unless the parties otherwise agree.

(c) Any party may attend any meetings and hearings personally and/or be represented at any meetings or hearings by legal counsel or other representative.

(d) Each party may examine, cross-examine and re-examine, as the Arbitrator shall deem appropriate, all witnesses at the arbitration.

(e) The Arbitrator may appoint one or more experts to report to him or her on specific issues to be determined by the Arbitrator. The expert shall be at arm's length from all parties and as to the five year period prior to the Arbitration shall not be a member of any accounting or legal firm or firms who advise or who have advised any of the parties, nor shall the expert be an individual who has been retained by any of the parties. The Arbitrator may require a party to give such expert(s) any relevant information, or to provide access to any relevant documents, goods, materials or other property for the expert's inspection. If a party so requests or if the Arbitrator considers it necessary, such expert(s) shall, after delivery of his or her written or oral report, participate in a hearing where the parties have the opportunity to put questions to him or her and to present expert witnesses in order

to testify on the points in issue.

4. **The Decision**

(a) The Arbitrator will make a decision in writing and, unless both the parties otherwise agree, will set out reasons for his or her conclusions and findings in the decision.

(b) The Arbitrator will send the decision to the parties as soon as practicable after the conclusion of the final hearing, but in any event no later than 60 days thereafter, unless that time period is extended for a fixed period by the Arbitrator on written notice to each party because of illness or other cause beyond the Arbitrator's control.

(c) The decision shall be final and binding on the parties and shall not be subject to any appeal or review procedure provided that the Arbitrator has followed these Rules provided herein in good faith and has proceeded in accordance with the principles of natural justice.

5. **Jurisdiction and Powers of the Arbitrator**

(a) By submitting to arbitration under these Rules, the parties shall be taken to have conferred on the Arbitrator the jurisdiction and powers set out in clause 5(b) below, each of which is to be exercised at the Arbitrator's discretion subject only to these Rules and the relevant law with the object of ensuring the just, expeditious, economical and final determination of the dispute referred to arbitration.

(b) The Arbitrator shall have jurisdiction to:

(i) Determine any question of law arising in the arbitration;

(ii) Determine any question as to the Arbitrator's jurisdiction;

(iii) Determine any question of good faith, dishonesty or fraud arising in the dispute;

(iv) Order any party to furnish further details of that party's case, in fact or in law, or to produce any documents, goods, materials or other property relevant to any fact or law at issue in the arbitration;

(v) Proceed in the arbitration notwithstanding the failure or refusal of any

party to comply with these Rules or with the Arbitrator's orders or directions, or to attend any meeting or hearing, but only after giving that party written notice that the Arbitrator intends to do so;

(vi) Receive and take into account such written or oral evidence tendered by the parties as the Arbitrator determines is relevant, whether or not strictly admissible in law;

(vii) Make one or more interim awards, including without limitation, interim awards to secure all or part of any amount in dispute in the arbitration and injunctive relief;

(viii) Hold meetings and hearings, and make a decision (including a final decision);

(ix) Order the parties to produce to the Arbitrator, and to each other for inspection, and to supply copies of, any documents or classes of documents in their possession or power which the Arbitrator determines to be relevant; and

(x) Order the preservation, storage, sale or other disposal of any property or thing under the control of any of the parties.

(c) In addition, the Arbitrator shall have such further jurisdiction and powers as may be allowed by the *Arbitration Act* of Manitoba, as amended or substituted from time to time.

(d) Notwithstanding the parties' intention that the Arbitrator be able to act free of Court proceedings as set forth herein, the parties consent to the decision of the Arbitrator being entered in any Court having jurisdiction for the purposes of enforcement.

6. **Arbitration Costs**

The Arbitrator's fees and all expenses and disbursements incurred by the Arbitrator in the conduct of the arbitration shall be shared equally between the parties. Expenses and disbursements, including without limitation, legal fees and expenses, travel costs and photocopying incurred by a party for its own participation in the arbitration shall be for the account of such party. The Arbitrator shall not be empowered to award costs to either party.

7. **Confidentiality**

All statements and evidence submitted for the arbitration, the decision of the Arbitrator, the fact of the arbitration itself and all other aspects regarding the arbitration shall be kept strictly confidential except as otherwise required by applicable law.

# Tab 4

Competition Tribunal | Tribunal de la Concurrence

Reference: *Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp. Trib. 01
File no.: CT2002001
Registry document no.: 005

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

IN THE MATTER OF an application by the Commissioner of Competition under section 92 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.

B E T W E E N :

**The Commissioner of Competition**
(applicant)

and

**United Grain Growers Limited**
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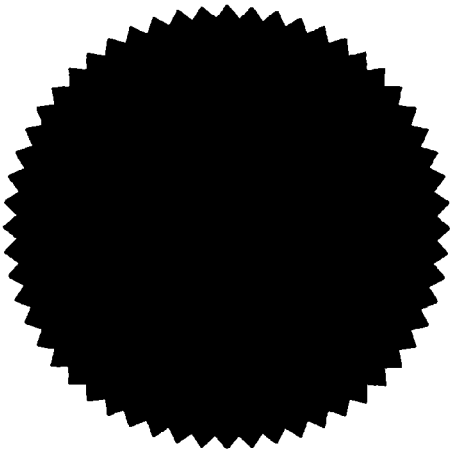


Decided on the basis of the record.
Member: McKeown J. (Chairman)
Date of order: 20020114
Order signed by: McKeown J.

**INTERIM CONSENT ORDER**

[1] FURTHER to the application filed on January 2, 2002, by the Commissioner of Competition (the "Commissioner") pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act") for an order directing the Divestiture of certain assets and certain other remedies in respect of the merger between Agricore Cooperative Ltd. and United Grain Growers Limited, the merged entities which have been carrying on business as "Agricore United" as of November 1, 2001;

[2] AND FURTHER to the application of the Commissioner for an interim consent order pursuant to sections 92 and 104 of the Act directing that certain assets encompassed by the Merger be maintained and preserved pending the hearing and final determination of the application pursuant to section 92 of the Act;

[3] AND UPON READING the notice of application filed January 2, 2002, the notice of application for an interim consent order, the draft interim consent order, the applicant's memorandum of argument on interim order, the affidavit of David Ouellet dated December 19, 2001, and the consent of the parties, filed herein;

[4] AND UPON DETERMINING that this is an appropriate case for the issuance of an interim consent order pursuant to sections 92 and 104 of the Act;

[5] AND UPON CONSIDERING that the Commissioner and Agricore United have reached an agreement which is reflected in this interim order;

[6] AND IT BEING UNDERSTOOD that nothing in this application shall be taken as an admission now or in the future by Agricore United or the Commissioner of any facts, submissions or legal arguments for any other purposes, including any further application under sections 92, 104 or 106 of the Act;

THE TRIBUNAL ORDERS THAT:

**Definitions**

[7] For the purposes of this order, the following definitions shall apply:

(a) "Agricore" means Agricore Ltd., a corporation continued under the provisions of the *Canada Business Corporations Act* (Canada);

(b) "Agricore United" means, following the Closing Date, United Grain Growers Limited, a corporation existing under the provisions of the *United Grain Growers Act* (Canada), a Special Act of the Parliament of Canada, and affiliates thereof, and carrying on business as "Agricore United";

(c) "Closing Date" means November 1, 2001;

(d) "Commissioner" means the Commissioner of Competition appointed pursuant to section 7 of the Act;

(e) "CWB" means the Canadian Wheat Board, an organization established under *The Canada Wheat Board Act* (Canada);

(f) "Divest" means to implement a Divestiture;

(g) "Divestiture" means the sale, transfer, assignment, redemption or other disposition (including, with the approval of the Commissioner, an asset swap arrangement) necessary to ensure that Agricore United does not retain, directly or indirectly, except as permitted upon the consent of the Commissioner, any right, title, control, interest, liability or obligation in respect of any of the assets to be Divested inconsistent with the intent of this order, other than obligations in respect of any representations, warranties and covenants included in any agreement between Agricore United and the Purchaser(s) of the Port Terminal as permitted by this order;

(h) "Full Capacity Operation" means a circumstance where terminal authorizations issued by the relevant terminal, which permit a Person to deliver grain to that terminal, equal available capacity at that terminal;

(i) "Independent Grain Companies" means those grain handling companies with no ownership interest in a port terminal in Vancouver and with no affiliation with an owner of a port terminal in Vancouver. For the purpose of this order, a grain handling company is affiliated with a port terminal owner if it has a 20% or more direct or indirect shareholding or ownership interest in the port terminal owner, or if a port terminal owner, other than Agricore United, has a 20% or more direct or indirect shareholding or ownership interest in the grain handling company;

(j) "Merger" means the merger of the port terminal grain handling operations of Agricore and UGG in the Port of Vancouver pursuant to the acquisition of Agricore by UGG pursuant to the Merger Agreement dated as of July 30, 2001;

(k) "Pacific Terminal" means the Pacific Elevators Limited port terminal facility, more particularly described in Schedule "A";

(l) "Person" means any natural person, corporation, association, firm, partnership or other business or legal entity;

(m) "Port Terminal Divestiture Option" has the meaning set out in Schedule "A";

(n) "Port Terminals" means, subject to Schedule "A", the UGG Terminal and the Pacific Terminal;

(o) "Purchaser" means the Person(s) or entity(ies) who purchase(s) a Port Terminal;

(p) "UGG Terminal" means the UGG port terminal located at 1155 Stewart Street, Vancouver, BC V6A 4H4; and

(q) "UGG" means, prior to the Closing Date, United Grain Growers Limited, a corporation existing under the provisions of the *United Grain Growers Act* (Canada), a Special Act of the Parliament of Canada.

**Application**

**[8]** The provisions of this order shall apply to:

(a) Agricore United;

(b) each division, subsidiary or other Person controlled by Agricore United and each officer, director, employee, agent or other Person acting for or on behalf of Agricore United with respect to any matter referred to in this order; and

(c) the successors and assigns of Agricore United and all other Persons acting in concert or participating with them with respect to any matter referred to in this order who shall have received actual notice of this order.

**Maintenance of the Port Terminals**

**[9]** During the term of this order, Agricore United shall take such steps as are necessary to maintain the competitive viability of both the UGG Terminal and the Pacific Terminal and shall not dispose of any material assets of the UGG Terminal or the Pacific Terminal.

**[10]** Without limiting the generality of the foregoing, during the term of this order, Agricore United shall provide such sales, managerial, administrative, operational and financial support as is necessary in the ordinary course of business to promote the continued effective operation of the UGG Terminal and the Pacific Terminal in accordance with standards similar to those existing prior to the Closing Date.

**[11]** Except as set out in paragraphs 13 to 16 below, during the term of this order, Agricore United shall not, without prior approval from the Commissioner (such approval not to be unreasonably withheld), enter into or withdraw from any material contracts or arrangements relating to the UGG Terminal or the Pacific Terminal, make any material changes to such operations, or terminate any current employment, salary or benefit agreements for any management personnel employed in relation to either the UGG Terminal or the Pacific Terminal.

**[12]** During the term of this order, Agricore United shall honour all existing contracts for the handling of grain for Independent Grain Companies. In addition, Agricore United shall offer to handle for Independent Grain Companies in the aggregate a minimum of 125,000 tonnes of grain

per month (1.5 million tonnes per year), by way of contracts, through either the UGG Terminal or the Pacific Terminal or through terminal arrangements entered into by Agricore United with other terminals. Where Agricore United enters into a terminal arrangement for the handling of an Independent Grain Company's grain with a third party, there shall be no additional cost to the Independent Grain Company as a result of the use of such third party's facility beyond that contemplated in paragraph 14 below.

**[13]** During the term of this order, new contracts for the handling of Independent Grain Companies' grain shall be based on reasonable commercial terms consistent with past practice, and shall include: (1) a contract term that ends on a date certain, provided that the Independent Grain Company shall have an option to terminate the contract upon either (i) a trustee being appointed pursuant to an order of the Tribunal to divest one of the Port Terminal Divestiture Options, or (ii) a Divestiture of one of the Port Terminal Divestiture Options, (2) a commitment by the Independent Grain Company that Agricore United will handle all of its Vancouver volume for the duration of the contract, and (3) renegotiation or arbitration in the event of major regulatory change. Agricore United may terminate such an agreement if the Independent Grain Company does not ship all of its Vancouver volume during the term of the contract through Agricore United.

**[14]** During the term of this order, prices for the handling of Independent Grain Companies' grain under any new contract shall be based on Agricore United's tariffs as filed with the Canadian Grain Commission under the *Canada Grain Act* (Canada) and Agricore United shall pay a diversion premium of at least $2 per tonne. Diversion premiums negotiated between Agricore United and an Independent Grain Company shall remain confidential. Any non-CWB tariff increase or any diversion premium decrease (CWB or non-CWB grain) from these initial levels must be commercially reasonable.

**[15]** In the event that bottlenecks, bountiful crop production or other causes create a situation of Full Capacity Operation at a port terminal facility designated to handle Independent Grain Companies' grain in respect of a given period (the "Relevant Period"), a terminal authorization for any given Independent Grain Company's grain will be issued in an amount equal to **(A÷B) x C**

**where:**

**A** = the relevant Independent Grain Company's shipment of grain through the Port of Vancouver for the last three completed months before the Relevant Period;

**B** = the total shipments of grain through the Port of Vancouver for the last three completed months before the Relevant Period; and

**C** = the available capacity at the designated port terminal facility for the Relevant Period.
In the event that an Independent Grain Company's terminal authorizations are reduced pursuant to this provision, all shippers to that terminal will have their terminal authorizations reduced on the same basis.

**[16]** During the term of this order, any disputes as to compliance with the commitments in paragraphs 13 to 16 as to price, tariffs, diversion premiums or other terms shall be settled by way of an arbitration procedure as outlined in Schedule "B" that is consistent with existing commercial practice and with terms of reference that have regard to market conditions and structure, capacity utilization, costs of operation, reasonable rate of return on investment and regulatory framework. During any arbitration procedure, Agricore United shall continue to provide port terminal services to the Independent Grain Company that initiated the arbitration.

**[17]** Notwithstanding any other provision of this order, Agricore United shall have no obligation to deal with an Independent Grain Company that defaults in payment or breaches other material terms of its contract with Agricore United.

**[18]** Agricore United shall provide a copy of this order to the Manager of Vancouver Operations and Agricore United shall direct such manager and any servants or agents of the parties operating and managing the UGG Terminal and the Pacific Terminal to do so in accordance with the terms of this order.

**[19]** During the term of this order, Agricore United may, with the approval of the Commissioner, implement one of the Port Terminal Divestiture Options.

**Compliance Inspection**

**[20]** For the purpose of determining or securing compliance with this order, subject to any valid claim to a legally recognized privilege, and upon written request, Agricore United shall permit any duly authorized representative of the Commissioner:

(a) upon a minimum of 2 business days notice to Agricore United, access during office hours of Agricore United to inspect and copy all relevant books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Agricore United relating to compliance with this order; and

(b) upon a minimum of 5 business days notice to Agricore United, and without restraint or interference from Agricore United, to interview relevant directors, officers or employees of Agricore United on matters in the possession or under the control of Agricore United relating to compliance with this order. Such directors, officers or employees may have counsel present at those interviews.

**Notices**

**[21]** Notices, reports or other communications required or permitted pursuant to this order shall be in writing and shall be considered to be given if dispatched by confirmed personal delivery or facsimile transmission to the address or facsimile number below:

(a) If to the Commissioner:

The Commissioner of Competition
Competition Bureau
Industry Canada
Place du Portage
Phase I, 50 Victoria Street
Hull, Quebec
K1A 0C9

Attention: John L. Syme
Arsalaan Hyder
Fax: (819) 953-9267

(b) If to the respondent:

Agricore United
201 Portage Avenue
TD Centre
Winnipeg, Manitoba
R3C 3A7

Attention: Christopher Martin
Fax: (204) 944-2299

With a copy to:

Davies Ward Phillips & Vineberg LLP
Suite 4400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Attention: Kent Thomson
John Bodrug
Fax: (416) 863-0871

**General**

**[22]** If the Commissioner's approval is sought pursuant to this order and such approval is not granted, or if a decision of the Commissioner is unreasonably delayed or withheld, Agricore United may apply to the Competition Tribunal for approval.

**[23]** In the event of a dispute as to the interpretation or application of this order, or breach of this order by Agricore United, the Commissioner or Agricore United shall be at liberty to apply to the Competition Tribunal for a further order.

**Term of Interim Consent Order**

**[24]** This order shall remain in effect until a further order of the Competition Tribunal or completion of a Port Terminal Divestiture Option, whichever occurs first.

DATED at Toronto, this 14th day of January, 2002.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) W. P. McKeown

## SCHEDULE "A"

**Port Terminal Divestiture Option**: means, at Agricore United's option, the Divestiture of one of the following:

Option 1: all of Agricore United's shares in Pacific Elevators Limited ("PEL") and Western Pool Terminals Ltd. ("WPTL") and its interest in the Loan Agreement between PEL, WPTL and Alberta Wheat Pool dated January 11, 1996 (the "Pacific Terminal"); or

Option 2: the UGG Terminal.

Once a Divestiture is implemented, the remaining Port Terminal ceases to be a "Port Terminal" for the purposes of this order.

## SCHEDULE "B"

## ARBITRATION PROCEDURES

1. **Initiation of Arbitration Proceedings**

(a) If any party to a port terminal handling agreement (the "Agreement") wishes to have any matter under this Agreement arbitrated in accordance with the provisions of the Agreement, it shall give notice to the other party hereto specifying particulars of the matter or matters in dispute and proposing the name of the person it wishes to be the single arbitrator. Within 15 days after receipt of such notice, the other party to the Agreement shall give notice to the first party advising whether such party accepts the arbitrator proposed by the first party. If such notice is not given within such 15 day period, the other party shall be deemed to have accepted the arbitrator proposed by the first party. Failing agreement of the parties on a single arbitrator within such 15 day period, either party may apply to a judge of the Manitoba Queen's Bench for the appointment of a single arbitrator. The arbitrator, whether agreed on by the parties or appointed by the Court (the "Arbitrator"), shall have the qualifications set out in paragraph (b).

(b) The Arbitrator shall be at arm's length from all parties and as to the five year period prior to the Arbitration, shall not be a member of any accounting or legal firm or firms who advise or who have advised any of the parties, nor shall the Arbitrator be an individual who has been retained by any of the parties.

2. **Submission of Written Statements**

(a) Within 15 business days of the appointment of the Arbitrator, the party initiating the Arbitration (the "Claimant") shall send to the other party (the "Respondent") a Statement of Claim setting out in sufficient detail the facts and any contentions of law on which it relies, and the relief that it claims.

(b) Within 15 business days of the receipt of the Statement of Claim, the Respondent shall send to the Claimant a Statement of Defence stating in sufficient detail which of the facts and contentions of law in the Statement of Claim it admits or denies on what grounds and on what other facts and contentions of law the Respondent relies.

(c) Within 10 business days of receipt of the Statement of Defence, the Claimant may send the Respondent a Statement of Reply.

(d) All Statements of Claim, Defence and Reply shall be accompanied by copies of all essential documents on which the party concerned relies and which have not previously been submitted by any party, and (where practicable) by any relevant samples.

(e) After submission of all the Statements, the Arbitrator will give directions for further conduct of the arbitration, which shall include meetings and hearings conducted in conformity with the Rules set forth below.

3. **Meetings and Hearings**

(a) Meetings and hearings of the Arbitrator shall take place in the City of Winnipeg, Manitoba or in such other place as the Claimant and the Respondent shall agree upon in writing and such meetings and hearings shall be conducted in the English language unless otherwise agreed by such parties and the Arbitrator. Subject to the foregoing, the Arbitrator may fix the date, time and place of meetings and hearings in the arbitration, and will give all the parties adequate notice of these provided the Arbitration shall commence within 30 days after the exchange of the Statements. Subject to any adjournments, which the Arbitrator allows, the final hearing will be continued on successive working days until it is concluded.

(b) All meetings and hearings will be in private unless the parties otherwise agree.

(c) Any party may attend any meetings and hearings personally and/or be represented at any meetings or hearings by legal counsel or other representative.

(d) Each party may examine, cross-examine and re-examine, as the Arbitrator shall deem appropriate, all witnesses at the arbitration.

(e) The Arbitrator may appoint one or more experts to report to him or her on specific issues to be determined by the Arbitrator. The expert shall be at arm's length from all parties and as to the five year period prior to the Arbitration shall not be a member of any accounting or legal firm or firms who advise or who have advised any of the parties, nor shall the expert be an individual who has been retained by any of the parties. The Arbitrator may require a party to give such expert(s) any relevant information, or to provide access to any relevant documents, goods, materials or other property for the expert's inspection. If a party so requests or if the Arbitrator considers it necessary, such expert(s) shall, after delivery of his or her written or oral report, participate in a hearing where the parties have the opportunity to put questions to him or her and to present expert witnesses in order to testify on the points in issue.

4. **The Decision**

(a) The Arbitrator will make a decision in writing and, unless both the parties otherwise agree, will set out reasons for his or her conclusions and findings in the decision.

(b) The Arbitrator will send the decision to the parties as soon as practicable after the conclusion of the final hearing, but in any event no later than 60 days thereafter, unless that time period is extended for a fixed period by the Arbitrator on written notice to each party because of illness or other cause beyond the Arbitrator's control.

(c) The decision shall be final and binding on the parties and shall not be subject to any appeal or review procedure provided that the Arbitrator has followed these Rules provided herein in good faith and has proceeded in accordance with the principles of natural justice.

5. **Jurisdiction and Powers of the Arbitrator**

(a) By submitting to arbitration under these Rules, the parties shall be taken to have conferred on the Arbitrator the jurisdiction and powers set out in clause 5(b) below, each of which is to be exercised at the Arbitrator's discretion subject only to these Rules and the relevant law with the object of ensuring the just, expeditious, economical and final determination of the dispute referred to arbitration.

(b) The Arbitrator shall have jurisdiction to:

(i) Determine any question of law arising in the arbitration;

(ii) Determine any question as to the Arbitrator's jurisdiction;

(iii) Determine any question of good faith, dishonesty or fraud arising in the dispute;

(iv) Order any party to furnish further details of that party's case, in fact or in law, or to produce any documents, goods, materials or other property relevant to any fact or law at issue in the arbitration;

(v) Proceed in the arbitration notwithstanding the failure or refusal of any party to comply with these Rules or with the Arbitrator's orders or directions, or to attend any meeting or hearing, but only after giving that party written notice that the Arbitrator intends to do so;

(vi) Receive and take into account such written or oral evidence tendered by the parties as the Arbitrator determines is relevant, whether or not strictly admissible in law;

(vii) Make one or more interim awards, including without limitation, interim awards to secure all or part of any amount in dispute in the arbitration and injunctive relief;

(viii) Hold meetings and hearings, and make a decision (including a final decision);

(ix) Order the parties to produce to the Arbitrator, and to each other for inspection, and to supply copies of, any documents or classes of documents in their possession or power which the Arbitrator determines to be relevant; and

(x) Order the preservation, storage, sale or other disposal of any property or thing under the control of any of the parties.

(c) In addition, the Arbitrator shall have such further jurisdiction and powers as may be allowed by the *Arbitration Act* of Manitoba, as amended or substituted from time to time.

(d) Notwithstanding the parties' intention that the Arbitrator be able to act free of Court proceedings as set forth herein, the parties consent to the decision of the Arbitrator being entered in any Court having jurisdiction for the purposes of enforcement.

6. **Arbitration Costs**

The Arbitrator's fees and all expenses and disbursements incurred by the Arbitrator in the conduct of the arbitration shall be shared equally between the parties. Expenses and disbursements, including without limitation, legal fees and expenses, travel costs and photocopying incurred by a party for its own participation in the arbitration shall be for the account of such party. The Arbitrator shall not be empowered to award costs to either party.

7. **Confidentiality**

All statements and evidence submitted for the arbitration, the decision of the Arbitrator, the fact of the arbitration itself and all other aspects regarding the arbitration shall be kept strictly confidential except as otherwise required by applicable law.

COUNSEL

For the applicant:

The Commissioner of Competition

John L. Syme
Arsalaan Hyder

For the respondent:

United Grain Growers Limited

Kent Thomson
John Bodrug

# Tab 5

Competition Tribunal | Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. United Grain Growers Limited,* 2002 Comp. Trib. 33
File no.: CT2002001
Registry document no.: 0074

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

AND IN THE MATTER of an application by the Commissioner of Competition under section 92 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.

B E T W E E N :

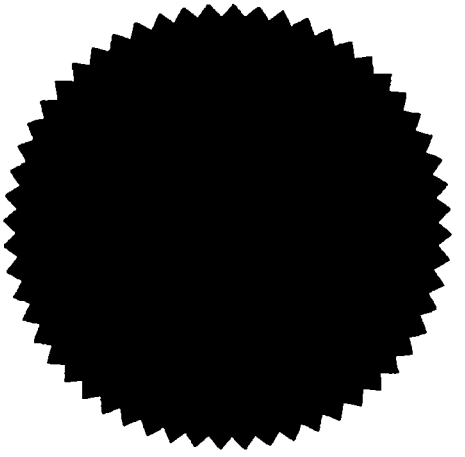
**The Commissioner of Competition**
(applicant)

and

**United Grain Growers Limited**
(respondent)

and

**The Canadian Wheat Board**
(intervenor)



Date of hearing: 20020910
Members: Dawson J. (presiding), L. Schwartz, A. Reny
Date of findings and determinations: 20020912
Findings and determinations signed by: Dawson J.

**FINDINGS AND DETERMINATIONS OF THE COMPETITION TRIBUNAL PURSUANT TO SECTION 92 OF THE *COMPETITION ACT***

[1] FURTHER to the application filed on January 2, 2002, by the Commissioner of Competition (the "Commissioner") pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), for an order directing the divestiture of certain assets and certain other remedies in respect of the Respondent's acquisition of Agricore Cooperative Ltd. on November 1, 2001 (the "Acquisition"), the merged entities having carried on business as "Agricore United" as of November 1, 2001;

[2] AND FURTHER to the Joint Submission by the Respondent and the Commissioner requesting certain findings and determinations pursuant to section 92 of the Act and subsections 8(1) and 8(2) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended (the "Competition Tribunal Act");

[3] AND UPON READING the notice of application filed January 2, 2002 (the "Notice of Application"); the Statement of Grounds and Material Facts dated December 19, 2001 (the "SGMF"); the affidavit of David Ouellet sworn December 19, 2001; the response filed February 6, 2002 (the "Response"); the reply filed February 25, 2002 (the "Reply"); the Joint Submission and Request for Findings and Determinations, dated September 6, 2002; the draft Findings and Determinations; the Respondent's Memorandum of Argument; the affidavit of Debra Bilous, sworn August 13, 2002; the Commissioner's Memorandum of Argument; the affidavit of Dr. William W. Wilson, sworn September 10, 2002; the affidavit of David Ouellet, sworn September 6, 2002, and the Parties' Position on the SGMF;

[4] AND UPON CONVENING the hearing of this matter in respect of the findings and determinations set out below and hearing the expert testimony of Dr. William W. Wilson and the evidence of David Ouellet, a senior competition law officer at the Competition Bureau who was involved with the investigation of the case, and adjourning the balance of the hearing to a later date;

[5] AND UPON DETERMINING THAT this is an appropriate case for the Tribunal to make findings and determinations at the outset of the hearing pursuant to section 92 of the Act and subsections 8(1) and 8(2) of the Competition Tribunal Act;

[6] AND UPON CONSIDERING the Confidential Agreement reached between the Commissioner and the Respondent on October 31, 2001;

[7] AND BEING SATISFIED that based on the evidentiary record before the Tribunal as of September 10, 2002, the Tribunal should make the findings below;

[8] AND FOR THE REASONS that will be delivered in writing after the completion of the balance of the hearing scheduled to take place in Vancouver, on October 21, 2002;

**Definitions**

[9] For the purposes of these Findings and Determinations, the following definitions apply:

(a) "PEL Interest" means the Respondent's interest in Pacific Elevators Limited ("PEL") and Western Pool Terminals Ltd. ("WPTL") and its interest in the loan agreement between PEL, WPTL and Alberta Wheat Pool dated January 11, 1996;

(b) "Pacific 1 Terminal" means that part of the Pacific Elevators complex known as the Pacific 1 Terminal and more particularly described in the Response;

(c) "SGMF" means the Statement of Grounds and Material Facts filed with the Notice of Application;

(d) "SLC" means the substantial lessening of competition as alleged by the Commissioner in the SGMF; and

(e) "UGG Terminal" means the grain terminal in Vancouver, British Columbia, owned by the Respondent prior to the Acquisition;

**[10]** The Tribunal hereby finds and determines that:

(a) the Acquisition causes an SLC as alleged by the Commissioner and, for the purposes of this proceeding, not contested by the Respondent, without the need for further evidence to establish an SLC or elements of an SLC;

(b) the divestiture by the Respondent of either the UGG Terminal or the PEL Interest, as requested by the Commissioner in the Notice of Application, is sufficient to address the SLC;

(c) the divestiture by the Respondent of the Pacific 1 Terminal, either alone or in combination with a portion of the Annex component of the Pacific Elevators complex (the "Annex"), would also be sufficient to address the SLC if:

(i) the divestiture is to an entity that does not have any direct or indirect interest in a Vancouver port grain terminal (other than Neptune or Vancouver Wharves);

(ii) the acquiring entity is independent of Agricore United;

(iii) the divestiture would result in the acquirer being able to operate on a stand alone basis independent of the other port grain terminal operators similar to, for example, the stand alone basis on which the UGG Terminal operates today; and

(iv) the divestiture would enable the acquirer to handle at least 2.2 million tonnes of any combination of grain, oil seeds and specialty crops per annum in the Port of Vancouver on a commercially competitive basis; and

(d) the Tribunal leaves to determination at a later date the issue of whether the Pacific 1 Terminal, either alone or in combination with a portion of the Annex, meets the four part test set out immediately above (the "Four Part Test").

**[11]** The Tribunal further confirms that the parties' joint submission and request for findings and determinations, and the findings and determinations made herein, do not limit the scope of the evidence which the parties are permitted to lead in respect of the issue of whether the Pacific 1 Terminal meets the Four Part Test.

DATED at Ottawa, this 12th day of September, 2002.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Eleanor R. Dawson

APPEARANCES:

For the applicant:

The Commissioner of Competition

John Campion
John L. Syme
Melanie L. Aitken

For the respondent:

United Grain Growers Limited

Kent Thomson
Sandra A. Forbes
John D. Bodrug

For the intervenor:

The Canadian Wheat Board

Randal T. Hughes

# Tab 6

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** the acquisition by the Commissioner of Competition under section 92 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:**



COMMISSIONER OF COMPETITION

Applicant

- AND -

UNITED GRAIN GROWERS LIMITED

**Respondent**

---

**REQUEST FOR LEAVE TO INTERVENE**
**ON BEHALF OF THE CANADIAN WHEAT BOARD**

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The Canadian Wheat Board ("the CWB") requests leave of the Competition Tribunal pursuant to Section 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19, as amended, to intervene in these proceedings. In support of this request, the CWB intends to rely up on the Affidavit of Adrian C. Measner sworn February 19, 2002.

1. **Name and Address of the Proposed Intervenor:**

   The Canadian Wheat Board
   423 Main Street
   P.O. Box 816
   Station Main
   Winnipeg, Manitoba
   R3C 2P5

Attention: James E. McLandress, General Counsel

Telephone: (204) 984-2413
Fax: (204) 983-5609

**Address for Service:**

Fraser Milner Casgrain LLP
P.O. Box 100
1 First Canadian Place
Toronto, Ontario
M5M 1E8
Attention: Randal T. Hughes

Phone: (416) 863-4446
Fax: (416) 863-4592
E-mail:randy.hughes@fmc-law.com

2. **The matters in issue that affect CWB and the competitive consequences arising from such matters:**

(a) The CWB is a farmer controlled marketing organization. It 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. Its mission is to market quality products and services in order to maximize returns to Western Canadian grain producers. The *CWB Act* and the regulations passed under it give the CWB exclusive jurisdiction over the purchase and sale of wheat, durum and barley grown in Western Canada and intended for export or domestic human consumption ("CWB grains").

(b) All of the money received by the CWB for the sale of CWB grains is pooled into one of four accounts (wheat, durum, barley and designated (i.e. malt) barley) and, after deducting the CWB's operating costs, all of the sales revenue earned by the CWB is returned to producers. Any increase in the operating costs of the CWB results in a reduction in the return to producers for CWB grains that the CWB markets on their behalf.

(c) 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, including United Grain Growers Limited ("UGG") and Agricore Cooperative Ltd. ("Agricore").

(d) The port terminal grain handling services in the Port of Vancouver are essential to the CWB's operations. In the Crop Years 1999-2000 and 2000-2001, an average of 8.9 million tonnes of CWB grains passed through these facilities, accounting for approximately 47.5% per

cent of CWB grains exported. The Vancouver facilities in which the merged entity Agricore United will have a complete or partial interest (Pacific Terminals, UGG Terminal and Cascadia Terminal) collectively handled an average of 62.5% of all CWB grain unloads in Vancouver in both of those years.

(e) The Commissioner and the Respondent have agreed for the purposes of this Application that the acquisition by UGG of Agricore is likely to prevent or lessen competition substantially in the market for port terminal grain handling services in the Port of Vancouver.

(f) The CWB is concerned that any further consolidation of the terminal capacity at the Port of Vancouver will further enhance the considerable market power which now exists in that market, adversely impacting access to facilities, prices, levels and quality of service both at the Port of Vancouver and upstream at the primary grain elevator level.

(g) The CWB is concerned that the alternative partial divestiture proposed by UGG in this Application will not adequately remedy the substantial lessening or prevention of competition arising from the acquisition.

(h) The CWB has a unique perspective on the potential competitive effects of the acquisition and the extent to which the partial divestiture proposed by UGG would provide an adequate remedy because it is the direct representative of Western Canadian producers of wheat and barley and is a major user of terminal facilities at the Port of Vancouver.

3. **The party whose position CWB intends to support:**

Based on the materials filed to date with the Competition Tribunal, the CWB intends to generally support the position of the Applicant.

4. **The Official Language to be used:**

English

5. **At this time, CWB proposes to participate in the proceedings on the following basis:**

(a) the review of any discovery transcripts and access to any discovery documents of the parties to the Application (but not direct participation in the discovery process);

(b) the calling of *viva voce* evidence and the cross-examination of witnesses at the hearing of the Application (to the extent not repetitive of the examination and cross-examination of the parties to the Application); and

(c) the submission of legal argument at the hearing of the Application and at any pre-hearing motions and at prehearing conferences.

DATED at Toronto, Ontario this 19th day of February, 2002

Fraser Milner Casgrain LLP
P.O. Box 100
1 First Canadian Place
Toronto, Ontario
M5M 1E8

Attention: Randal T. Hughes
Susan E. Paul
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Fax: (416) 863-4592

Barry Zalmanowitz
Telephone: (780) 423-7344
Fax: (780) 423-7276

**Solicitors for the Canadian Wheat Board**

1401593_1.DOC

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** the acquisition by the Commissioner of Competition under section 92 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:**

COMMISSIONER OF COMPETITION

Applicant



- AND -

UNITED GRAIN GROWERS LIMITED

Respondent

---

**AFFIDAVIT OF**
**ADRIAN C. MEASNER**

---

1. I am the Executive Vice-President of Marketing for the Canadian Wheat Board ("the CWB") and as such have knowledge of the matters hereinafter deposed to, except where stated to be 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 ten 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. Its mission is to market quality products and services in order to maximize returns to Western Canadian grain producers.

4. The *CWB Act* and the regulations passed under it give the CWB exclusive jurisdiction over the purchase and sale of wheat, durum and barley grown in Western Canada and intended for export or domestic human consumption ("CWB grains").

5. Producers deliver their CWB grains over the course of the crop year to primary elevator companies that act as handling agents for the CWB. 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.

6. 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 per cent or more of all sales proceeds being returned to producers. The amount that each producer ultimately receives for its 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. Grain companies in Canada may be categorized as "integrated" companies which have both port and country facilities and "non-integrated" companies which have only country facilities. At the Port of Vancouver there are four integrated companies: Agricore United, Saskatchewan Wheat Pool ("SWP"), James Richardson International ("JRI") and Cargill Canada Ltd. ("Cargill"). It is my understanding that the ownership interests of these companies in terminal facilities located in Vancouver are as follows: Agricore United has the United Grain Growers Limited ("UGG") terminal and a partial interesting both Cascadia Terminal (50%) and Pacific Elevators (70%). SWP has its own facility and a partial interest in Pacific Terminals (30%). JRI has its own facility and Cargill has a 50% interest in Cascadia Terminal. There are a few reasonably large non-integrated companies such as Louis Dreyfus Canada Ltd., N. M. Paterson & Sons Limited, Parrish & Heimbecker Limited and Conagra Grain Canada. Finally, there are a number of small non-integrated companies, most of which own a single grain handling facility in the country. Many of these single point elevator companies are represented by the Inland Terminals Association of Canada. Non-integrated grain companies depend on the four integrated grain companies for access to port terminal facilities.

8. The CWB conducts business with both integrated and non-integrated grain companies.

9. Integrated companies can determine the economic viability of non-integrated companies through their ownership of terminal elevators. The ability of a non-integrated company to compete for the farmers' grain in Western Canada often depends on: (a) the level of diversion payments paid out to non-integrated grain companies in return for the processing of their originations at port, and (b) the granting of terminal authorization to unload non-integrated companies' cars at port. Ownership of the port terminal facilities can therefore affect competitiveness throughout the grain industry.

**Grain Terminal Facilities at the Port of Vancouver**

10. The port terminal grain handling services in the Port of Vancouver are essential to the CWB's operations. In each of the crop years 1999-2000 and 2000-2001, an average of 8.9 million tonnes of CWB grains passed through these facilities, accounting for approximately 47.5% per cent of CWB grains exported. The Vancouver facilities in which the merged entity Agricore United will have a complete or partial interest (Pacific Terminals, UGG Terminal and Cascadia Terminal) collectively handled an average of 62.5% of all CWB grain unloads in Vancouver in both of those years.

11. There is limited ability to shift tonnage of CWB grain between the Port of Vancouver and other Canadian or U.S. ports in an attempt to enhance terminal competition at Vancouver. West Coast ports yield the greatest returns for Western producers of CWB grain and the use of alternative facilities results in reduced returns for those producers.

12. The CWB's 10-year forecast of Canadian grain and oilseeds exports shows an overall increase to almost 27 MT by 2008-2009 and a portion of this increase in trade is projected to come from markets which have traditionally been served through West Coast ports, including Vancouver. Accordingly, the Port of Vancouver is expected to remain an important export corridor for the sale of CWB grains.

**The Anti-Competitive Effect on the Canadian Wheat Board of a Partial Divestiture of the Pacific Complex**

13. As I understand it, the Commissioner and the Respondent have agreed for the purposes of this Application that the acquisition by UGG of Agricore Cooperative Ltd. is likely to prevent or lessen competition substantially in the market for port terminal grain handling services in the Port of Vancouver. The CWB is concerned that any further consolidation of the terminal capacity at the Port of Vancouver will further enhance the market power which now exists in that market, adversely impacting access to facilities, prices, and quality of service both at the Port of Vancouver, and upstream at the country or primary grain elevator level.

14. I believe that existing market power at the Port of Vancouver already manifests itself in the terminals' posted tariffs, which have been rising continuously for the past several years. These tariffs are a significant cost to the CWB and its producers. For example, FOB charges alone are in the range of $8 to $10 per tonne and every tonne of CWB grain that passes through a terminal in Vancouver is subject to an FOB charge. This is in addition to terminal tariffs for various services and programs that the CWB requests and in addition to terminal tariffs for weighing and inspection and cleaning that producers pay when they deliver their CWB grain to the elevators in the country. 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.

15. Market power at the Port of Vancouver also manifests itself in the unwillingness of the integrated companies to enter 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. Significantly, both facilities are owned by independent operators that do not own country facilities. In the fall of 2000, the CWB proposed the implementation of individual terminal agreements with the integrated companies in the Port of Vancouver to specify a guaranteed level of terminal space and number of CWB unloads for a negotiated rate. The CWB's willingness to enter into such 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. To date, however, the terminals have resisted entering into negotiations individually and the CWB has had to deal with the terminals as a group in order to reach an arrangement assuring the CWB access to port terminal grain facilities at Vancouver.

16. The CWB is particularly concerned that the alternative partial divestiture proposed by UGG in this Application will not adequately remedy the substantial lessening or prevention of competition arising from the acquisition and that it could have a substantial effect on competition including increases in prices for utilizing terminal facilities, reduced access to terminal facilities for non-integrated grain companies, and the lessening of competition in the country if the diversion payments currently offered by terminals to non-integrated facilities are reduced or eliminated. Ultimately these would have an adverse impact on the farmers whom the CWB represents.

17. The CWB believes that Pacific 1 Terminal may not be able to compete on an economically viable basis as a stand-alone facility. We are concerned that there are a number of potentially serious shortcomings to Pacific 1 Terminal as a stand-alone facility. Based on the information currently available, our primary concerns are that Pacific 1 Terminal's rail car spotting and unloading capabilities are inadequate and that it has insufficient storage space. Ensuring proper unload and storage capacity is a critical issue for the viability of any terminal facility.

18. For these reasons, the CWB believes that the divestiture of Pacific 1 Terminal alone is not an adequate remedy and that a divestiture as proposed by the Commissioner is required.

**Unique Perspective of the Canadian Wheat Board**

19. The CWB has a unique perspective on the potential competitive effects of the acquisition and the extent to which the partial divestiture proposed by UGG would provide an

adequate remedy because it is the direct representative of Western Canadian producers of wheat and barley and is a major user of terminal facilities at the Port of Vancouver.

**Extent of Intervention**

20. It is not the current intention of the CWB to adduce evidence at the hearing of this Application. However, the CWB wishes to preserve its right to do so, and to cross-examine witnesses at the hearing should circumstances arise which affect its interests.

**Purpose of Affidavit**

21. I make this affidavit in support of the request of the Canadian Wheat Board for leave to intervene and not for any improper purpose.

SWORN BEFORE ME at the City of Winnipeg, Manitoba this 19th day of February, 2002

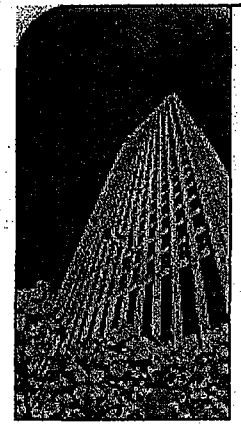
Adrian C. Measner

A Notary Public in and for the Province of Manitoba.

1401581_1.DOC

# Tab 7

Home
About JRI
Grain Merchandising
Farm Service Centres
Export Terminals
Agri-Foods
Agri-Products
Kelburn Farm
Contact Us



# News

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## POOL and JRI create joint venture to operate their Vancouver port terminals

April 06, 2005 10:00:00

For Immediate Release
Date: April 6, 2005
Regina, Saskatchewan
Listed: TSX
Symbol: SWP

POOL and JRI create joint venture to operate their Vancouver port terminals

Saskatchewan Wheat Pool and James Richardson International Limited (JRI) today announced their agreement to jointly operate their Vancouver port terminals. The adjacent facilities are located on the North shore of Vancouver's Burrard Inlet.

The agreement, which is subject to regulatory approval, provides for joint administration and operation of the two port terminals. A new business corporation owned equally by Saskatchewan Wheat Pool and JRI will be established to act as a joint venture terminal operator and agent for the two companies. The Pool and JRI will each continue to own their respective facilities and employees will remain with the parent companies.

"Through this new joint venture, the Pool and JRI will see significant benefits that will ultimately strengthen our competitive position at port and within the global marketplace, bringing value to our destination customers and to the grain handling industry as a whole. It is consistent with the Pool's strategic priorities to optimize our footprint and focus on achieving

operational excellence in our core operations. The transaction illustrates our shared commitment to employ strategies that not only enhance our operations but improve Canada's export capabilities internationally," said Mayo Schmidt, Pool CEO.

The joint venture between the Pool and JRI will improve operating efficiencies and increase productivity and throughput potential through specialization of each facility, which will result in better rail car utilization and shipping capacity.

"This alliance is a very positive step for the Port of Vancouver particularly in light of the significant changes that have occurred in the grain handling and transportation segment over the past number of years. The joint venture will favourably position the Pool and JRI to provide cost-competitive service to our customers while adding value with respect to identity-preserved commodities, product traceability, food safety and railcar and vessel logistics," said Curt Vossen, JRI President.

By specializing the two plants by commodity, there will be greater flexibility when handling Canadian Wheat Board grains and open market grains such as canola and peas. The new venture will be able to identity preserve commodities by strategically managing grain flows to either site. The new company expects to enjoy a more efficient system for unloading rail cars and to provide increased shipping capabilities with combined access to three shipping berths. It will manage the facilities adopting industry "best practice" principles with respect to operational staffing, training, safety, plant maintenance and customer service. Start-up for the joint venture is expected in approximately two months time.

The Pool and JRI expect to create additional synergies in the future, by linking their adjacent rail yards and joining the tracks to enable the direct exchange of railcars, allowing for improved logistic management of grains and oilseeds between the two facilities.

The Pool's wholly owned Vancouver terminal has a licensed capacity of 237,240 metric tonnes and JRI's terminal has a licensed capacity of 108,000 metric tonnes, for a total of 345,240 tonnes of combined capacity.

Saskatchewan Wheat Pool also owns a port terminal in Thunder Bay, Ontario. JRI owns and operates additional port terminal facilities in Thunder Bay, Port Stanley, and Hamilton, Ontario, and Sorel-Tracy, Quebec. These facilities are not part of the new joint venture and will be operated by the parent companies as is normal course.

Saskatchewan Wheat Pool is a publicly traded agribusiness headquartered in Regina, Saskatchewan. Anchored by a Prairie-wide grain handling and agri-products marketing network, the Pool channels Prairie production to end-use markets in North America and around the world. These operations are complemented by agri-food processing and strategic alliances, which allow the Pool to leverage its pivotal position between Prairie farmers and destination customers. The Pool's shares are listed on the Toronto Stock Exchange under the symbol SWP.

JRI, a subsidiary of James Richardson & Sons Limited, is Canada's largest privately owned agribusiness. It handles all major grains, oilseeds, and special crops through farm service centres known as JRI in Eastern Canada and Pioneer in Western Canada. JRI is also actively involved in food processing through its subsidiary Canbra Foods, one of Canada's largest integrated oilseed crushing, processing and packaging operations.

For more information:

Jean-Marc Ruest
James Richardson International Limited
Assistant Vice-President,
Legal and Industry Affairs
Phone: (204) 934-5488

Susan Cline
Saskatchewan Wheat Pool
Investor Relations and Communications
Phone: (306) 569-6948

# Tab 8

Western Producer
Terminals operate while review moves forward

Thursday July 21, 2005

By Adrian Ewins

Saskatoon newsroom

A new grain handling terminal company is up and running at the port of Vancouver.

But the joint venture between Saskatchewan Wheat Pool and JRI International Ltd. still hasn't received final approval from the federal competition bureau.

Pacific Gateway Terminal Ltd., as the new corporation running the two former competing elevators is called, began doing business July 11.

The two companies, which announced the joint venture in April, asked permission to implement certain parts of the project before the completion of the bureau's merger review analysis.

The bureau and the two companies agreed to a detailed consent order that was filed with the federal competition bureau July 5.

"We try to meet the parties' requests, so we signed an agreement with the competition tribunal that allows them to conduct some of the operations they had wanted," said Andaleeb Qayyum, a competition law officer.

Temporary agreement

The agreement, which sets out specific performance requirements in areas such as service standards, personnel, working conditions and equipment, will be in place for 60 days.

However, Qayyum said there is no deadline for the bureau to complete its review of whether the project is likely to substantially prevent or lessen competition. He declined to identify specific issues.

The former SWP terminal has a licensed storage capacity of 237,240 tonnes, while the old JRI facility can hold 108, 000 tonnes. The combined capacity of 345,240 tonnes represents about 36 percent of total storage capacity at the port.

A JRI official said while the approval process has been slower than expected, the interim order has allowed the companies to introduce some efficiencies they hope to realize from the project.

"We're now putting in place the intentions of the partners, namely that SWP commodities might be coming to the old JRI elevator and conversely something we send to Vancouver may end up in storage in SWP space," said Jean-Marc Ruest, assistant vice-president of legal affairs.

He acknowledged that the competition bureau could eventually order changes in the original proposal.

The companies said the new venture will result in more efficient use of rail cars and vessels, more efficient use of storage space, improved throughput and lower costs.

Rail cars arriving on the north shore will be directed to the terminal best able to handle the grain, reducing delays and possible demurrage.

Company officials also say it will be easier to provide services to customers in areas such as identity preservation, product traceability, food safety, special crop handling and blending.

Each terminal will continue to be owned by its respective parent company, while earnings will be shared on a basis proportional to the amount of grain handled at each facility. No money changed hands as part of the deal.

# Tab 9

CT- 2005-008

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act* R.S.C. 1985, c. C-35 as amended;

**AND IN THE MATTER OF** joint ventures between Saskatchewan Wheat Pool Inc. and James Richardson International Limited in respect of port terminal grain handling in the Port of Vancouver;

**AND IN THE MATTER OF** filing and registration of a Consent Interim Agreement, pursuant to section 105 of the *Competition Act*.



**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

**- AND -**

**SASKATCHEWAN WHEAT POOL INC.**

**-AND-**

**JAMES RICHARDSON INTERNATIONAL LIMITED**

---

**CONSENT INTERIM AGREEMENT**

---

**WHEREAS** Saskatchewan Wheat Pool Inc. and James Richardson International Limited, together with their Affiliates, 6362681 Canada Ltd. and 6362699 Canada Ltd., have entered into a series of agreements (collectively, the "JV") dated April 6, 2005 creating joint ventures in connection with the Marketing of grain handling services to Third Party Graincos and the operation of their respective port terminal grain handling terminals in the Port of Vancouver;

**AND WHEREAS** SWP and JRI have requested an advance ruling certificate from the Commissioner of Competition in connection with the JV;

**AND WHEREAS** the Commissioner of Competition has not yet completed her inquiry in respect of the JV;

**AND WHEREAS** the object of this Consent Interim Agreement is to provide the

Commissioner of Competition with adequate time to complete her inquiry and to ensure that, prior to the completion of that inquiry, Saskatchewan Wheat Pool Inc. and James Richardson International Limited take no action that would impair the ability of the Competition Tribunal to remedy the effect of the JV on competition for port terminal grain handling services under section 92 of the *Competition Act* because that action would be difficult to reverse;

**AND WHEREAS** the Commissioner of Competition and Saskatchewan Wheat Pool Inc. and James Richardson International Limited agree that upon the signing of this Consent Interim Agreement, it shall be filed with the Tribunal for immediate registration;

**NOW THEREFORE** Saskatchewan Wheat Pool Inc. and James Richardson International Limited and the Commissioner of Competition have agreed to the terms of this Consent Interim Agreement as follows:

## I. DEFINITIONS

1. For the purposes of this Agreement, the following capitalized terms have the following meaning:

   (a) "Affiliate" has the meaning given to it in subsection 2 (2) of the Act;

   (b) "Agreement" means this Consent Interim Agreement entered by Saskatchewan Wheat Pool Inc. and James Richardson International Limited and the Commissioner of Competition pursuant to section 105 of the Act;

   (c) "Commissioner" means the Commissioner of Competition appointed pursuant to section 7 of the *Act* (Canada);

   (d) "Hold Separate Monitor" means the Person appointed pursuant to Part IV of the Agreement, and any employees, agents or other persons acting for or on behalf of the Hold Separate Monitor;

   (e) "JRI" means James Richardson International Limited, a corporation existing under the laws of Canada, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates;

   (f) "JV" means the joint ventures between JRI and Saskatchewan Wheat Pool Inc., and their Affiliates, 6362681 Canada Ltd. And 6362699 Canada Ltd., as reflected in their agreements dated April 6, 2005, pursuant to which JRI and Saskatchewan Wheat Pool Inc. have agreed to coordinate the Marketing of grain handling services to Third Party Graincos. and the operation of their grain handling

terminals in the Port of Vancouver;

(g) "Marketing" means any action taken to promote or sell services and, without limiting the generality of the foregoing, includes the setting of prices, rates, rebates, allowances, diversion premiums, tariffs and terms of service;

(h) "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.

(i) "SWP" means Saskatchewan Wheat Pool Inc., a corporation existing under the laws of Canada, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates;

(j) "Third Party Graincos" means all Persons, who do not have an interest in port terminal grain handling facilities in the Port of Vancouver, in which neither JRI or SWP have any interest, who, in the past, currently, or in the future, have been, are, or will be, provided with any grain handling services by JRI and/or SWP in the Port of Vancouver;

(k) "Tribunal" means the Competition Tribunal established by the *Competition Tribunal Act* (Canada), R.S.C. 1985, c. 19 (2nd Supp.), as amended.

2. For the purposes of this Agreement, "Confidential Information" means competitively sensitive or proprietary information pertaining to the provision of grain handling services to Third Party Graincos including, without limiting the generality of the foregoing, with respect to the provision of grain handling services to Third Party Graincos, any and all information pertaining to marketing methods or techniques, pricing, terms of service, revenues, costs, customer lists or other trade secrets pertaining to marketing.

## II. APPLICATION

3. The provisions of this Agreement apply to:

(a) JRI;

(b) SWP;

(c) 6362681 Canada Ltd.;

(d) 6362699 Canada Ltd.;

(e) all other Persons acting in concert or participating with (a) to (d), above with

respect to the matters referred to in this Agreement, who shall have received actual notice of this Agreement;

(f) the Commissioner; and

(g) the Hold Separate Monitor.

## III. HOLD SEPARATE

4. SWP and JRI shall, during the term of this Agreement, take all necessary steps to ensure they operate independently in respect of the Marketing of grain handling services to Third Party Graincos at the Port of Vancouver and at the Prince Rupert Terminal.

5. SWP and JRI shall, during the term of this Agreement:

(a) maintain and hold such physical assets, including computer systems and databases used in connection with the Marketing of grain handling services to Third Party Graincos, in good condition and repair, normal wear and tear excepted, and to standards at least equal to those maintained prior to the date of this Agreement;

(b) take all commercially reasonable steps to maintain quality and service standards for Third Party Graincos at the level that existed prior to the date of this Agreement, save as required by prudent management of such;

(c) not communicate Confidential Information to any Person, including each other, other than the Hold Separate Monitor, the Commissioner, or as otherwise permitted herein;

(d) not, to any material extent, alter, or cause to be altered, the management of those parts of their companies that market port terminal grain handling services to Third Party Graincos as they existed prior to the date of this Agreement, except as may be necessary to comply with the terms of this Agreement or to replace employees that may resign, save as required by prudent management; and;

(e) not terminate or alter any current employment, salary or benefit agreements for any employees working in those parts of their companies that market port terminal grain handling services to Third Party Graincos, to any material extent, save as required by prudent management.

6. SWP shall not offer employment to employees of JRI employed, directly or indirectly in the marketing of port terminal grain handling services to Third Party Graincos. The foregoing shall apply *mutatis mutandis* to JRI.

## IV. MONITOR

7. Upon registration of this Agreement, the Commissioner shall appoint a Hold Separate Monitor. The choice of Hold Separate Monitor shall be subject to the consent of JRI and SWP, which consent shall not be unreasonably withheld. The Hold Separate Monitor shall be responsible for monitoring the compliance of JRI and SWP with this Agreement. If JRI and SWP have not opposed, in writing, including the reasons for opposing, the selection of the Hold Separate Monitor within 10 days after notice by the Commissioner to JRI and SWP of the identity of the Hold Separate Monitor, JRI and SWP shall be deemed to have consented to the selection of the Hold Separate Monitor.

8. If the Hold Separate Monitor ceases to act or fails to act diligently and consistent with the purposes of this Agreement, the Commissioner may appoint a substitute Hold Separate Monitor consistent with the terms of paragraph 7 of this Agreement. This Agreement shall apply to any substitute Hold Separate Monitor appointed pursuant to this paragraph.

9. SWP and JRI shall be jointly responsible for all fees or expenses reasonably and properly charged or incurred by the Hold Separate Monitor, or any substitute thereof appointed pursuant to this Agreement, in connection with the execution or performance of the Hold Separate Monitor's duties under this Agreement.

10. The Hold Separate Monitor shall have full and complete access to all personnel, books, records, documents and facilities of SWP and JRI that pertain, directly or indirectly to the Marketing of port terminal grain handling services to Third Party Graincos. SWP and JRI shall cooperate with any reasonable request of the Hold Separate Monitor. Neither SWP nor JRI shall take any action to interfere with or impede the Hold Separate Monitor's ability to discharge his/her duties and responsibilities.

11. The Hold Separate Monitor shall serve without bond or other security, on such reasonable and customary terms and conditions as are agreed, with the approval of the Commissioner. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of SWP and JRI such persons as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities under this Agreement. The Hold Separate Monitor shall account for all expenses incurred, including fees for his/her services, and such account shall be subject to the approval of the Commissioner.

12. SWP and JRI shall indemnify the Hold Separate Monitor and hold him/her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the duties of the Hold Separate Monitor, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Hold Separate Monitor.

13. The Hold Separate Monitor shall report in writing to the Commissioner: (i) every 20 days after being appointed until this Agreement is terminated; and (ii) at any other time as requested by the Commissioner or her staff, concerning SWP and/or JRI compliance with this Agreement.

14. Neither SWP nor JRI shall exert or attempt to exert any influence, direction or control over a Hold Separate Monitor which may adversely affect the discharge of the Hold Separate Monitor's duties under the terms of this Agreement.

15. This Agreement shall not be construed as providing the Hold Separate Monitor with ownership, management, possession, charge or control of SWP or JRI.

16. The Hold Separate Monitor shall execute a confidentiality agreement with JRI, SWP and their Affiliates, 6362681 Canada Ltd. and 6362699 Canada Ltd. in which the Hold Separate Monitor will undertake not to disclose any competitively sensitive or proprietary information acquired in the performance of the Hold Separate Monitor's duties to any person except to the Commissioner.

17. If the Hold Separate Monitor considers that SWP and/or JRI is in default of any of the terms of this Agreement, he/she shall immediately notify the Commissioner of the breach, who shall forthwith give notice to SWP and JRI setting out the particulars of such default.

18. If the Hold Separate Monitor advises the Commissioner that SWP and/or JRI is in default of any of the terms of this Agreement, or if the Commissioner otherwise believes such to be the case, then for the purpose of determining or securing compliance with this Agreement, subject to any valid claim to a legally recognized privilege, and upon written request, SWP and/or JRI shall permit any duly authorized representative of the Commissioner:

    (a) upon a minimum of 3 days notice to SWP and JRI, access during office hours of SWP and/or JRI, to inspect and copy all books, ledgers, accounts, correspondence, memorandum, and other records and documents in the possession or under control of SWP and/or JRI relating to compliance with this Agreement; and

(b) upon a minimum of 8 days notice to SWP and/or JRI, and without restraint or interference from SWP and/or JRI, to interview directors, officers or employees of SWP and/or JRI on matters in the possession or under the control of SWP and/or JRI relating to compliance with this Agreement.

## V. NOTIFICATION

19. Each of SWP and JRI shall provide a copy of this Agreement to each of their officers, employees, or agents having managerial responsibility for any obligations under this Agreement, no later than 5 days from the date this Agreement is registered.

20. Notices, reports and other communications required or permitted pursuant to any of the terms of this Agreement, shall be in writing and shall be considered to be given if dispatched by personal delivery, registered mail or facsimile transmission to the parties:

1. If the Commissioner

The Commissioner of Competition
Competition Bureau

Place du Portage, 21st floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9
Attention: Senior Deputy Commissioner (Mergers)
Fax: (819) 954-0998

With a copy to:

Director, Competition Law Division
Competition Law Division
Department of Justice
Place du Portage, 22nd floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9

Attention: Director of Competition Law Division
Fax: (819) 953-9267

2. If to SWP:
Address 2625 Victoria Avenue, Regina, SK
Attention: Ray Dean, General Counsel/Corporate Secretary

| | |
|---|---|
| Tel: | (306 ) 569-4200 |
| Fax: | (306) 569-5133 |

2. If to JRI

| | |
|---|---|
| Address | 2800 One Lombard Place<br>Winnipeg, MB R3B 0X8 |
| Attention: | Jean-Marc Ruest |
| Tel: | (204) 934-5488 |
| Fax: | (204) 943-2574 |

## VI. GENERAL

21. SWP and JRI agree that they will take such steps as are necessary to ensure that 6362681 Canada Ltd. and 6362699 Canada Ltd, which are wholly owned by SWP and JRI, take such measures, including adopting any necessary resolutions or obtaining any necessary authorizations, to ensure they are be bound by the terms of this Agreement.

22. This Agreement shall remain in effect for 60 days from the registration of this Agreement with the Tribunal. The Commissioner hereby covenants to JRI and SWP to forthwith register this Agreement with the Tribunal upon execution and delivery of this Agreement by all parties hereto.

23. SWP and JRI agree to the registration of this Agreement by the Tribunal, on usual terms, covering the matters agreed to herein. The Commissioner may extend any of the time periods contemplated by this Agreement, other than the time period in paragraph 22 of this Agreement.

24. SWP and JRI and the Commissioner may mutually agree to amend this Agreement in any manner pursuant to subsection 106(1) of the Act.

25. The computation of any time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. I-21 as amended.

26. This Agreement constitutes the entire agreement between the Commissioner, SWP and JRI with respect to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral.

27. In the event of a dispute as to the interpretation or application of this Agreement, including any decision by the Commissioner pursuant to this Agreement or breach of this

Agreement by the Respondents, the Commissioner, SWP or JRI shall be at liberty to apply to the Tribunal for a further order interpreting any of the provisions of this Agreement.

28. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which taken together shall constitute one and the same instrument. In the event of any discrepancy between the English and French versions of this Agreement, the English version shall prevail.

DATED at Winnipeg, Manitoba, this 30th day of June, 2005.

FILED AND REGISTERED BY the Tribunal, this day of mm/dd/yy.

Mendai Leaf
Commissioner of Competition
July 4, 2005

SASKATCHEWAN WHEAT POOL INC.

per _____

JAMES RICHARDSON INTERNATIONAL LIMITED

per Walter N. Fox
WALTER N. FOX
VICE PRESIDENT
June 30, 2005

413180

Agreement by the Respondents, the Commissioner, SWP or JRI shall be at liberty to apply to the Tribunal for a further order interpreting any of the provisions of this Agreement.

28. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which taken together shall constitute one and the same instrument. In the event of any discrepancy between the English and French versions of this Agreement, the English version shall prevail.

DATED at Regina, Saskatchewan this 30 day of June, 2005.

FILED AND REGISTERED BY the Tribunal, this day of mm/dd/yy.

Jun 30, 2005

SASKATCHEWAN WHEAT POOL INC.

per

Commissioner of Competition

July 4, 2005

JAMES RICHARDSON INTERNATIONAL LIMITED

per

# Tab 10

# [CONFIDENTIAL]

# Tab 11

# [CONFIDENTIAL]

# Tab 12

DAVIES

DAVIES WARD PHILLIPS & VINEBERG LLP

44th Floor
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Toronto Canada M5X 1B1

Tel 416 863 0900
Fax 416 863 0871
www.dwpv.com

August 9, 2005

Christopher D. Margison
Dir 416 863 5588
cmargison@dwpv.com

File No. 205664

**BY E-MAIL**

**CONFIDENTIAL**

Mr. Graham Law
Barrister and Solicitor
525 East 80th Street, #4-A
New York, New York 10021

Dear Graham:

**Agricore United – Port Terminals**

Further to my voicemail message to you on August 8, 2005 and my telephone conversation with John Syme on August 9, 2005, I am writing to request that the Commissioner of Competition (the "Commissioner") agree to extend the Port Terminal Initial Sale Period from August 15, 2005 to August 29, 2005 pursuant to paragraph 48 of the Consent Agreement registered with the Competition Tribunal on October 17, 2002.

As I discussed with Mr. Syme, since the last extension was granted on July 18, 2005, Terminal One Vancouver Limited ("Terminal One") has devoted a significant amount of time developing a revised offer for the UGG Terminal and had additional meetings with Agricore United. [redacted]

Agricore United and its board of directors would like the opportunity to fully consider any revised offer for the UGG Terminal put forward by Terminal One and, if necessary, deal

with any issues that arise. However, as a result of the vacation schedules of certain board members, Agricore United's board of directors will not be able to consider any such offer before August 18, 2005. Accordingly, in order to ensure that Agricore United has sufficient time to evaluate any revised offer for the UGG Terminal put forward by Terminal One and deal with any issues that might arise, we are asking that the Commissioner consent to an extension of the Port Terminal Initial Sale Period from August 15, 2005 to August 29, 2005. Such an extension would also provide the Commissioner with additional time to review any revised offer put forward by Terminal One.

Please do not hesitate to contact me if you have any questions with respect to any aspect of the foregoing.

Yours very truly,

Chris Margison

Christopher D. Margison

CDM/pf

# Tab 13

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August 11, 2005

Sandra A. Forbes
Dir 416 863 5574
sforbes@dwpv.com

File No. 205664

**BY FAX AND E-MAIL**

**CONFIDENTIAL**

Mr. Graham Law
Barrister and Solicitor
525 East 80th Street, #4-A
New York, New York 10021

Dear Mr. Law:

**Agricore United (CT 2002-001) – Consent Agreement Dated October 17, 2002 and Issued by the Competition Tribunal (the "Consent Agreement")**

I am responding to your letter of August 10, 2005 to my partner Christopher Margison in which you indicated that the Commissioner is not prepared to grant any further extension of the Port Terminal Initial Sale Period pursuant to the above-noted Consent Agreement. I confirm John Bodrug's and my advice to you in our telephone call this morning that we have instructions to file with the Competition Tribunal an application for an order under section 106 of the *Competition Act* rescinding the Consent Agreement, which we plan to file today or tomorrow.

I also confirm our request during our telephone call this morning that the Commissioner agree, pursuant to section 48 of the Consent Agreement, to an extension of the Port Terminal Initial Sale Period until such time as the Tribunal has ruled on Agricore United's application under section 106. I understand from our conversation that the Commissioner refuses to provide the requested consent. Agricore United maintains that the Commissioner's refusal is unreasonable in the circumstances. Accordingly, we will also be filing a motion for interim relief under section 49 of the Consent Agreement, requesting

the Tribunal to approve the requested extension. As we discussed, that motion will have to be heard and decided by the Tribunal before 12:00 noon (Winnipeg time) on August 15, unless the Commissioner consents to an extension of the Port Terminal Initial Sale Period.

Yours very truly,

Sandra A. Forbes

SAF/npm
cc: John Syme
*Industry Canada*

# Tab 14

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June 15, 2005

John D. Bodrug
Dir 416 863 5576
jbodrug@dwpv.com

File No. 205664

**BY E-MAIL**

**CONFIDENTIAL**

Mr. Graham Law
Barrister and Solicitor
525 East 80th Street, #4-A
New York, New York 10021

Dear Graham:

**Agricore United ("AU") – Port Terminals**

Further to our telephone conversation earlier today and my letter to Doug Milne on May 30, 2005 (a copy of which is attached), I am writing concerning the implications of the recent decision of the Competition Tribunal (the "Tribunal") in *RONA Inc.* v. *The Commissioner of Competition*[1] for the October 17, 2002 consent agreement between the Commissioner of Competition (the "Commissioner") and AU (the "AU Consent Agreement"). Before commenting on the implications of the decision, I will summarize its key aspects (which, as of now, is available only in French).

**The Tribunal's Decision in *RONA***

On January 10, 2005, RONA Inc. filed an application with the Tribunal pursuant to paragraph 106(1)(a) of the *Competition Act* (the "Act") for an order rescinding the consent agreement between it and the Commissioner which was registered with the Tribunal on September 4, 2003 (the "RONA Consent Agreement") in connection with RONA's acquisition of the competing Réno Dépot chain of retail home improvement stores. Among other things, the RONA Consent Agreement required that RONA divest a big box home improvement store located in Sherbrooke, Quebec (the "Sherbrooke Store").

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1 CT-2003-007, Public Version of Reasons for Order, May 30, 2005, released by the Tribunal on June 6, 2005.

*The Parties' Positions*

In its notice of application, RONA argued that clear evidence of the imminent opening of a big box home improvement store in Sherbrooke by Home Depot amounted to a change in circumstances that justified rescinding the RONA Consent Agreement. RONA also argued that, if Home Depot's expansion plans in Sherbrooke had been known at the time the RONA Consent Agreement was entered into, the Commissioner would not have had any concerns about the Sherbrooke market in the first place and RONA would not have agreed to divest the Sherbrooke Store. Rather, the merger would have proceeded in Sherbrooke as it did in other markets, without the necessity of any divestiture.

The Commissioner contested RONA's application on several grounds. For example, while acknowledging that Home Depot would shortly enter the Sherbrooke market, the Commissioner argued that the RONA Consent Agreement should not be rescinded because the divestiture process was in full swing and an agreement of purchase and sale had been signed by a prospective buyer and the trustee appointed pursuant to the RONA Consent Agreement. In those circumstances, the Commissioner argued that rescinding the RONA Consent Agreement would, among other things: (i) threaten to make consent agreements unenforceable and ineffective; and (ii) cause unfair prejudice to the prospective purchaser of the Sherbrooke Store. The Commissioner also argued that, even if RONA could satisfy the statutory test for rescission, the Tribunal should nevertheless exercise its discretion to deny RONA's application.

*The Tribunal's Findings*

The Tribunal rejected each of the arguments advanced by the Commissioner and issued an order rescinding the RONA Consent Agreement. The Tribunal found that new evidence of an imminent opening of a Home Depot big box store in Sherbrooke constituted a change from the circumstances that prevailed at the time the RONA Consent Agreement was executed. In the Tribunal's view, the opening of a Home Depot store in Sherbrooke within the next year would resolve the Commissioner's concerns with respect to the Sherbrooke market.

Further, the Tribunal found that the parties would not have entered into the RONA Consent Agreement had there been, at that time, proof of Home Depot's expansion plans in Sherbrooke. In this regard, the Tribunal held that the intention of the parties must be measured as at the time of the application to vary or rescind the consent agreement and not by reference to the time the consent agreement was entered into.

The Tribunal also made some other significant points dealing with applications to vary or rescind consent agreements. For example, the Tribunal said that a consent agreement is in substance a negotiated instrument between the parties rather than an order of the Tribunal. Consequently, determining whether a change in circumstances justifies varying or rescinding a consent agreement requires the Tribunal to inquire into the intentions of the

parties. In this regard, the Tribunal rejected the Commissioner's submission that the relevant inquiry involves treating the consent agreement as though it were an order made by the Tribunal and determining, in light of the alleged change in circumstances, whether the Tribunal (not the parties) would have made the order.

In addition, the Tribunal indicated that the ability to vary or rescind consent agreements as the circumstances warrant is consistent with Parliament's intention that the consent agreement process be as flexible as possible to allow for the efficient resolution of competitive concerns in a naturally evolving marketplace. The Tribunal added that the Commissioner has the obligation to remain sensitive to market circumstances throughout the life of a consent agreement, and suggested that the Commissioner ought to have taken advantage of the flexibility in the process to amend the RONA Consent Agreement as evidence of Home Depot's expected entry in the Sherbrooke market became more and more concrete. In this regard, after finding that the Commissioner and her representatives had become focussed on RONA's divestiture of the Sherbrooke Store, the Tribunal cautioned that a consent agreement [translation] "is not an end in itself [but] one of among several ways to advance the purposes of the Act, and its force derives from its utility, not from its mere existence".

**Application to AU Consent Agreement**

[redacted] An inability of a purchaser group of independent grain companies to secure commitments of independent grain companies (including the group members' own volumes) to use the purchased terminal would demonstrate both the absence of any need for a divestiture to provide an alternative Vancouver port terminal for independent grain companies and the inability to make an effective divestiture in light of current market conditions.

Indeed, as we have previously discussed, including during the meeting that George Addy and Christopher Margison had with the Bureau on June 8, 2004, in our view there is already a sufficient basis of changed circumstances to warrant a variation to the AU Consent Agreement to remove any divestiture requirement. To summarize our previous submissions on this point:

- Significant excess capacity continues to be available at each of the port terminals in the Port of Vancouver, including the port terminals operated by SWP and JRI. (In this regard, as indicated by the Tribunal in *Hillsdown*, "[i]f other firms in the market have excess capacity, they can respond to a supra-competitive price rise by flooding the market at a lower price level".)

- Agricore United understands that a number of independent grain companies entered into long-term handling agreements with third party Vancouver port terminal operators after the AU Consent Agreement was registered with the Tribunal. As evidenced by Terminal One's recent difficulties in seeking to negotiate for grain volumes in Vancouver, these contracts tie up a significant portion of the independent grain that would otherwise be available for Terminal One (or any other owner of the UGG terminal) to compete for. Had the parties known that such a substantial volume of independent grain would be tied up under long-term handling agreements at this time, they would not have entered into a consent agreement requiring the divestiture of a Port Terminal. In the absence of a sufficient quantity of independent grain, any remedy requiring the divestiture of a port terminal would be fatally undermined absent the purchaser entering into a handling agreement with the Canadian Wheat Board, a result that would prejudice independent grain companies and that neither party intended.

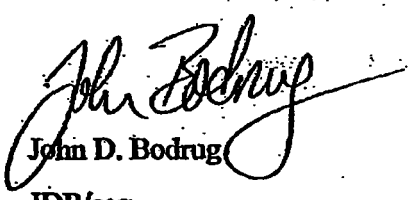
- The behavioural provisions included in the AU Consent Agreement are working to address any possible concerns about access to terminal capacity in the Port of Vancouver by independent grain companies.

In light of the foregoing, while reserving AU's rights to apply for a section 106 variation to the AU Consent Agreement even under current circumstances, we submit that the Commissioner should consent to an amendment to the AU Consent Agreement to remove any divestiture requirement if Terminal One does not complete the Proposed Transaction.

[redacted]

Please do not hesitate to contact me if it would be helpful to discuss the foregoing.

Yours very truly,



John D. Bodrug

JDB/seg

[CONFIDENTIAL]

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# [CONFIDENTIAL]