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

CONSENT ORDER IMPACT STATEMENT

CONSENT ORDER IMPACT STATEMENT

1. This Statement is filed by the Commissioner of Competition (the "Commissioner") pursuant to section 77 of the *Competition Tribunal Rules*. It describes the circumstances underpinning the Draft Consent Order ("DCO") filed by the Commissioner as part of this proceeding and the DCO's anticipated effect on competition. The DCO is submitted by the Commissioner, with the consent of the respondent.

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

I. THE NATURE AND PURPOSE OF THE PROCEEDING

3. The Commissioner files with this Consent Order Impact Statement, a Notice of Application with a Statement of Grounds and Material Facts, a DCO, the Affidavits of D. Ouellet and H. Palsson, and the required Consents, and makes this Application pursuant to sections 92 and 105 of the *Competition Act* (the "Act"). The Commissioner has also applied for a Consent Interim Order pursuant to section 104 of the Act.

4. Pursuant to the terms of a Merger Agreement between United Grain Growers Limited ("UGG") and Agricore Cooperative Ltd. ("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 ("the Acquisition"). These assets include (1) port terminal grain handling assets, (2) primary grain elevator assets and (3) shares in an entity with canola processing assets. The transaction closed on November 1, 2001 and as of that date UGG and Agricore have been carrying on business as Agricore United. Having regard to concerns expressed by the Commissioner about the likely effects of the Acquisition on competition in Canada, Agricore United has agreed to divest certain primary grain elevator assets and to abide by certain confidentiality provisions with respect to its canola processing interests.

5. The settlement reached between the Commissioner and UGG is designed to eliminate the substantial lessening of competition which would likely have arisen in certain markets in which both UGG and Agricore have operations. The Commissioner requests that the Competition Tribunal give effect to this settlement through approval of the DCO.

II. THE ALLEGED EFFECTS OF THE ACQUISITION ON COMPETITION

6. The Commissioner assessed the likely competitive effects of the Acquisition in respect of the following product and geographic markets: (1) the port terminal grain handling market in Vancouver; (2) all local primary grain handling markets across Western Canada; and (3) the canola seed purchasing and processing market in North America.

7. The Commissioner examined the likely impact on competition of the Acquisition, and particularly the likely effect on prices if Agricore were to effectively exit from the markets as a competitive alternative as a result of the Acquisition. Finally, the Commissioner considered possible remedies.

A. PRIMARY GRAIN ELEVATORS

Industry Overview

8. 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.;

   (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.

9. 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.

10. 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.

11. 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 acceptable 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).

Position of Agricore United in the Primary Elevator Grain Handling and Purchasing Market

12. As the table below indicates, prior to the Acquisition, Agricore and UGG together owned 43% of all Western Canadian primary grain elevators and held 35% of total Western Canadian grain handling storage capacity. 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	751020	12.0	87	12.8
SWP	1517200	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	251110	4.0	23	3.4
Others	717,990	11.5	31	4.5
Total	6,260,730	100	681	100

Likely Effect of the Acquisition on Competition in the Primary Elevator Grain Purchasing and Handling Market

13. The Acquisition would likely substantially lessen competition in the following 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 Starr 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).

14. Each of the foregoing markets is highly concentrated. A combination of UGG and Agricore substantially increased concentration in already highly concentrated grain purchasing and handling markets.

15. In the primary 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%.

16. On the basis of the foregoing, absent the proposed remedy, the Acquisition is likely to lead to a substantial lessening of competition in the markets referred to above.

17. The remedy proposed in the DCO requires that Agricore United divest the primary elevator assets set out in Schedule "A" of the DCO. The proposed remedy will be effective in removing the substantial lessening of competition in the affected primary grain handling markets.

B. CANOLA PURCHASING AND PROCESSING

Ownership Structure

18. CanAmera Foods Limited Partnership ("CanAmera") is a leading Canadian manufacturer and marketer of canola oil, and, is one of the largest canola processors in Canada.

19. Pursuant to the Acquisition, UGG acquired Agricore's interest in CanAmera and Agricore United is now able to nominate a representative to CanAmera's Board of Directors.

20. 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.

21. 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...".

Industry Overview

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

23. Canola seed processors generally have a limited amount of storage capacity and therefore they 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.

Position of Agricore United in the Canola Purchasing and Processing Market

24. 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.

25. 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.

Likely Effect of the Acquisition on Competition in the Canola Purchasing and Processing Market

26. 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 markets.

27. 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.

28. This transaction will reinforce ADM's already significant position with respect to both domestic and export purchases of canola seed.

29. 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.

III. CONCLUSIONS AND RECOMMENDATION

ANTICIPATED IMPACT OF THE DRAFT CONSENT ORDER

<u>Primary Grain Elevators</u>

30. The DCO agreed to by the Commissioner and UGG contemplates divestitures of primary elevators in each of the local market areas around Dauphin, Edmonton and Peace River. These divestitures will remove the substantial lessening of competition arising from this transaction in these local markets.

31. In the draw areas for primary elevators in the vicinity of Dauphin, Manitoba, Agricore United would be required to divest of an elevator at Dutton Siding. Pre-merger UGG had approximately a 30% to 35% share and Agricore a 15% to 20% share of the local markets. The divestiture would leave Agricore United with a market share of approximately 40% to 45% in the "Dauphin market."

32. In addition to Agricore United and the divested facility at Dutton Siding, some producers in the Dauphin market would be able to access facilities operated by Cargill, Paterson and Pioneer. Most producers will have access to at least three primary elevators post-merger. This will be similar to the situation that prevailed pre-merger.

33. In the two draw areas for primary elevators centred around Agricore's HTPs at Star and Legacy Junction, Alberta (Edmonton area) Agricore had a pre-merger market share of about 40% and UGG had a market share of 10% to 15 %. The draw area for the Agricore HTP at Star 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. Post-merger, Agricore United would have a market share of approximately 50% to 55% in each of the identified local markets in the Edmonton area.

34. With the divestiture of four elevators located at Gaudin, Killam, Westlock and Bawlf, Agricore United would have a post-merger market share of approximately 40% to 45% in

the two local markets in the Edmonton area.

35. Producers in the Edmonton area will have access to Cargill, Pioneer, SWP and in some cases, Louis Dreyfus in addition to Agricore United and the divested elevators. Most producers will have access to three or four suppliers of grain handling services locally post-merger in the Edmonton area. This would be similar to the situation pre-merger.

36. In the draw areas for primary elevators in the vicinities of Rycroft and Fahler ("Peace River Region"), pre-merger, Agricore had approximately 40% to 50% market share and UGG had approximately 20% to 25%. The divestiture of either, what were formerly UGG's elevators at Rycroft and Falher or what was Agricore's facility in Rycroft, will address the substantial lessening of competition arising from the merger in that market. With the divestitures contemplated in the DCO, Agricore United would hold a post-merger market share of approximately 40% to 50%.

37. With the divestitures in the DCO most producers in the Peace River Region would have access to three local grain elevator companies. This would replicate the pre-merger situation in the Peace River Region.

Canola Purchasing and Processing

38. In the absence of the DCO the acquisition by UGG of Agricore's interest in CanAmera will likely result in a substantial lessening or prevention of competition in the canola seed purchasing and processing market.

39. If implemented, the terms of the DCO relating to canola processing will prevent ADM from obtaining, via either Board or Grain Committee representation, commercially sensitive information concerning the operations of CanAmera and, indirectly, being able to influence CanAmera.

ALTERNATIVES TO THE SETTLEMENT

Primary Grain Elevators

40. As an alternative to the DCO, the Commissioner considered contested litigation seeking divestitures in the relevant markets for primary grain handling. The Commissioner has accepted the DCO for a number of reasons. First, the Commissioner is satisfied from his review of this transaction and related matters that the proposed divestitures will eliminate the substantial lessening of competition which would otherwise have arisen from the Acquisition. Second, the Commissioner believes that the proposed divestitures should result in sales of the affected businesses to effective competitors so as to prevent any possible exercise of market power in the markets concerned. Third, the DCO provides a timelier and more certain outcome for producers of grain. Finally, the DCO provides a timelier and more certain outcome for UGG and minimizes the intrusion into its contractual relations with other parties, in order that it may proceed with the remainder of the Acquisition and have the opportunity to achieve their anticipated cost savings and efficiencies.

Canola Purchasing and Processing

41. As an alternative to the DCO, contested litigation seeking the divestiture of UGG's acquired interest in CanAmera would have been required to remove the substantial lessening of competition. The DCO provides a timelier and more certain outcome for Agricore United and the Commissioner.

RECOMMENDATION

42. For the reasons presented herein, the Commissioner requests that the Competition Tribunal issue the DCO.