CT-2001/007

PUBLIC

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 for an order 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

STATEMENT OF GROUNDS AND MATERIAL FACTS

STATEMENT OF GROUNDS AND MATERIAL FACTS

I. INTRODUCTION

1. The Commissioner of Competition (the "Commissioner") brings this Consent application pursuant to sections 92 and 105 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: (1) the purchasing and handling of grain in certain local markets in Western Canada; and (2) canola oil-seed purchasing and processing in Canada. UGG and Agricore have been carrying on business as Agricore United since November 1, 2001. The Commissioner, with the consent of Agricore United, respectfully submits for approval a draft Consent Order which, if implemented, will eliminate the likely substantial lessening or prevention of competition which the Commissioner submits will otherwise be occasioned by the Acquisition. A separate application relating to certain Vancouver port terminal assets which were part of this Acquisition will also be brought pursuant to section 92 of the Act to remedy the substantial lessening or prevention of competition in the market for port terminal grain handling services alleged by the Commissioner.

2. The Commissioner alleges certain material facts and makes certain submissions in this statement. Agricore United does not contest the allegations or submissions herein for the purpose of this application, but nothing in this application or other filings shall be taken as an admission now or in the future by Agricore United of any such allegations or submissions.

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 which had its head office in Winnipeg, Manitoba, 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. Pre-merger Archer Daniels Midland Company ("ADM") had a 42% ownership position in UGG, while post merger it has a 19% interest in Agricore United which could, at ADM's option and subject to certain conditions, ultimately rise to 45%.

7. Prior to the Acquisition, Agricore, which had its head office in Winnipeg, Manitoba, 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 co-operative.

III. THE TRANSACTION

8. 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 interest in port terminal facilities in Vancouver, Prince Rupert and Thunder Bay;

   (b) whole or partial interest 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").

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

IV. DETAILS OF THE INQUIRY

10. 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.

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

12. 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.

13. The Acquisition combines the two largest grain handling companies in Alberta and Manitoba and results in the merged entity, Agricore United, having high market shares in primary elevator grain handling, in excess of 50% by capacity, in certain markets across Manitoba and Alberta.

14. With regard to the markets for canola seed purchasing and processing, pursuant to the Acquisition, Agricore United now has what was formerly Agricore's partial interest in CanAmera, a large domestic oil seed processor. ADM is a major shareholder in Agricore United and is also a major domestic oil seed processor. 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 for canola purchasing and processing. Combined, ADM and CanAmera have approximately a 65% share of the canola seed purchasing and processing markets in Canada.

15. The preliminary examination and the Inquiry into the proposed transaction has included the following:

(a) a review of 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 met with and obtained 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 proposed transaction 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 merger;

(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.

16. 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.

V. COMPETITIVE EFFECTS OF THE MERGER

SUMMARY

17. The Commissioner states that the acquisition of Agricore by UGG is likely to substantially lessen or prevent competition in the following markets:

    (a) certain local primary grain handling services in certain areas of Alberta and Manitoba;

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

    (c) canola seed purchasing and processing in Canada.

A. PRIMARY GRAIN ELEVATORS

INDUSTRY OVERVIEW

Introduction

18. 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 ("HTP"). HTPs have substantially greater capacity than traditional elevators. Each of these two types of elevators is described in greater detail below;

(c) the CWB, which is, by law, the only purchaser of wheat and barley, that is either to be exported from Canada or for domestic human consumption. Grain meeting that description is referred to as "CWB Grain", 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, for shipping; and

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

19. The grain industry in Western Canada comprises production regions in the three Prairie Provinces and the Peace River region, which is an area that traverses Northern Alberta and British Columbia.

20. As noted above, grain handling companies, including Agricore United (and prior to the Acquisition, UGG and Agricore), purchase grain from farmers either on their own account or as agents of the CWB.

21. Grain handling begins when a producer's grain is transported from the farm to a primary elevator where the grain is weighed, graded and dockage (i.e., foreign material in the grain such as dirt and straw) is assessed. At a primary elevator, grain handling comprises receiving, grading, possibly cleaning, elevation, storage and loading grain onto rail cars. The farmer is then issued a cheque for the grain delivered, based upon the then current market price for the grade, less charges levied for delivery (if made by the grain company), elevation, dockage and cleaning (if applicable).

22. Elevators are licensed by their static storage capacity in tonnes. The amount of grain received at a given elevator is referred to as that elevator's handle. The number of times an elevator ships or handles the equivalent of its total storage capacity in a year is referred to as the number of "turns" or the "turn ratio." In 1992-93, the average turn ratio for primary elevators was 5. That figure increased to 5.92 in 1996-97, but then declined to approximately 5.5 for 1999-00. In a 1999 study, Trimac Consulting Services Ltd. estimated that in 1998-99, the 186 HTPs for which it had data averaged 7.3 turns, with approximately 10% achieving more than 20 turns.

23. Between 1970 and 2001, the number of primary grain elevators decreased from approximately 5,000 to less than 700 and in that same period primary elevator storage capacity decreased from approximately 11 million tonnes to approximately 6 million tonnes.

24. Pre-merger, the principal grain handling companies in Canada were: Agricore, UGG, Saskatchewan Wheat Pool ("SWP"), Pioneer Grain [the grain handling arm of James Richardson International ("JRI")], Cargill Limited ("Cargill"), N.M. Paterson & Sons Limited ("Paterson"), Louis Dreyfus Canada Ltd. ("Louis Dreyfus") and Parrish & Heimbecker, Limited ("P&H"). The table below depicts the breakdown of elevators owned by the various grain handling companies:

Grain Co	**Storage (tonnes)**	**% Storage**	**Elevators**	**% Elevators**
Agricore	1,432,340	22.9	207	30.4
UGG	751,020	12.0	87	12.8
SWP	1,517,200	24.2	151	22.2
Pioneer Grain	561,740	9.0	78	11.5
Cargill	479,430	7.6	45	6.6
Paterson	290,040	4.6	48	7.0
Louis Dreyfus	259,860	4.2	11	1.6
P&H	251,110	4.0	23	3.4
Others	717,990	11.5	31	4.5
Total	6,260,730	100	681	100

Inland Terminals

25. There are ten farmer owned and operated inland terminals, most of which are located in Saskatchewan. These facilities, which are included in the "others" category in the table above, provide grain handling services and are in direct competition with the major grain handling companies. However most of these inland terminals have some form of affiliation with a major grain handling company.

Producer Cars

26. In addition to grain-handling companies, farmers also have the option to use "producer cars" to ship their grain to port. By using a producer car, farmers save on elevation fees which could amount to approximately $1,000 on a carload of grain. However these facilities are not licensed elevators and therefore they do not provide all of the services of a grain handling elevator such as blending and in some cases cleaning. Historically, only approximately one percent of all grain produced in Western Canada has been shipped by producer cars.

Regulatory Environment

27. 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.

28. 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 primary elevators and port terminals.

29. 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.

Changes in the Industry

30. The grain handling industry has undergone significant structural and regulatory changes in recent years. Many older, wooden, primary elevators have been closed and in their place HTP elevators have been constructed.

31. In 1980 the average primary elevator in Western Canada had about 3,500 tonnes of storage and about 10 rail car spots. By comparison an HTP typically has 15,000 to 40,000 tonnes of storage and 50 to100 rail car "spots." The term "spot" refers to the capacity of a facility to accommodate rail cars at a given time. For example, a facility with a 50 car "spot" could accommodate 50 rail cars at one time.

32. It is generally accepted in the industry, with certain limited exceptions, that the storage space for a given elevator should be approximately four times the total capacity of the rail cars that fill that elevator's car spot. One rail car holds approximately 90 tonnes of grain. Therefore, for example, an elevator with a 25 car spot loading 2,250 (90 x 25) tonnes of grain at one time would require approximately 9,000 tonnes of storage. In keeping with the foregoing, an elevator with a 50 car spot would require approximately 18,000 tonnes of storage space and a 100 car spot about 36,000 tonnes.

33. HTP elevators invariably have a larger number of rail car spots and are capable of handling much greater volumes of grain than traditional primary elevators. HTPs also draw grain from a larger area than the traditional primary elevators.

34. The incentives to build new HTP primary elevators are driven by the commodity mix in the draw area and the Multi Car Incentive ("MCI") rates offered by the railways. MCI rates are offered by railways to grain handling companies based on their ability to provide, within a set period of time following the delivery of empty rail cars, loaded blocks of 25, 50 and 100 rail cars for transport from individual elevators. In order to obtain the MCI rate, the loaded block of cars must also be unloaded within a fixed period of time. Since the supply of grain cars can be a bottleneck in the system the loading and unloading time constraints are

intended to expedite the handling of rail cars so as to minimize their turnaround time. The MCI rate ranges from $1/ tonne to $6/tonne.

35. Other structural changes to the industry include the abandonment of certain secondary rail-lines, a process that has been both hastened by and contributed to, the closure of a number of older primary elevators. These changes have resulted in a grain-handling network, which, in economic terms, is more efficient (i.e., the cost of transporting grain from the grain elevator to port terminals has been reduced). The logistics of handling and transportation from primary elevator to port terminal to vessel position is referred to as "pipeline management" in the grain handling industry.

CWB Business and Grain Car Allocation

36. The CWB recently adopted a tendering system pursuant to which grain handling companies can tender to supply grain and ship to a specified destination. Rail cars come with successful tenders. During the current crop year, the CWB will 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.

Transportation

37. As noted above, incentives in the form of rebates are sometimes offered by grain handling companies to farmers as a means of encouraging them to transport grain significant distances to the relevant company's primary elevators. Most of the grain that is delivered to primary grain elevators is then transported via rail to domestic users **(e.g. at flour mills, barley malters, feed mills, feed lots and oilseed crushers)**, US consumers or port terminals for export to other countries.

38. A key factor in ongoing rationalization of traditional primary grain elevators, is the adoption of MCI rates by the railways (described in paragraph 34 above). MCI rates ($1-$6/ tonne) are a substantial fraction of the rail rate to Vancouver, which ranges from $28-$45/tonne depending on the point of origin in Western Canada.

RELEVANT PRODUCT MARKET

39. The relevant product market for the primary grain elevator portion of this application is the purchasing and handling of grain.

RELEVANT GEOGRAPHIC MARKET

40. The relevant geographic markets for the primary grain elevator portion of this application are the local draw areas for each relevant elevator. To calculate market shares the Commissioner used 'draw areas' for Agricore's 38 HTP elevators.

INDUSTRY CONCENTRATION

41. UGG and Agricore are two of a small number of grain handling companies competing to purchase and handle grain in the following local geographic markets:

(a) the draw areas for primary elevators in the vicinity of the Agricore HTP at Dauphin, Manitoba;

(b) the two draw areas for primary elevators centred around Agricore's HTPs at Star and Legacy Junction, Alberta (Edmonton area). The draw area for the Agricore HTP at Starr includes primary elevators at Westlock and Gaudin (near Fort Saskatchewan). The draw area for the Agricore HTP at Legacy Junction includes primary elevators at Killam and Bawlf; and

(c) the draw areas for primary elevators in the vicinity of the Agricore HTP at Rycroft, Alberta (Peace River Area).

42. In this application the Commissioner is not alleging any likely substantial prevention or lessening of competition in any local geographic markets for the purchase and handling of grain, other than those referred to in the foregoing paragraph.

43. A combination of UGG and Agricore substantially increased concentration in already highly concentrated grain purchasing and handling markets.

44. In the draw areas for primary elevators in the vicinity of Dauphin, Manitoba and in the Edmonton area, the post-merger market share of Agricore United is approximately 50% to 55%, while in the Peace River Region the post-merger market share of Agricore United is approximately 60% to 65%.

SECTION 93 FACTORS

Acceptable Substitutes

45. The Commissioner concluded that there are no acceptable substitutes for primary grain elevator purchasing and handling services. While there are other facilities that can legally receive grain, such as process elevators (e.g. at flour mills, barley malters, feed mills, feed lots and oilseed crushers), the vast majority of the grain received at such facilities is sourced directly from primary grain elevators and not from farmers' operations.

46. Primary grain elevators located in the US are not potential substitutes for primary grain elevator services in Canada in view of the prohibitive transportation costs associated with shipping grain from the geographic markets of Peace River, Edmonton or Dauphin over the US border and on to US primary elevators.

Barriers to Entry

47. The Commissioner concluded that the barriers to entry into primary grain elevator handling services are high because of sunk costs.

48. The capital costs for construction of a new HTP elevator facility are estimated to be in the

range of about $10-$15 million, depending on the configuration adopted and the size of the storage built. New elevators are usually built to load 50 or 100 rail cars and therefore qualify for railway MCI rebates.

49. There are few, if any, economically viable possible alternative uses for an HTP grain elevator other than grain handling and storage. The capital invested in a new grain elevator is therefore almost entirely sunk cost.

50. The only significant entry in Western Canada in recent years is by Louis Dreyfus. However, the existing capacity of incumbent grain companies is more than sufficient to handle all grain crops grown in Western Canada. Further, existing excess capacity of incumbent grain companies is a barrier to entry because it represents a sunk cost.

51. An operator of a primary elevator also requires access to port terminals on commercially competitive terms.

52. Regulation is not a significant barrier to entry. The approval and construction of a new primary elevator facility can be completed in about one year.

Removal of a Vigorous and Effective Competitor

53. Agricore has been a strong competitor to UGG in providing primary grain elevator handling services in local markets in the areas of Peace River, Edmonton and Dauphin.

54. In the relevant markets, the acquisition of Agricore by UGG will result in substantially less grain handling choice for farmers, in the absence of the Draft Consent Order ("DCO"). This will allow Agricore United to exercise market power, resulting in higher handling fees and lower grain prices.

Effective Remaining Competition

55. The Commissioner concluded that if Agricore United is permitted to retain all the Agricore and UGG primary grain elevators in the affected areas of Peace River, Edmonton and Dauphin, the remaining companies will not be effective competitors for the purposes of eliminating the substantial lessening of competition. UGG and Agricore were two of a small number of grain handling companies competing to purchase and handle grain in those areas. Without the divestitures contemplated in the DCO filed by the Commissioner as part of his Application herein, the remaining third party grain-handling companies cannot be relied upon to prevent the substantial lessening of competition arising from this merger.

Foreign Competition

56. US primary grain elevator facilities do not compete in the affected local markets.

ANTI-COMPETITIVE EFFECTS

57. The Commissioner concluded that it is unlikely that UGG's exercise of market power will be prevented by new entry or by farmers transporting their products to more distant markets, or by any other countervailing competitive force. It is also the view of the Commissioner that it is unlikely that Agricore United's exercise of market power in any of the relevant geographic markets would be thwarted by significantly increased purchases of grains by processors or other buyers. The purchase decisions of these buyers are based on factors other than small but significant changes in grain prices, such as supply and demand conditions in their selling markets. Without the remedy contemplated in the DCO the Acquisition would result in substantial lessening of competition for a significant period of time.

B. CANOLA PURCHASING AND PROCESSING

OWNERSHIP STRUCTURE

58. Pursuant to the Acquisition, UGG acquired Agricore's interest in CanAmera which is a leading Canadian manufacturer and marketer of canola oil, and, is one of the largest canola processors in Canada. By virtue of its interest in CanAmera, Agricore (and now Agricore United), could nominate a representative to sit on CanAmera's Board of Directors.

59. Agricore United has 16.67% interest in CanAmera. SWP has a 33.3% interest and CSY Agri-Processing, Inc. and its subsidiary Central Soya Company, Inc. effectively hold the remaining 50%.

60. The actual governance of CanAmera is administered through CF Edible Oils Inc. As a result of its shareholder interest, Agricore's CEO has traditionally been one member of the six person CF Edible Oils Inc. Board and Agricore has had an observer at certain committee meetings where detailed operational information is provided, discussed and commercial decisions are taken.

61. ADM is also a major canola oil seed processor and is a direct competitor with CanAmera. Pre-merger ADM had a 42% ownership position in UGG while post merger it holds 19% of the common shares of Agricore United which could, at ADM's option and subject to certain conditions, ultimately rise to 45%. ADM also 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 a Grain Operations Committee established by UGG. Further, the agreement establishing that Committee provides that ADM shall have "...substantial influence over the operating units of UGG that procure, transport and market grain...".

62. 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 take competitive advantage of commercially sensitive information which

could result in a substantial lessening of competition for canola seed purchasing and processing.

INDUSTRY OVERVIEW

63. Canola seed processing results in two products: (1) a dry protein meal used in livestock and pet feed and; (2) a canola vegetable oil used as a major ingredient in numerous food products. As described below, the processors purchase seed from grain handling companies, who themselves have purchased it from farmers.

64. Canola seed processors generally have a limited amount of storage capacity and therefore tend to deal with grain handling companies who have an efficient and responsive delivery system. While direct purchases by processors from the farmers are utilized, the logistics of timely and efficient delivery make direct sourcing a minor proportion of their requirements.

65. CanAmera is viewed as a dominant participant in the North American canola processing industry. Together CanAmera and ADM account for 65% to 80% of the North American canola processing market. Other significant participants in the market include JRI and Cargill. JRI operates its canola processing business through its subsidiary, Canbra Foods Ltd.

66. CanAmera operations consist of:

(a) a soya bean and canola crushing plant in Hamilton, Ontario;

(b) canola crushing plants at Fort Saskatchewan, Alberta; Nipawin, Saskatchewan; and Harrowby and Altona, Manitoba;

(c) edible oil refineries at Toronto, Ontario; Montreal, Quebec; Nipawin, Saskatchewan; Altona, Manitoba; and at Wainwright, Alberta; and

(d) packaging plants in Oakville, Ontario and Edmonton, Alberta.

67. ADM has oilseed processing facilities at Lloydminster, Alberta; Windsor, Ontario and Velva, North Dakota.

RELEVANT PRODUCT MARKET

68. Canola purchasing and processing are the relevant product markets. Canola differs from other types of grains in terms of customer uses and pricing.

69. Canola processing which involves crushing, extraction and refining, is a capital intensive industry. Canola processing results in two products: (1) a dry protein meal used in livestock and pet feed and (2) a canola vegetable oil which is refined and then used in salad dressings, margarine, cookies and other types of bakery products.

70. Canadian oil seed processors purchase just under 40% of total Canadian canola seed production, the balance is exported primarily to the US, Mexico, Japan and China.

71. ADM is a leading exporter of Canadian grown canola. Post-merger ADM's share of total Canadian canola exports will be approximately 50%. ADM's significant position in both domestic and foreign canola purchases makes it unlikely that a small but significant price decrease by domestic canola crushers would be defeated by an increase in canola exports.

72. Canola oil is Canada's most popular all-purpose vegetable oil. In fact, Canadians are the largest per capita consumers of canola oil in the world. This is due in large part to the perceived health benefits associated with its use, as compared to other oils. Canola oil is often recommended by nutrition experts over other oils as it has the lowest level of saturated fat.

73. Canada is one of the largest producers of canola oil in the world. Canola oil accounts for approximately 78% of total Canadian production of edible oils, including approximately 88% of salad and cooking oils, 71% of shortening oils, and 53% of margarine oils.

RELEVANT GEOGRAPHIC MARKET

74. Canola seed production requires a climate with cool nights, therefore the crop is primarily grown in the northern regions of the US and in Canada. For this reason canola processors are located in these same regions.

75. Canola processors purchase the bulk of their canola seed requirements from grain handling companies. The geographic market for grain handling companies is local. Some of the grain handling companies are integrated into canola processing (i.e. Cargill and JRI) while UGG, Agricore and SWP have either equity or contractual ties to ADM or CanAmera.

76. In respect of canola processing the geographic market is regional encompassing the major grain growing regions in Western Canada and the Northwestern US. The major competitors in the canola processing industry have plants located in both the US and Canada.

77. Since canola oil is a major food product and a major ingredient in other food products, a key component of the canola processing business is to have plants situated in various locations to effectively service the food industry.

INDUSTRY CONCENTRATION

78. CanAmera and ADM are the dominant suppliers in the market for canola processing services in North America. In respect of canola oil processing, CanAmera and ADM account for at least 46% and 22% of the North American market, respectively. Cargill and JRI are the only other two major participants in this market and would account for approximately 20% and 12% of the market, respectively. These same market shares are reflective of the situation that exists in Canada. There is only one other competitor, a small farmer's co-operative canola processor located in Montana which would represent an insignificant share of the market.

SECTION 93 FACTORS

Acceptable Substitutes

79. Soya bean oil, which like canola oil is extracted through crushing, is substitutable for canola oil in some applications. Canola oil sells at a premium over soya bean oil. Each oil has its own distinct nutrient and fatty acid components. For example, as noted above, canola is recognized as having the lowest level of saturated fat as compared to all other oils and, as such, is viewed by many as a more healthy oil alternative. The use of each of these two oils therefore depends on the desired benefits and functionality required.

80. Other edible oil products include, olive oil, corn oil, palm oil, sunflower oil and peanut oil, all of which have higher levels of saturated fat than canola oil and are priced differently than canola oil. In addition, the use of peanut oil in North America has declined significantly in recent years due to common concerns relating to food allergies and its serious consequences on health, particularly among children.

Barriers to Entry

81. The barriers to entry into the canola processing market are high and include the following:

    (a) significant sunk costs for required multiple plant locations;

    (b) excess capacity in the market; and

    (c) specialized knowledge for operations and commodity trading.

Remaining Competition

82. The dominant industry participants in canola processing in North America are ADM and CanAmera. Cargill and JRI together represent less than 35% of the market.

Foreign Competition

83. CanAmera, ADM, Cargill and JRI are the only major canola processors in North America. US plants are located in North Dakota, Montana and Minnesota. There is no foreign competition which originates from outside the US and Canada.

84. As noted above, canola oil and canola meal which are processed in Canada are sold in both Canada and the US. However, while canola meal is processed in the US and sold into Canada, little if any canola oil is processed in the US and sold into Canada.

ANTI-COMPETITIVE EFFECTS

85. The acquisition by UGG of Agricore's interest in CanAmera will likely result in a substantial lessening or prevention of competition in the canola purchasing and processing market.

86. CanAmera and ADM are the largest canola processors in North America. Together they account for approximately 65% of the canola oil processing market both in Canada and the US. Absent some safeguard, the Acquisition could result in ADM being in a position to receive commercially sensitive information concerning the operations of CanAmera and, indirectly, being able to influence the output pricing decisions of CanAmera. These circumstances would likely result in a substantial lessening of competition for canola purchasing and processing.

87. This transaction will reinforce ADM's already significant position with respect to both domestic and export purchases of canola seed and would likely result in lower prices being offered to canola seed producers. ADM would be in a position to substantially lessen competition by influencing canola seed prices, grade assessment, trucking allowances and other terms.

VI. RELIEF SOUGHT

PRIMARY GRAIN ELEVATORS

88. The Commissioner requests an Order or Orders pursuant to section 92 of the Act requiring the Respondent to divest:

    (a) the UGG elevator at Dutton Siding, Manitoba;

    (b) the UGG elevator at Gaudin, Alberta;

    (c) the UGG elevator at Killam, Alberta;

    (d) the Agricore elevator at Westlock, Alberta;

    (e) the Agricore elevator at Bawlf, Alberta; and

    (f) at the Respondent's option, either the Agricore elevator at Rycroft, Alberta or the UGG elevator at Rycroft, Alberta and the UGG elevator at Falher, Alberta.

CANOLA PURCHASING AND PROCESSING

89. The Commissioner requests an Order or Orders pursuant to section 92 of the Act requiring the Respondent to:

    (a) maintain all non-public information regarding CanAmera, obtained as a result of Agricore United's shareholdings in CanAmera, confidential and separate from ADM (including the ADM nominees to the Agricore United board of directors).

    (b) not appoint any director, officer or employee of ADM as a nominee to the board of directors of CanAmera.

(c) exclude canola processing from the scope of the Agricore United Grain Operations Committee's mandate.

90. The restrictions set out in 89(a) to 89(c) shall remain in effect so long as Agricore United is entitled either to elect a representative to the Board of Directors of CanAmera or holds a greater than 10% interest in CanAmera, but in any event, not beyond November 1, 2011.

VII. CONCLUSION

91. The Commissioner concludes that the Acquisition would result in a likely substantial lessening or prevention of competition in a number of relevant markets. Nevertheless, it is submitted that each likely substantial lessening or prevention of competition identified by the Commissioner will be eliminated by the DCO as more fully explained in the Consent Order Impact Statement filed with the Commissioner's Application.

92. The Commissioner therefore seeks, pursuant to subsections 92(1)(e) and section 105 of the Act, the issuance of an Order on the same terms and conditions as are set out in the DCO.