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CT- 2002-001

Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

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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 United Grain Growers Limited of Agricore Cooperative Ltd., a company engaged in the grain handling business (the "Acquisition");

AND IN THE MATTER OF an application for an order by the Commissioner of Competition under section 92 of the *Competition Act* regarding the Acquisition;

AND IN THE MATTER OF a consent agreement entered into by the Commissioner of Competition and United Grain Growers Limited in relation to the Acquisition, dated October 17, 2002.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant/Responding Party

- and -

UNITED GRAIN GROWERS LIMITED

Respondent/Moving Party

NOTICE OF MOTION

**Re: Respondent's Motion for Directions/Orders Concerning Trustee Sale Period and
Notice under Paragraph 45 of the Consent Agreement**

TAKE NOTICE THAT the Respondent will make a motion to the Competition Tribunal (the "Tribunal") on or before September 12, 2006. All capitalized terms in this Notice have the meaning ascribed to them in the Consent Agreement, unless otherwise defined herein.

THE MOTION IS FOR:

Trustee Sale Period

1 With respect to the remaining term of the Consent Agreement (the "Trustee Sale Period"):

- (a) An order that the Trustee Sale Period be extended to October 26, 2006 or such date that the Vancouver Port Authority ("VPA") provides its position on whether or not (and on what terms) it will consent to a transfer of the lease relating to the UGG Terminal to a potential purchaser under the Consent Agreement (the "Expiry Date" or "ED").

- (b) In the event that the VPA consents to a transfer of the lease relating to the UGG Terminal to a prospective purchaser under the Consent Agreement on the terms and conditions of the New Terminal Lease (as defined below), an order that the Trustee's duties and powers under the Consent Agreement are fully reinstated and the Trustee Sale Period is extended according to the following schedule:
 - (i) ED + 0 days – Restart of the Trustee Sale Period

 - (ii) ED + 25 days – Deadline for receipt of offers from prospective purchasers of the UGG Terminal

 - (iii) ED + 46 days – Deadline for the Trustee to recommend a purchaser of the UGG Terminal to Agricore United and the Commissioner, as required under the Consent Agreement

- (iv) ED + 51 days – Deadline for Commissioner and Agricore United to exercise their rights under the Consent Agreement to request information concerning the proposed divestiture or potential purchasers
 - (v) ED + 60 days – Deadline for the Trustee to respond to questions asked by the Commissioner and/or Agricore United, subject to any agreed extension between the parties
 - (vi) ED + 75 days – Deadline for the Commissioner and Agricore United to exercise their rights under the Consent Agreement to object to the divestiture proposed by the Trustee (assuming responses to questions are received on or before ED + 60)
 - (vii) ED + 76 days – Expiry of the Trustee Sale Period
 - (viii) ED + 91 days – Earliest possible closing date of the sale of the UGG Terminal under the Consent Agreement
 - (ix) ED + 106 days – The date up to which the Trustee may, in its sole discretion, extend the closing of the sale of the UGG Terminal under the Consent Agreement
- (c) In the event that the VPA does not consent to a transfer of the lease relating to the UGG Terminal to a prospective purchaser under the Consent Agreement on the terms and conditions of the New Terminal Lease, an order that the Trustee Sale Period is terminated, the Trustee has no further rights concerning a divestiture

under the Consent Agreement and the Commissioner is required to seek directions from the Tribunal.

Notice Provided Under Paragraph 45 of the Consent Agreement

2. With respect to the notice by the Commissioner purportedly pursuant to paragraph 45 of the Consent Agreement, dated August 23, 2005 (the "Notice"), directions and/or orders from the Tribunal concerning the validity and appropriate scope of the Notice in the current circumstances, including:
 - (a) An order directing the Commissioner to provide Agricore United with further and better particulars of the specific documents the Commissioner wishes to inspect and how those documents are relevant to the issue of Agricore United's compliance with the Consent Agreement, rather than simply listing broad and general categories of documents as is currently provided in the Notice.
 - (b) An order directing the Commissioner to propose to Agricore United a reasonable and efficient process for the conduct of any appropriate inspection pursuant to paragraph 45 of the Consent Agreement and, failing agreement by the parties, an order directing the process to be followed.
 - (c) An order that the Commissioner is only entitled to inspect appropriate documents as at August 2006, and not over the past four years or, alternatively, directions concerning the appropriate time frame of the documents that the Commissioner is entitled to inspect pursuant to paragraph 45 of the Consent Agreement.

- (d) An order that the Commissioner is not entitled under paragraph 45 to inspect prospective plans, proposals and discussion papers or, alternatively, directions concerning the appropriate parameters of inspection of such documents.
 - (e) An order that the Commissioner is not entitled under paragraph 45 to require production for inspection of documents which have been previously provided to the Commissioner or made available to her or, alternatively, directions concerning the appropriate process for the inspection of such documents.
 - (f) An order that the Commissioner is not entitled under paragraph 45 to inspect documents relating to the Pacific Complex or, alternatively, directions concerning the appropriate process for the inspection of such documents.
3. An Order that the Commissioner's motion for contempt received by the Respondent on August 30, 2006 be adjourned pending determination of this motion.
 4. An order, if necessary, abridging the time for service and filing of this motion.
 5. An order, if necessary, scheduling a pre-hearing teleconference to set the date for the hearing of this motion, as well as a schedule for delivery of motion materials.
 6. An order awarding costs of this motion in favour of the Respondent.
 7. Such further and other orders as requested by the Respondent and deemed just by the Tribunal.

THE GROUNDS FOR THE MOTION ARE:

Background to the Consent Agreement

1. On November 1, 2001, United Grain Growers Limited acquired Agricore Cooperative Limited (the "Acquisition"), and commenced carrying on business as "Agricore United".
2. On January 2, 2002, the Commissioner filed an application with 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"), and 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. The Section 92 Application was scheduled to commence in Vancouver on October 21, 2002. However, on October 17, 2002, the Commissioner and Agricore United resolved the outstanding issues and executed and filed the Consent Agreement, thereby terminating the Section 92 Application.

The Consent Agreement

4. The Consent Agreement includes maintenance, interim access and divestiture provisions.

Maintenance and Interim Access Provisions

5. The maintenance provisions (regarding maintenance of the Port Terminals) are found in paragraphs 34-37 of the Consent Agreement. The interim access provisions (regarding providing others with grain handling services) are found in paragraphs 38-44 of the Consent Agreement. These provisions have now been in place for almost four years.

Divestiture Provisions and the Port Terminals

6. The Consent Agreement required Agricore United to offer to divest, at its option, either the UGG Terminal or its interest in the Pacific Complex within the "Port Terminal Initial Sale Period", a period of time defined in the Consent Agreement.
7. Agricore United does not own the lands on which the UGG Terminal and Pacific Complex are situated, but rather leases those lands from the Vancouver Port Authority ("VPA"), a federal crown agent, who is not a party to the Consent Agreement. Pursuant to its statutory mandate under the *Canada Marine Act* and related regulations, the VPA is granted the authority to manage the lands and waterways which constitute the Port of Vancouver, including the power to lease the lands.
8. Pursuant to the terms of the leases granted by the VPA with respect to the UGG Terminal and the Pacific Complex, the consent of the VPA must be obtained before the lease can be assigned or transferred to a prospective purchaser under the Consent Agreement. Accordingly, a divestiture of a Port Terminal under the Consent Agreement cannot be accomplished without the VPA's consent.
9. The Consent Agreement provides that if Agricore United does not divest a Port Terminal within the Port Terminal Initial Sale Period, a Trustee will be appointed to seek to implement a divestiture pursuant to the Consent Agreement, at the price and on the terms and conditions most favourable to Agricore United then reasonably available, in the opinion of the Trustee, [CONFIDENTIAL].
10. The Consent Agreement allowed Agricore United to elect whether the Trustee will (if necessary) 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.

11. The Consent Agreement required that divestiture of a Port Terminal, whether by Agricore United or the Trustee, must be completed on two terms, amongst others. First, the divestiture must be by way of disposition of the Port Terminal for use as a going concern. Second, the divestiture must be to one or more arm's length purchasers who will use the Port Terminal for the same purpose it was used prior to November 1, 2001 and who must have the managerial, operational and financial capability to operate the Port Terminal for such purpose.
12. [CONFIDENTIAL].

Agricore United's Divestiture Efforts and The Section 106 Application

13. Agricore United made diligent and good faith efforts to divest a Port Terminal during the Port Terminal Initial Sale Period, as extended pursuant to the Consent Agreement and by agreement of the parties to August 15, 2005, the history of which is outlined in the materials filed in the application brought by Agricore United on August 11, 2005 for an order under section 106 of the *Competition Act* (the "Section 106 Application").
14. During the Port Terminal Initial Sale Period, Agricore United entered into negotiations with the VPA regarding the terms of a new lease with respect to both the Pacific Complex and the UGG Terminal. The VPA agreed to the terms of a [CONFIDENTIAL] lease for a new tenant of either Port Terminal who would carry on a grain handling business (the "New Terminal Lease") that Agricore United was permitted

to market to prospective purchasers of the Port Terminals during the Port Terminal Initial Sale Period.

15. For the reasons explained in detail in the Section 106 Application, Agricore United was not able to effect a divestiture of the UGG Terminal prior to August 15, 2005.
16. On August 11, 2005, Agricore United filed the Section 106 Application for an order rescinding the Consent Agreement and related relief.
17. The grounds for the Section 106 Application are set out in detail in the materials filed in that proceeding.
18. On August 11, 2005, Agricore United requested, pursuant to paragraph 48 of the Consent Agreement, that the Commissioner agree to an extension of the Port Terminal Initial Sale Period pending the disposition of the Section 106 Application. The Commissioner eventually consented (at the hearing of Agricore United's motion for such relief) to the extension of the Port Terminal Initial Sale Period pending the final determination of the Section 106 Application.
19. The hearing of the Section 106 Application commenced on March 27, 2006 in Ottawa. On April 6, 2006, as a result of information learned for the first time from an intended witness, Agricore United decided that the appropriate way to proceed was for the Section 106 Application to be adjourned, and the matter referred to the Trustee to determine whether the Trustee could divest the UGG Terminal in a manner consistent with the Consent Agreement.

20. Agricore United proposed that the Section 106 Application be adjourned on certain terms to allow the sale process conducted by a Trustee under the Consent Agreement (the "Trustee Sale Process") to run its course and so that the composition of the Tribunal and the record of the proceeding would be preserved in the event the parties were required to return to the Tribunal for additional relief. This led to a contested motion before the Tribunal, which was heard on April 21, 2006.
21. On May 10, 2006, the Tribunal dismissed Agricore United's motion for an adjournment of the Section 106 Application and related relief.
22. On May 11, 2006, Agricore served and filed its Notice of Withdrawal of the Section 106 Application.

Trustee Sale Period

23. The Trustee was appointed pursuant to the Consent Agreement on May 12, 2006 and the Trustee Sale Period, a period of four months, commenced on the same day.
24. **[CONFIDENTIAL]**.
25. On July 7, 2006, Agricore United and the Commissioner agreed to extend the expiry of the Trustee Sale Period to **[CONFIDENTIAL]**.
26. **[CONFIDENTIAL]**.
27. **[CONFIDENTIAL]**.
28. **[CONFIDENTIAL]**.

29. As at July 28, 2006, it was clear that it was impossible for the Trustee to complete a divestiture within the Trustee Sale Period and that the Trustee Sale Period would end without a divestiture, absent the consent of the parties to extend the Trustee Sale Period.
30. **[CONFIDENTIAL]**.
31. **[CONFIDENTIAL]**.
32. The Commissioner's position as reflected in the August 11, 2006 notice remains her position today.
33. Commencing August 11 until August 24, 2006, representatives of the Commissioner initiated discussions with Agricore United concerning the correct expiry date of the Trustee Sale Period (September 12 or October 16).
34. In the midst of those discussions and while waiting for the Commissioner to confirm her position in writing, and without any notice to Agricore United, on August 23, 2006, the Commissioner served on Agricore United a notice purportedly pursuant to paragraph 45(a) of the Consent Agreement (previously defined as the "Notice").
35. The Notice specified that the Commissioner would attend at Agricore United's offices on August 28, 2006 (later extended to August 29) for the purpose of determining and/or securing compliance with the Consent Agreement by way of an inspection and review of an extremely broad category of documents relating both to the Pacific Complex and UGG Terminal for the period of October 17, 2002 through to August 28, 2006.

36. Agricore United advised the Commissioner of its serious concerns about the validity and scope of the Notice and requested that the Commissioner respond to its questions and concerns about the Notice.
37. The Commissioner refused to fully respond to Agricore United's questions and concerns, and also refused to grant Agricore United's request for a one week extension to allow it to consult with counsel and determine its position on the validity and appropriate scope of the Notice.
38. Agricore United advised the Commissioner that it would not permit her representatives to attend at its offices on August 29 and would advise shortly whether and how Agricore United would be prepared to comply with the Notice, or parts of it, on a more reasonable time frame.
39. There is no basis or justification for the "urgency" insisted on by the Commissioner for compliance with the Notice, assuming it is proper.
40. The Notice was not motivated by the receipt of any complaint by the Commissioner regarding Agricore United's compliance with the Consent Agreement.
41. There is a serious issue as to whether the Notice was issued for a purpose authorized by paragraph 45 of the Consent Agreement, especially considering that the Commissioner had not performed a compliance inspection at any time since the Consent Agreement was entered into almost 4 years ago and has now sought to do so, in the absence of any complaint about compliance, only a few weeks before the sale process contemplated by

the Consent Agreement is about to expire and the status of the Consent Agreement is likely to be the subject of an application to the Tribunal.

42. Further, the scope of the Notice is obviously excessive and inappropriate in terms of the description of the documents it purports to cover. The list of categories of records and documents that the Notice specifies "without limiting the generality of the foregoing" includes open ended categories of records and documents dating back almost 4 years, and are either apparently or obviously unrelated to any possible issue of compliance with the Consent Agreement.
43. Agricore United's request of the Commissioner to provide an explanation as to why and how these very broad categories are relevant to any valid issue of compliance with the Consent Agreement was refused.
44. In addition, the Notice improperly requests information with respect to the Pacific Complex, even though, pursuant to the definition of "Port Terminals" in Section 1(s) and Schedule "A" of the Consent Agreement, the Pacific Complex has ceased to be a Port Terminal for the purposes of the Consent Agreement and the Consent Agreement now contemplates a divestiture only of the UGG Terminal.
45. Also, the Notice improperly requests inspection of documents already in the possession of the Commissioner, including documents already provided to the Commissioner in the context of the Section 106 Application or otherwise.
46. In addition, the Notice fails to set out, and the Commissioner has failed to propose, a reasonable and efficient process for any valid inspection of documents pursuant to

paragraph 45 of the Consent Agreement and, as currently drafted, would be extremely time consuming, expensive and burdensome for Agricore United to comply with.

47. On August 28, 2006, Agricore United advised the Commissioner that if she did not provide Agricore United with the reasonable time necessary to consult with counsel concerning the Notice, Agricore United would file a motion with the Tribunal pursuant to paragraph 50 of the Consent Agreement concerning the appropriate interpretation of paragraph 45 of the Consent Agreement and the validity of the Notice, and any other relevant matters relating to the Trustee Sale Process.
48. At the same time, Agricore United reminded the Commissioner that documents within the scope of categories listed in the Notice are contained in the data room set up for the purposes of the Trustee Sale Process and invited the Commissioner to attend at the data room and review those documents, without prejudice to the dispute concerning paragraph 45 of the Consent Agreement and the validity and scope of the Notice.
49. The Commissioner refused to accept this invitation and, rather than referring the dispute to the Tribunal under paragraph 50 of the Consent Agreement, has filed a contempt motion.
50. Sections 38 and 68(1) of the *Competition Tribunal Rules* and sections 48 – 50 and Schedules "A" and "B" of the Consent Agreement.
51. Such further and other grounds as counsel may advise and this honourable Tribunal may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Affidavit evidence on behalf of Agricore United, to be sworn; and
2. such further and other evidence as counsel may advise and this honourable Tribunal may permit.

DATED AT TORONTO, this 30th day of August, 2006.

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AND TO: Commissioner of Competition
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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 United Grain Growers Limited of Agricore Cooperative Ltd., a company engaged in the grain handling business; and

AND IN THE MATTER OF an application for an order by the Commissioner of Competition under section 92 of the *Competition Act*; and

AND IN THE MATTER OF a consent agreement entered into by 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.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant/Responding Party

- and -

UNITED GRAIN GROWERS LIMITED

Respondent/Moving Party

NOTICE OF MOTION

**Re: Respondent's Motion for Direction Concerning
Trustee Sale Period**

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