PUBLIC

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 for an order by the Commissioner of Competition under sections 92 and 105 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:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

UNITED GRAIN GROWERS LIMITED

Respondent

- and -

THE CANADIAN WHEAT BOARD

Intervener

COMMISSIONER OF COMPETITION'S MEMORANDUM OF ARGUMENT MOTION FOR SHOW CAUSE HEARING AND RELIEF

PART I - NATURE OF THE MOTION

The Motion

1. This Memorandum of Argument is filed by the Commissioner of Competition ("Commissioner") in connection with the Commissioner's motion for a show cause order requiring the Respondent, United Grain Growers Limited ("AU"), to appear before the Competition Tribunal ("Tribunal") in Ottawa on September 5, 2006, or such other time as the Tribunal may require, to show cause why it should not be found in contempt, in having refused to allow the Commissioner to conduct an inspection properly required pursuant to paragraph 45 of the Consent Agreement dated October 17, 2002, between the Commissioner and AU (the "Consent Agreement").

Summary of Commissioner's Position

2. On October 17, 2002, AU and the Commissioner filed the Consent Agreement with the Tribunal for registration.

Affidavit of Terence Stechysin dated August 29, 2006 (the "Stechysin Affidavit"), para 9

3. Pursuant to the Consent Agreement, AU agreed, among other things, to divest either the UGG Terminal or its interest in the Pacific Terminal during an initial sale period (described below), failing which a trustee would be appointed to implement a divestiture.

Stechysin Affidavit, para 9

4. Paragraph 45 of the Consent Agreement provides the Commissioner with a right of

inspection, during the life of the Consent Agreement, for the purpose of "determining or securing compliance" with the Consent Agreement.

Stechysin Affidavit, paras 9 & 10

5. The Commissioner's right of inspection permits the Commissioner, on a minimum of two business days notice and subject only to any valid claim of a legally recognized privilege, "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".

Stechysin Affidavit, paras 9 & 10

6. On August 23, 2006, the Commissioner served AU with a written notice of inspection pursuant to paragraph 45 of the Consent Agreement (the "Notice"), notifying AU that the Commissioner would attend at the offices of AU in Winnipeg to conduct an inspection on Monday, August 28, 2006.

Stechysin Affidavit, para 24

7. On August 25, 2006 pursuant to a request for additional time made by AU, the Commissioner agreed, as a courtesy, to defer the inspection until Tuesday, August 29, 2006.

Stechysin Affidavit, para 26

8. Subsequently, on August 25, 2006, counsel to AU, Davies, Ward, Phillips & Vineberg LLP ("Davies"), advised that AU would not permit the Commissioner to conduct an inspection at its offices on August 29th, citing AU's purported, but unsubstantiated, concerns that the Notice had been served with an "improper purpose", was "excessive in scope" and contained "improper requests". By letter dated August 27, 2006, the Commissioner repeated its request that AU comply with the Notice and provided a detailed response to the concerns raised in Davies' August 25th letter.

Stechysin Affidavit, paras 27 & 29

9. Despite the fact that the Commissioner has a clear right to inspect under paragraph 45 and has provided proper notice of inspection to AU, AU has persisted in refusing to allow the Commissioner's inspection, citing irrelevant and, in any event, wholly unsubstantiated grounds which the Commissioner submits, are completely without merit.

10. Accordingly, AU is in breach of paragraph 45 of the Consent Agreement and should be required to appear before the Tribunal to show cause why it should not be found in contempt. Further, AU should be required to comply with the Notice forthwith.

PART II - THE FACTS

The Acquisition and SLC Findings

11. On November 1, 2001, AU completed its acquisition of Agricore Cooperative Ltd. (the "Acquisition").

Stechysin Affidavit, para 4

12. On January 2, 2002, pursuant to the October 31, 2001 letter agreement entered into between the Commissioner and AU, the Commissioner filed an application pursuant to section 92 of the *Competition Act* (the "Act") alleging that the Acquisition was likely to prevent or lessen competition substantially in the market for port terminal grain handling services in the Port of Vancouver. The Commissioner sought an order directing the divestiture of either the UGG grain terminal or AU's interest in the Pacific Terminal. Pleadings closed on February 25, 2002.

Stechysin Affidavit, para 5

13. At the request of the parties, on September 10, 2002, the Tribunal convened a hearing to consider whether the Acquisition was likely to cause a substantial lessening of competition ("SLC") in the market for port terminal grain handling services at Vancouver. The Commissioner filed with the Tribunal, among other things, the expert report of Dr. William Wilson and the affidavit of David Ouellet, the lead Senior

Competition Law Officer assigned to the matter. Both Dr. Wilson and Mr. Ouellet testified before the Tribunal at the hearing on September 10, 2002.

Stechysin Affidavit, para 6

14. On September 12, 2002, the Tribunal issued its Findings and Determinations (the "SLC Finding"). The Tribunal found that the Acquisition caused an SLC in the market for port terminal grain handling services at Vancouver, as alleged by the Commissioner. The Tribunal also found that a divestiture of the UGG Terminal or AU's interest in the Pacific Terminal would remedy the SLC.

Stechysin Affidavit, para 7

15. The Tribunal left open for determination the question of whether the divestiture of that part of the Pacific Terminal referred to as Pacific 1, would also remedy the SLC. That determination was to have been made following a hearing which was to have commenced on October 21, 2002.

Stechysin Affidavit, para 8

The Consent Agreement

16. However, the remedy hearing was not convened because, on October 17, 2002, the Commissioner and AU filed the Consent Agreement with the Tribunal. Pursuant to the Consent Agreement, AU agreed to divest, at its option, either the UGG Terminal or the Pacific Terminal in the period between October 17, 2002 and [CONFIDENTIAL]

(the "ISP"), failing which a trustee would be appointed to implement the sale within three months time [CONFIDENTIAL].

Stechysin Affidavit, para 9

17. Paragraph 45(a) of the Consent Agreement provides the Commissioner, during the life of the Consent Agreement, with the right to conduct inspections for purposes of determining or securing compliance with the Consent Agreement. It provides as follows:

> "For the purposes 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; "

Stechysin Affidavit, paras 9 & 10

18. In the Fall 2003, AU elected to divest the UGG Terminal.

Stechysin Affidavit, para 11

19. Through a mechanism provided for under the Consent Agreement and a series of extensions agreed to by the Commissioner to facilitate a divestiture by AU, the Commissioner agreed to extend the ISP from [CONFIDENTIAL] to August 12, 2005, relying on AU's representations that a sale of the UGG Terminal was imminent. However, there was no divestiture in that period.

Stechysin Affidavit, para 12

20. On August 12, 2005, the Commissioner refused to agree to a further extension of the ISP. Immediately thereafter, on August 12, 2005, AU filed an application under section 106 of the Act seeking recission of the Consent Agreement. The ISP was subsequently extended for a further 8 months while the section 106 application proceeded. Following two weeks of hearings in that proceeding, on May 11, 2006, AU abandoned its case and filed a Notice of Withdrawal of its section 106 application.

Stechysin Affidavit, paras 13-17.

The Trustee Sale Process

21. On May 12, 2006, the Commissioner confirmed the appointment of Grant Thornton LLP ("GTL") as trustee for the sale of the UGG Terminal. Pursuant to the terms of the Consent Agreement, as amended by agreement of the parties, GTL had the four months beginning on May 12, 2006 and ending on September 12, 2006 (the "TSP") to complete a divestiture.

Stechysin Affidavit, para 18

22. On July 7, 2006, the Commissioner and AU agreed to extend the TSP to October 16, 2006. This date was agreed to conform to the time line for the sale process proposed by GTL. That sale process provided for the following milestones:

-- August 25, 2006: receipt of offers by all prospective purchasers

-- September 15, 2006: selection by GTL of the "winning bid"

-- September 15 to October 16, 2006: consideration of the proposed purchaser by the Commissioner and AU pursuant to paragraphs 28-31 of the Consent Agreement.

Stechysin Affidavit, para 19

23. On July 11, 2006, GTL sent a Confidential Information Memorandum ("CIM") to [CONFIDENTIAL] prospective purchasers ("PPs") which, among other things, set out the time line as described above.

Stechysin Affidavit, para 20

24. [CONFIDENTIAL]

Stechysin Affidavit, para 21

25. [CONFIDENTIAL]

Stechysin Affidavit, para 22

26. [CONFIDENTIAL]

Stechysin Affidavit, para 23

27. On August 24, 2006, the Commissioner wrote to AU stating that, given AU's obligation to divest and concomitant obligation to ensure that any consents or approvals required to

discharge its obligations under the Consent Agreement have been obtained, the Commissioner was prepared to attend additional meetings between the VPA, AU and GTL, and that she had no objection to AU and the GTL meeting independently with the VPA. The Commissioner confirmed her understanding [CONFIDENTIAL]

Stechysin Affidavit, para 25

28. [CONFIDENTIAL] Whether the terms of that lease will be such that the divestiture of the UGG Terminal will remain a viable option as a remedy for the SLC in port terminal grain handling services in Vancouver remains to be seen.

Stechysin Affidavit, para 28

Stechysin Affidavit, para 24

29. In the event that the terms of the VPA lease are such that a divestiture of the UGG Terminal is no longer viable, either commercially or as a sufficient remedy for the SLC at Vancouver, then the Commissioner will take such steps as are necessary to address that issue, including, as appropriate, proceedings to address AU's failure to obtain the necessary consent or approval from the VPA and to fulfill its unconditional obligations under the Consent Agreement, and proceedings to ensure that the SLC at Vancouver is remedied, whether by a divestiture of the Pacific Terminal or by some other means.

The Notice

30. On August 23, 2006, the Commissioner served AU with a written notice of inspection

pursuant to paragraph 45 of the Consent Agreement (the "Notice"), notifying AU that the Commissioner would attend at the offices of AU in Winnipeg to conduct an inspection on Monday, August 28, 2006.

Stechysin Affidavit, para 24

31. On August 25, 2006 pursuant to a request for additional time made by AU, the Commissioner agreed, as a courtesy, to defer the inspection until Tuesday, August 29, 2006.

Stechysin Affidavit, para 26

32. Subsequently, on August 25, 2006, counsel to AU, Davies, Ward, Phillips & Vineberg LLP ("Davies"), advised that AU would not permit the Commissioner to conduct an inspection at its offices on August 29th, citing AU's purported, but unsubstantiated, concerns that the Notice had been served with an "improper purpose", was "excessive in scope" and contained "improper requests". By letter dated August 27, 2006, the Commissioner repeated its request that AU comply with the Notice and provided a detailed response to the concerns raised in Davies' August 25th letter.

Stechysin Affidavit, paras 27 & 29

33. Despite the fact that the Commissioner has a clear right to inspect under paragraph 45 and has provided proper notice of inspection to AU, AU has persisted in refusing to allow the Commissioner's inspection, citing irrelevant and, in any event, wholly unsubstantiated grounds which the Commissioner submits, are completely without merit.

PART III - THE ISSUES

34. The Issues on this Motion are:

(i) Does this Tribunal have the jurisdiction to order contempt?; and

(ii) Has the Commissioner made out a sufficient basis for a show cause hearing?;

PART IV - THE LAW AND ARGUMENT

Issue 1: The Tribunal has the jurisdiction to order contempt *ex facie.*

35. The Tribunal has jurisdiction to enforce its orders by finding in contempt any person who does not comply with a Tribunal order pursuant to Part VIII of the Act.

***Competition Tribunal Act*, s. 8(2)**
***Chrysler Canada Ltd. v. Canada (Director of Investigation and Research),* (1992) 2 S.C.R. 394**

36. By operation of subsection 105(4) of the Act, the Consent Agreement has the same force and effect as an order of the Tribunal, and proceedings, including contempt proceedings, may be taken in respect of it, as if it were an order of the Tribunal.

***Competition Act*, s-s. 105(4)**

Issue 2: The Commissioner has made out a sufficient basis for a Show Cause Hearing

(i) The Test for Show Cause Hearing

37. As there is no specific contempt provision provided for in the Tribunal's Rules, reference may be made to the Federal Court Rules by operation of the "gap" rule in the Tribunal's Rules.

***Competition Tribunal Rules*, s-s. 72(1)**

38. Contempt of court is defined in Rule 466 of the *Federal Court Rules* as follows:

466. Subject to rule 467, a person is guilty of contempt of Court who: (a) at a hearing fails to maintain a respectful attitude, remain silent or refrain from showing approval or disapproval of the proceeding; (b) disobeys a process or order of the Court; (c) acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court; (d) is an officer of the Court and fails to perform his or her duty; or (e) is a sheriff or bailiff and does not execute a writ forthwith or does not make a return thereof or, in executing it, infringes a rule the contravention of which renders the sheriff or bailiff liable to a penalty.	466. Sous réserve de la règle 467, est coupable d'outrage au tribunal quiconque: a) étant présent à une audience de la Cour, ne se comporte pas avec respect, ne garde pas le silence ou manifeste son approbation ou sa désapprobation du déroulement de l'instance; b) désobéit à un moyen de contrainte ou à une ordonnance de la Cour; c) agit de façon à entraver la bonne administration de la justice ou à porter atteinte à l'autorité ou à la dignité de la Cour; d) étant un fonctionnaire de la Cour, n'accomplit pas ses fonctions; e) étant un shérif ou un huissier, n'exécute pas immédiatement un bref ou ne dresse pas le procès-verbal d'exécution, ou enfreint une règle don't la violation le rend passible d'une peine.

39. Contempt proceedings follow a two-stage procedure, as set out in Rules 467 through 472 of the *Federal Court Rules*. At the first stage, an applicant seeks a "show cause" order from the court or tribunal requiring the person alleged to be in contempt to appear before it to answer to the allegations.

40. In order to obtain a show cause order, an applicant must only establish a *prima facie* case.

***R. v. Perry*, [1982] 2 F.C. 519 (C.A.) at pp. 4-5 (QL)**

41. To establish a *prima facie* case, an applicant must demonstrate to the court or tribunal that, assuming the evidence relied on by the applicant in support of the show cause order to be true, the elements necessary for a finding of contempt have been proved. In the words of Lacombe J. in *CUPW v. Canada Post Corp*:

> "Whether this was the result of intervention by the other appellants or occurred for some other reason hardly mattered so far as the making of the show cause order was concerned. A specific material fact which affected the appellant in some way, if not directly, had been established in the affidavits of the postal workers submitted in support of the respondent's application: the prohibition contained in the arbitral award had not been observed in three of its establishments. There was accordingly prima facie evidence that the arbitral award had been disobeyed, and this was submitted to the Judge making the show cause order for his consideration. This evidence was clear enough to allow him, in view of the allegations of the respondent's application, to tie it to the personal responsibility of the appellant and to justify him in summoning the latter to appear and eventually answer to the Court on the matter. It is at the later stage, at the hearing on the merits, that the appellant will be able to present its defence arguments in an effort to avoid liability, possibly including the one now being made in its appeal. On an application for a show cause order, a judge needs only to be satisfied that the evidence contained in the affidavits filed in support of the application is sufficient to authorize the making of the order: Baxter Travenol Laboratories Inc. v. Cutter (Canada) Ltd. (1985), 56 N.R. 282 (F.C.A.), at page 288.

***Canadian Union of Postal Workers v. Canada Post Corp.*, [1987] 3 F.C. 654, at para. 41**

42. If a *prima facie* case is made out, the court must issue a show cause order, unless the violation of the order is so unimportant or has occurred in circumstances such that it is absolutely certain that the contemnor does not deserve sanction.

R. v. Perry, supra

43. It is not appropriate, at the stage of the show cause hearing for the court to consider defences or questions of admissibility of evidence which may be raised by the defendant, whether based on the *Charter*, the common law or statute. The proper time to hear such arguments is when the alleged contemnor appears before the court at the time of the hearing on the merits.

Baxter Labratories Ltd. v. Cutter, **(1983) 2 D.L.R. (4th) 621, at 629**

(ii) The Substantive Legal Requirements for Contempt

44. There are two constituent elements of contempt. The first is that the alleged contemnor had knowledge of the order; the second is that he or she has breached the order.

Nintendo of America Inc. v. 131865 Canada Inc. et al, **(1991) 41 F.T.R. 186, at 188**

(a) Knowledge

45. The person alleged to be in contempt of an order must have knowledge of the existence of that order.

Tele-direct Publications v. Canadian Business Online **(1998) 83 C.P.R. (3d) 34;**
Bhatnager v. Canada, **[1990] 2 S.C.R. 217; 71 D.L.R. (4th) 84.**

(b) Breach

46. The person subject to the order must be in breach of that order, either expressly or by necessary implication.

Valmet Oy v. Beloit Canada Ltd., **(1988) 20 C.P.R. (3d) 1, at 17-18 (per Marceau J.)**

47. However, in proving a breach it is not necessary to show that the alleged contemnor intended to violate the order or did so deliberately.

> ***Nintendo, supra,* at 188.**
> ***Canadian Human Rights Commission v. Heritage Front and Droege,* (1994) 78 FTR 241 at 247.**

48. The motive of the contemnor for breaching the order, or the fact he or she was acting in good faith, is not relevant to a determination of contempt; rather, it is considered when determining the appropriate punishment.

> ***Baxter supra;***
> ***Penthouse International v. 163564 Canada Inc.* (1996) 63 C.P.R. 328 at 333.**

(iii) The Commissioner has established a *prima facie* case for contempt

49. In the present case, AU plainly has knowledge of the Consent Agreement and of the Notice delivered pursuant thereto.

50. As to breach, the Commissioner submits that AU's refusal to permit the Commissioner to conduct an inspection, notwithstanding her clear right under the Consent Agreement to do so, constitutes a clear and flagrant breach of the Consent Agreement.

51. By refusing to allow the Commissioner to conduct an inspection, AU is, pursuant to s-s. 105(4) of the Competition Act, in violation of an order of the Tribunal and proceedings may be taken accordingly.

> ***Competition Act* s-s. 105(4)**

52. The grounds on which AU has refused to allow the Commissioner are not only completely unsubstantiated, they are not valid bases for avoiding its obligations to permit the Commissioner's inspection.

53. Regarding AU's allegation that the Notice was served with an "improper purpose," AU has indicated that it "is concerned that the Notice has been given with a view to discovering documents and information for the purpose of a further proceeding before the Tribunal, in respect of which the Commissioner may not otherwise be entitled to discovery, and not for a valid purpose contemplated by paragraph 45 of the Consent Agreement." In effect, AU suggests that the Commissioner, a public office holder appointed pursuant to s. 7 of the Act to administer and enforce the Act, is abusing her rights under paragraph 45 to clandestinely obtain discovery to which she is not otherwise entitled.

54. First, the Commissioner considers this to be a serious allegation which is both untrue and entirely unsupported: rather, it is based on speculation and supposition. Second, and in any event, to the extent that AU suggests that the Commissioner could not perfectly appropriately rely upon information collected pursuant to her inspection powers in proceedings relating to "compliance" with the Consent Agreement, AU is plainly wrong.

55. Regarding AU's allegation that the Notice is excessive in scope, the Notice describes the records that are to be made available for inspection and/or copying using precisely the

language employed in paragraph 45 of the Consent Agreement. Therefore, the class of records identified and sought pursuant to the Notice is precisely that which AU agreed under paragraph 45 to provide. The Commissioner submits that, by definition, the Notice cannot be excessive in scope.

56. AU alleges that the request in connection with the Pacific Terminal are "improper requests". It is clear on the face of the Consent Agreement that, notwithstanding AU's "election" to sell the UGG Terminal, until the implementation of a divestiture, AU continues to have obligations to the Commissioner and the Tribunal relating to the Pacific Terminal. For example, paragraphs 34 through 44 of the Consent Agreement expressly require AU to maintain both the UGG and Pacific Terminals until the implementation of a port terminal divestiture option.

57. In any event, the Consent Agreement clearly contemplates that, until a port terminal divestiture option is implemented, AU must maintain both the UGG and Pacific Terminals so as to preserve both terminal options agreed to in the Consent Agreement (and found by the Tribunal) to be possible and viable means of remedying the SLC.

58. In all the circumstances, the Commissioner submits that there is a *prima facie* case of contempt.

PART V - ORDER SOUGHT

59. The Commissioner respectfully requests:

a. an order requiring AU:

(i) to appear before the Tribunal in Ottawa on September 5, 2006, or at such time as is fixed by the Tribunal, to answer allegations of contempt;

(ii) to be prepared to hear proof of the alleged contempt, as outlined in this Notice of Motion and the Commissioner's Memorandum of Argument; and

(iii) to present any defence it may have;

b. an order that any cross-examinations shall be conducted *viva voce* before the Tribunal at the show cause hearing;

c. an Order awarding costs of this motion to the Commissioner on a full indemnity basis; and

d. such further and other relief as the Commissioner may request and this Honourable Tribunal may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Gatineau, this 29th day of August, 2006.

John L. Syme
Jonathan Chaplan
Steve Sansom
Eunice Yuh
Department of Justice
Counsel to the Commissioner of Competition
Place du Portage, Phase I
2220 - 50 Victoria Street
Hull, Quebec K1A 0C9
Telephone: (819) 997-3325
Facsimile: (819) 953-9267

VI. LIST OF AUTHORITIES

1. *Competition Tribunal Act,* subsection 8(2)

2. *Chrysler Canada Ltd. v. Canada (Director of Investigation and Research),* [1992] 2 S.C.R. 394

3. *Competition Act, subsection* 105(4)

4. *Competition Tribunal Rules, subsection* 72 (1)

5. *Federal Court Rules, 1998,* sections 466-472

6. *Canadian Union of Postal Workers v. Canada Post Corp.*, [1987] 3 F.C. 654

7. *R. v. Perry*, [1982] 2 F.C. 519 (C.A.)

8. *Baxter Labratories Ltd. v. Cutter (*1983), 2 D.L.R. (4th) 621

9. *Nintendo of America Inc. v. 131865 Canada Inc. et al.* (1991), 41 F.T.R. 186

10. *Tele-Direct Publications v. Canadian Business Online* (1998), 83 C.P.R. (3d) 34

11. *Bhatnager v. Canada,* [1990] 2 S.C.R. 217

12. *Valmet Oy v. Beloit Canada Ltd.* (1988), 20 C.P.R. (3d) 1

13. *Canadian Human Rights Commission v. Heritage Front and Droege* (1994), 78 F.T.R. 24

14. *Penthouse International v. 163564 Canada Inc. (*1996), 63 C.P.R. 328