Public Version

CT-2002-001

THE COMPETITION TRIBUNAL

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

IN THE MATTER OF an Application by United Grain Growers Limited under section 106 of the *Competition Act*;

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

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

February 27, 2006

Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT | #0162b

B E T W E E N:

UNITED GRAIN GROWERS LIMITED

Applicant

-and-

THE COMMISSIONER OF COMPETITION

Respondent

Expert **AFFIDAVIT OF DR. RALPH WINTER**

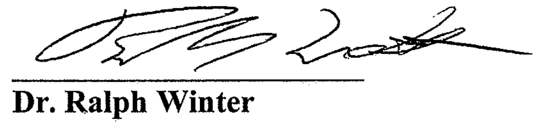
I, Ralph Winter, of the City of Vancouver, in the Province of British Columbia, **MAKE OATH AND SAY**:

1. Attached hereto and marked as Exhibit "A" is a true copy of my expert report, which represents my work, conclusions and opinions.

2. I make this affidavit pursuant to Rule 47(1) of the *Competition Tribunal Rules*.

Sworn before me at the
City of Toronto, in the
Province of Ontario
this 27th day of January 2006

A Commissioner for Oaths



Dr. Ralph Winter

SHAWN JAMES LYNN, a
Commissioner, etc., Province of Ontario,
while a student-at-law.
Expires May 5, 2007.

EXPERT ECONOMIC REPORT OF DR. RALPH WINTER

Professor of Strategy and Business Economics

University of British Columbia

January 27, 2006

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I. INTRODUCTION

1. I have been retained by counsel to the Commissioner of Competition ("Commissioner") in connection with Agricore United's application for an order of the Competition Tribunal ("Tribunal") under section 106 of the *Competition Act* ("*Act*") to rescind the consent agreement ("Consent Agreement") between Agricore United ("Agricore" or "AU") and the Commissioner dated October 17, 2002 that required Agricore to divest, at its option, either the UGG Terminal or its interest in Pacific Elevators Limited ("PEL") and Western Pool Terminals Ltd. ("WPTL"), or the assets owned by PEL and WPTL.[1] The Consent Agreement was obtained to remedy the substantial lessening of competition ("SLC") found by the Tribunal in respect of the acquisition of Agricore by United Grain Growers Limited (the "Acquisition").

SUMMARY OF AGRICORE'S ARGUMENTS

2. Agricore claims that the circumstances that led to the Consent Agreement have changed significantly. In its Application, Agricore alleges only one changed circumstance: that the amount of "uncommitted" grain shipped to the Port of Vancouver by grain companies that own primary elevators but not port terminals in Vancouver ("Non-integrated Graincos" or "Non-integrated Grain Companies")[2] has "diminished dramatically" since the Consent Agreement was entered into. The alleged decline is claimed to be the result of consolidation among grain companies in Western Canada and exclusive, long-term handling agreements entered into by Non-integrated Graincos with port terminal operators in the Port of Vancouver, all of whom own primary elevators ("Integrated Graincos" or "Integrated Grain Companies").[3] This is the only changed circumstance advanced by the AU in its application.

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[1] Schedule A of Consent Agreement, Commissioner's Disclosure Statement, Tab 2, at NCBK 5748.

[2] I adopt the Commissioner's terminology and refer to primary elevator operations that do not own port terminals in Vancouver as Non-integrated Graincos. Agricore and Dr. Ware refer to these as "Independent Grain Companies" or "IGCs". While different terminology is adopted we are speaking about the same set of firms.

[3] United Grain Growers Limited v. The Commissioner of Competition, *Statement of Grounds and Material Facts Re: Section 106 Application*, August 11, 2005, CT-2002-001, [hereafter referred to as the *UGG Statement of Grounds and Material Facts*] at paragraph 7.

3. Agricore claims that the consequences of the alleged reduction in uncommitted grain are two-fold. First, it is alleged that there is no longer a need for the UGG Terminal divestiture since without it Non-integrated Grain Companies "continue to have access to port terminal grain handling services in the Port of Vancouver at competitive rates."[4] Second, Agricore asserts that the alleged reduction in uncommitted grain puts an effective divestiture at risk. In essence, Agricore claims there is an insufficient volume of grain available from Non-integrated Grain Companies coming off contract soon to allow the owner of the divested terminal to operate on a sustainable basis, putting into doubt the effectiveness of the remedy in the Consent Agreement. Specifically, Agricore alleges that

> "The only realistic prospect for the UGG Terminal to be used for grain handling would be an acquisition by a purchaser who enters into a handling agreement with the Canadian Wheat Board, a statutory monopoly incorporated pursuant to the provisions of the *Canadian Wheat Board Act* (the "CWB Monopoly"). A handling agreement between a purchaser of the UGG Terminal and the CWB Monopoly would, however, adversely affect the Western Canadian grain handling industry, including Independent Grain Companies, and would be inconsistent with, and undermine, the objectives of the Consent Agreement."[5]

4. The only other alleged change in circumstances in Agricore's filings is offered by AU's economic expert, Dr. Ware. Dr. Ware claims that there has been a relevant change in market conditions due to a change in railcar rates from points in Western Canada to Prince Rupert.[6] He also claims that the Saskatchewan Wheat Pool ("SWP") Terminal in the Port of Vancouver has increased its unloading capacity.[7] Dr. Ware concludes that the effect of the railcar rate change was to broaden the relevant product market to

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4 *UGG Statement of Grounds and Material Facts*, at paragraph 9.

5 *UGG Statement of Grounds and Material Facts*, at paragraph 8.

6 Expert Economic Report of Dr. Roger Ware, Confidential Version, December 23, 2005, [hereafter referred to as "Ware Report"] at paragraph 1(b).

7 Ware Report, at paragraph 6(d).

include the Prince Rupert Grain Terminal. He alleges that the consequence of this expansion of the relevant market and the SWP capacity change has been to "increase dramatically the degree of excess capacity at Canadian West Coast port terminals."[8]

5. The effect of the claimed increase in excess capacity alleged by Dr. Ware is likely an increase in competition, which he believes reduces the likelihood of a viable and effective divestiture.[9]

MANDATE

6. I have been asked by counsel to the Commissioner to respond to AU's claims and Dr. Ware's report, as summarized above. In so doing, I address two questions in my report with reference to the changes in circumstances alleged by AU and Dr. Ware:

   i) Have relevant market conditions changed since the Consent Agreement so as to eliminate the previously established need to remedy the substantial lessening of competition from the Acquisition?

   ii) Have relevant market conditions changed since the Consent Agreement so as to make the agreed-upon divestiture remedy no longer viable?

QUALIFICATIONS

7. The following is a summary of my qualifications in the area of Economics, and the more specific areas of Competition Policy and Industrial Organization. I hold the Canada Research Chair in Business Economics and Policy at the Sauder School of Business, University of British Columbia. I have been with the Sauder School at the University of British Columbia since 2002. Prior to this I was Professor of Economics at the University of Toronto. I joined the University of Toronto in 1979. I have also held visiting scholar positions at Stanford University, Yale University, Centre de Recherche en Economie et Statistique, Paris and the University of Geneva. I have taught numerous undergraduate and graduate courses in the areas of competition policy, contract theory, finance and

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8 Ware Report, at paragraph 6(d).

9 Ware Report, at paragraphs 6(d) and 26.

industrial organization. I have published widely in the fields of industrial organization, competition and regulatory policy and finance. Among my publications is the 2002 book (co-authored with M.J. Trebilcock, E. Iacobucci and P. Collins) *The Law and Economics of Canadian Competition Policy*, which was awarded the Doug Purvis Memorial Prize for the outstanding contribution to Canadian Economic Policy in 2002. As an economic expert, I have been retained by the Competition Bureau, the U.S. Department of Justice and private parties. I have testified before the Competition Tribunal, Canadian Radio-television and Telecommunications Commission, Ontario courts, Ontario Energy Board, Alberta Energy and Utilities Board, British Columbia Utilities Commission and the Newfoundland and Labrador Board of Commissioners of Public Utilities.

8. My *curriculum vitae* is attached as Appendix A to this report.

INFORMATION REVIEWED

9. To prepare this report, I have reviewed the materials contained in the Commissioner's Disclosure Statement and Agricore's Disclosure Statement. I also participated in interviews of Canadian Wheat Board representatives and an interview with representatives of a Non-integrated Grain Company.

SUMMARY OF OPINION

10. It is my opinion that the evidence does not show that market circumstances have changed so as to obviate the original Tribunal finding that a divestiture of a port Terminal is required to remedy the SLC found by the Tribunal in respect of the Acquisition.[10] Furthermore, I find that the evidence does not show that the allegedly changed circumstances make the divestiture of the UGG Terminal not viable.

11. The remainder of my report is organized as follows. I first present a summary of the background facts that are essential to understanding the issues raised in this proceeding. This is followed by my analysis of the two questions posed above with

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[10] The Consent Agreement required divestiture of the UGG Terminal or divestiture of Agricore's interest in Pacific Elevators Limited ("PEL") and Western Pool Terminals Ltd. ("WPTL"), or the assets owned by PEL and WPTL to resolve the SLC. See Schedule A of Consent Agreement, Commissioner's Disclosure Statement, Tab 2, NCBK 5748.

reference to the alleged changes in circumstances made by AU regarding whether market conditions have changed so as to eliminate the need for the divestiture remedy; and whether market conditions have changed so as to make the divestiture agreed upon in the Consent Agreement no longer viable. I then turn to an assessment of Dr. Ware's expert report. I close by discussing several economic principles that are relevant to any consideration of the expert report of Martyszenko, Craig & Ross.[11]

II. ESSENTIAL BACKGROUND FACTS

A. SUPPLIERS OF PORT TERMINAL HANDLING SERVICES IN VANCOUVER

12. Port terminals handle various grains delivered to them by the Canadian Wheat Board ("CWB") and individual grain companies. Grains are elevated, stored and loaded onto vessels. Additional services may be provided, such as cleaning, drying and blending at the port terminal. The collection of these services is referred to hereafter as "port terminal handling services".

13. There are five port terminals that provide port terminal handling services in Vancouver:[12]

    - Pacific Elevators Terminal, owned by AU
    - UGG Terminal, owned by AU
    - Cascadia terminal, owned equally by AU and Cargill
    - SWP terminal, owned by SWP
    - JRI Terminal, owned by James Richardson International Limited ("JRI")

14. Table 1 (attached) provides the merged firm's share of grain shipments through the port of Vancouver for the most recent year with terminal-specific data (2004/05); with shares of shipments at the time of the Consent Agreement; and the shares of capacity estimated at the time of the original Application. Since 2002, there has been no significant reduction in Agricore's market share. If there is no remedy, it remains the

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11 Letter dated December 23, 2005 to Mr. Kent Thomson and Ms. Sandra Forbes of Davies Ward Phillips & Vineberg from Alan B. Martyszenko of Martyszenko, Craig & Ross [hereafter referred to as the "Martyszenko Report"].

12 There are also two other terminals within the Port of Vancouver (Neptune Terminals and Vancouver Wharves) but both focus on handling specialized grains that do not require storage, cleaning, blending or other typical port terminal grain handling services (see Confidential Affidavit of Dr. William W. Wilson, Commissioner's Disclosure Statement, Tab 51, page 2, at NCBK 6450), and hence these terminals were not found to be part of the relevant market.

case that AU would have a significant interest in approximately 63% of the storage capacity for port terminal handling services in Vancouver. With a divestiture of the UGG Terminal, AU's share falls to about 52%.

15. There are high barriers to entry into port terminal handling services.[13] At the time of the Tribunal hearing on the substantial lessening of competition in September 2002, the costs of using alternative port terminals outside of Vancouver, such as the one at Prince Rupert, were found to be so high as to make the PRG Terminal in Prince Rupert an ineffective competitor to the ports in Vancouver.[14] The PRG Terminal is also owned by the same firms operating the Vancouver port terminals.[15]

16. Moreover, the joint ownership interests of the Cascadia and PRG Terminal allow the owners of the Vancouver port terminals legitimately to set tariffs jointly for their combined facilities, thereby allowing an exchange of information and level of cooperation that is not typical of completely independent firms without cross-equity interests. Neither JRI nor SWP were found by the Tribunal to have sufficient capacity to be effective competitors such that they would be able to eliminate the SLC arising from the Acquisition.[16]

17. The Tribunal agreed with the Commissioner's conclusion that the Acquisition would lead to a substantial lessening of competition. The Commissioner's basis for his conclusion is encapsulated in the following:

> "If Agricore United is permitted to retain all of Agricore's interests in port terminals, it will likely be able to exercise market power over port terminal grain handling services at Vancouver and over primary grain handling

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[13] This is true in Vancouver (see Commissioner of Competition v. United Grain Growers Limited, *Statement of Grounds and Material Facts*, December 17, 2001, Commissioner's Disclosure Statement, Tab 4, at paragraphs 61-65) and elsewhere. Entry into the operation of port elevators is recognized to be difficult, as port terminals are larger, more expensive structures than country elevators to operate. Port terminals require good deepwater loading sites without environmental risks, which are limited. See James MacDonald, Economic Research Service, US Department of Agriculture (1999) "Cargill's Acquisition of Continental Grain: Anatomy of a Merger", *Agricultural Outlook*, September, at 23-24.

[14] Confidential Affidavit of Dr. William W. Wilson, Commissioner's Disclosure Statement, Tab 51, pages 4-6, at NCBK 6452-6454.

[15] Commissioner of Competition v. United Grain Growers Limited, *Statement of Grounds and Material Facts*, December 17, 2001, Commissioner's Disclosure Statement, Tab 4, at paragraph 22.

[16] Commissioner of Competition v. United Grain Growers Limited, Statement *of Grounds and Material Facts*, December 17, 2001, Commissioner's Disclosure Statement, Tab 4, at paragraph 68.

services on the Prairies. UGG's acquisition of Agricore's port grain terminals in Vancouver will substantially lessen competition for port terminal grain handling services by enabling Agricore United to unilaterally increase prices and/or lower diversion premiums. UGG's acquisition of Agricore will result in a substantial lessening of competition by making it more likely that the few port terminal grain handling companies remaining post merger will engage in interdependent behavior and will increase prices or depress diversion premiums."[17]

18. Following a review of the materials submitted to the Tribunal and upon hearing the testimony of the Commissioner's witnesses, the Tribunal accepted the Commissioner's arguments and found that the Acquisition "causes an SLC as alleged by the Commissioner and, for the purposes of this proceeding, not contested by the Respondent".[18] To remedy the SLC, the Tribunal determined that the divestiture of either the UGG Terminal (or other assets subject to certain conditions) was required.[19] Subsequently, the Commissioner and AU filed the Consent Agreement pursuant to section 105. The Consent Agreement requires that AU divest, at its option, either the UGG Terminal or its interest in Pacific Elevators Limited ("PEL") and Western Pool Terminals Ltd. ("WPTL"), or the assets owned by PEL and WPTL.[20] AU selected the UGG Terminal for disposition.

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[17] Commissioner of Competition v. United Grain Growers Limited, *Statement of Grounds and Material Facts*, December 17, 2001, Commissioner's Disclosure Statement, Tab 4, at paragraph 76.

[18] Commissioner of Competition v. United Grain Growers Limited, *Findings and Determinations of the Competition Tribunal Pursuant to Section 92 of the Competition Act*, September 12, 2002 [hereafter referred to as "Tribunal Findings and Determinations"], Commissioner's Disclosure Statement, Tab 42, paragraph 10.

[19] The alternatives to the UGG Terminal divestiture were divestiture of AU's interest in Pacific Elevators Limited ("PEL") or AU could divest the Pacific I Terminal, either alone or in combination with a portion of the Annex component of the Pacific Elevators complex if the divestiture is to an entity that does not have any direct or indirect interest in a Vancouver port grain terminal, the acquiring entity is independent of AU, the acquirer would be able to operate the assets on a stand alone basis independent of any other port grain terminal operations and similar to the stand alone basis on which the UGG Terminal operates and the divestiture would enable the acquirer to handle at least 2.2 million tonnes of any combination of grain, oil seeds, and specialty crops per annum in the Port of Vancouver on a commercially competitive basis. See Tribunal Findings and Determinations, Commissioner's Disclosure Statement, Tab 42, at paragraphs 10 (b)-(c).

[20] Schedule A of Consent Agreement, Commissioner's Disclosure Statement, Tab 2, NCBK 5748.

B. BUYERS OF PORT TERMINAL HANDLING SERVICES IN VANCOUVER

19. Before being used or consumed, grain must be transported from the farm gate to customers in Canada or around the world. Grain is typically transported from the farm gate to a primary elevator on the prairies.[21] Primary elevator operations are of two types: (i) "Integrated" primary elevators owned by firms that own port terminals; and (ii) "Non-integrated" primary elevators owned by firms that are not integrated with port terminals. If destined for export from Canada by ship, grain is loaded at the primary elevators and transported by rail to a port terminal.

20. No rail cars can be made available to the primary elevator on the prairies without "terminal authorization" from a port terminal.[22] As a result, Non-integrated Grain Companies have an incentive to secure access to port terminals, and (with rare exceptions if any) will have handling agreements in place with an Integrated Grainco for this purpose.[23] Integrated Grain Companies typically make payments to Non-integrated Grain Companies to encourage the Non-integrated Graincos to use its port terminal over rival terminals at the port.[24] These payments are known as "diversion premiums" or "shipper incentives". If these payments are made, generally they are set out in handling agreements between the Integrated Grainco and the Non-integrated Grainco.

21. AU relies on this arrangement to focus in their Application on the Non-integrated Grain Companies as the buyers of port terminal handling services in Vancouver, since Integrated Graincos use their own port facilities and are generally not substantial buyers

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21 There are some exceptions. Some rail cars are loaded directly by farmers in the country and do not pass through primary elevators. These are referred to as producer cars. Some grain is transported by truck to the port terminals and some shipments are loaded directly from railcars onto waiting vessels without passing through port terminals. These are known as direct hits. These exceptions account for a very small proportion of total shipments (Commissioner of Competition v. United Grain Growers Limited, Affidavit of John De Pape and Richard Schwindt at A2), and hence they will not be considered further in this report.

22 Commissioner of Competition v. United Grain Growers Limited, *Statement of Grounds and Material Facts*, December 17, 2001, Commissioner's Disclosure Statement, Tab 4, at paragraph 31.

23 For example, using the contracts in place as of August 1, 2005, of the total 2004/05 crop year shipments through the port of Vancouver made by Non-Integrated Graincos, at least 97.5% were under Handling Agreements.

24 A port terminal may also offer other port terminals shipper incentives if one port terminal uses another port terminal's facilities. [CONFIDENTIAL]

of other port terminals' services.[25] However, the largest buyer of port terminal handling services in Vancouver is the CWB, which is the sole purchaser and marketer of wheat, durum and barley grown in western Canada and intended for export or domestic human consumption ("CWB grains"). As the sole purchaser and marketer of CWB grains, the CWB pays the charges associated with the handling and shipping of CWB grains from the primary elevator to the port terminal.[26] Farmers are responsible for the charges associated with elevating grain to an instore primary elevator position and cleaning the grain for export. Farmers select the primary elevator to deliver their CWB grain based on the package of services and incentives the primary elevator offers to attract their CWB grain. Primary elevators deliver CWB grains to particular port terminals in Vancouver on behalf of the CWB. When a Non-integrated Grainco handles and delivers the CWB grains to the Vancouver port, the Non-integrated Grainco typically collects diversion premiums from the Vancouver port terminal for this delivery. Whether the primary elevator is integrated or not, however, it does not "purchase" port terminal handling services for CWB grains.[27] The CWB is the purchaser (either directly or indirectly) of port terminal handling services for CWB grains.[28] The mandate of the CWB is to act in the interests of western Canadian farmers. The CWB is a cooperative in this sense. The price that farmers receive from the CWB for their grain is determined in stages throughout the year, but the total compensation to farmers ultimately reflects the market prices at which the CWB is able to sell the grain.

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[25] [CONFIDENTIAL]

[26] At all times title to the CWB grains remains with the CWB.

[27] The market is unusual in that the decision of which supplier to use for port terminal services for CWB grains is taken not by the buyer (the CWB) but by the shipper (the Grainco). This decision is taken in response to shipper incentives or diversion premiums in the case of nonintegrated graincos. From the supplier's perspective, the diversion premium is like a reduction in the price, but this reduction does not accrue to the buyer.

[28] If the CWB sells the grain on an FPB or CIF basis to a customer, the CWB pays the port terminal elevation charges directly. If the CWB sells the grain to a customer while the grain is in storage at the port terminal, then the customer pays the terminal elevation but the CWB price to the customer is reduced by the amount of the port terminal elevation fee.

22. As noted by Dr. Ware, CWB grains have accounted for approximately 65% to 75% of all grain shipped through the port of Vancouver on an annual basis over the past five years.[29]

23. The majority of non-CWB grains, such as canola, oats, flax, rye, peas, and mustard seeds, are purchased at primary elevators by grain handling companies (either Integrated or Non-integrated Graincos) on their own account.[30] Farmers are free to sell their non-CWB grains to the primary elevator offering the farmer the best value.[31] Title to the non-CWB grains passes from the farmer to the primary elevator at the time of purchase. The primary elevator then incurs various costs to elevate, store and clean the non-CWB grains. The primary elevator contracts with the railways for shipment of the non-CWB grains to a port terminal if the product is destined for export by ship. If the primary elevator is a Non-integrated Grainco, it may sell the non-CWB grain to the port terminal for further handling prior to delivery to the final customer, or the Non-integrated Grainco may pay for port terminal handling services for the non-CWB grains before selling the non-CWB grains to the final customer. Thus, it is only for non-CWB grains that Non-integrated Grain Companies purchase port terminal handling services.

24. Table 2 (attached) provides a summary breakdown of CWB and non-CWB grain shipments through each terminal for the years with available data. Table 3 (attached) provides for a breakdown of the total grain volumes each port terminal handled for Non-integrated Grain Companies compared to the Integrated Graincos' internal shipments and transfers with other Integrated firms from 1998/99 to 2003/04. Table 4 (attached) distinguishes CWB and non-CWB grain shipments for each port terminal's own shipments, shipments among Integrated Graincos, and shipments from Non-integrated Graincos for the 2003/04 crop year, the most recent year for which such detail is available. As these tables make clear, the largest buyer of port terminal handling

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29 Ware Report, page 7, at footnote 3.

30 Commissioner of Competition v. United Grain Growers Limited, *Statement of Grounds and Material Facts*, December 17, 2001, Commissioner's Disclosure Statement, Tab 4, at paragraph 27.

31 Primary elevators compete for farmers' CWB and non-CWB grains by offering various incentives to farmers such as paying for a higher grade than is delivered by the farmer ("grade promotions") and by subsidizing the costs of trucking the farmer's grain to the primary elevator. For non-CWB grains, elevators also compete on the basis of price.

services in Vancouver is the CWB. Non-integrated Grain Companies selling non-CWB grains for which they need to pay for port terminal handling services only represented 4% of total grain shipments through the five ports in 2003/04, and [CONFIDENTIAL] of the total grain shipments through the UGG Terminal.

C. CONTRACTS FOR PORT TERMINAL HANDLING SERVICES IN VANCOUVER:

25. Notwithstanding the significant volume of Vancouver port terminal handling services that the CWB requires each crop year, the CWB does not obtain volume discounts from port terminals for their services. Instead, the CWB pays port terminals (and also primary elevators) the posted tariffs filed for these services with the Canadian Grain Commission ("CGC"). While these rates are filed with the CGC as tariffs, they are neither regulated nor approved by the CGC. The CWB does not receive any portion of the diversion premiums that may be paid by port terminals to Non-integrated Graincos for shipment of its grain.[32]

26. There are only two circumstances when the CWB does not pay full CGC tariffs.[33] The first is when the CWB tenders its grain handling services and shipment to a designated location (either a single terminal or a port).[34] Integrated and Non-integrated Grain Companies bid on these tenders (not all tenders receive bids), indicating the amount the primary elevator will be willing to be paid by the CWB for delivery to the port.[35] Assuming bids are tendered, the CWB may be offered a discount from the normal charge that it would pay the primary elevator for delivery of CWB grains to the port.[36] The second circumstance is when the CWB has a handling agreement with a particular

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32 Appendix B (attached) summarizes when the CWB pays posted tariffs and when other parties may receive incentive payments for each of several types of transactions.

33 [CONFIDENTIAL]

34 The CWB tenders about 20% of its grain handling service contracts through Vancouver, Prince Rupert, Thunder Bay and Churchill (Quorum Report of 2003-04, Commissioner's Disclosure Statement , Tab 141, at paragraph 1, page 28).

35 For example, a bid may indicate the primary elevator is willing to receive "$5 under" meaning the primary elevator is willing to receive from the CWB $5 per metric tonne below posted tariffs, after taking into account the cost of rail transport from the primary elevator to the port.

36 Note that technically the CWB pays the tariff in this circumstance; however the tender offer may provide an incentive to the CWB. There may also be times when the tender trades at a premium to the CGC tariffs, in which case the CWB pays the premium to the grain company on executed tenders.

terminal whereby the CWB receives a discount off the tariff for the port terminal handling services. While the CWB has sought to enter into handling agreements with numerous port terminals that provide the CWB with shipper incentives similar to those that the port terminals provide Non-integrated Graincos, currently, the CWB has individual terminal agreements only with Hudson Bay Terminals (Omnitrax) in the Port of Churchill and Mission Terminal in the Port of Thunder Bay.[37] As a matter of practice, the CWB directs grain to these terminals from various graincos in proportion to the total volume of CWB grains shipped.

27. In the case of non-CWB grains, the price that a Non-integrated Grainco pays for port terminal handling services may be equal to a CGC posted tariff, or it may be specified in the handling agreement between the Non-integrated Grainco and the port terminal. Alternatively, the contract may specify a diversion premium paid to the Non-integrated Grainco, with the Non-integrated Grainco paying the CGC tariff to the port terminal.[38]

28. Currently, the Vancouver port terminals have handling agreements with 24 Non-integrated Grain Companies. Table 5 (attached) provides a list of the days remaining in each of these contracts as of August 12, 2005. While some of the handling agreements have a very long term, several have early termination options. Significantly, any handling agreement entered into with AU or UGG after the date of the Consent Agreement (October 17, 2002) must provide that the Non-integrated Grain Company has the option to terminate the handling agreement upon either (i) a Trustee being appointed pursuant to the Consent Agreement to complete the divestiture, or (ii) the divestiture.[39] [CONFIDENTIAL] other handling agreements have early termination provisions.[40]

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37 Affidavit of Ward Weisensel, at paragraph 27. [CONFIDENTIAL]

38 Once again, it is important to note that while an Non-integrated Grain Company may obtain a diversion payment from a port terminal for shipping CWB grains to that port terminal, the diversion premium does not factor into the price that the CWB pays for port terminal handling services in Vancouver for this shipment.

39 Consent Agreement, Commissioner's Disclosure Statement, Tab 1, page 17, at NCBK 5712.

40 [CONFIDENTIAL]

III. ANALYSIS OF AU'S CLAIM OF CHANGED CIRCUMSTANCES

A. IS THE NEED FOR A REMEDY ELIMINATED DUE TO CHANGED CIRCUMSTANCES?

29. Agricore claims that the allegedly changed circumstances demonstrate that buyers (AU restricts itself to considering only Non-integrated Graincos) continue to have access to port terminal grain handling services in the Port of Vancouver at competitive rates.[41] AU, in effect, alleges that there is no need for the remedy.

30. To assess this claim, I start by considering the evidence of price changes and trends. Following this, I turn to examining AU's and Dr. Ware's claim that there have been changes in the extent of, and volume associated with, long-term handling agreement and that these indicate that Non-integrated Graincos "have secured for themselves greater access to port terminal grain handling services in the Port of Vancouver, even in the absence of a divestiture".[42] Finally in this regard, I ask more specifically whether the need for a remedy has been eliminated by changed circumstances. While effectively claimed by AU, this is a question not addressed by AU's economic expert.

(i) Price Changes and Trends

31. Different buyers pay different prices for port terminal handling services. I begin by considering the largest buyer of these services – the CWB. Figure 1 (attached) plots the CPI-deflated tariffs for the basic elevation charge for wheat at each of the Vancouver port terminals from 1998 to 2005.[43] These are the CPI-adjusted charges that the CWB pays for wheat elevation service. Even after adjusting for general price increases (CPI), prices have risen since the Acquisition. Figure 2 (attached) plots the CPI-deflated tariffs

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41 *UGG Statement of Grounds and Material Facts*, at paragraph 9.

42 Ware Report, paragraph 6 (c).

43 Tariffs may change throughout the year. In order to calculate an annual tariff, I weight different tariffs at different points of the year by the number of weeks these tariffs are in effect. Thus, if there is one tariff change that happens mid-way through the crop year, the average annual tariff is equal to the sum of the two tariffs divided by two.

for the basic elevation charge for canola (a non-CWB grain) at each of the Vancouver port terminals from 1998 to 2005.[44] These too have risen since the Acquisition.[45]

32. This evidence on inflation-adjusted prices raises the question of whether or not diversion premiums paid to Non-integrated Grain Companies for handling non-CWB grains may have increased as well, thereby offsetting the increases in tariffs for non-CWB grains. Figure 3 (attached) plots the diversion premiums for canola contained in the handling agreements for new contracts entered into each year with Non-integrated Graincos. A similar lack of substantially increasing diversion premiums for wheat is evident from Figure 4 (attached). There is no evidence of a sufficient increase in diversion premiums to fully offset the rising tariffs. Figure 5 (attached) plots the average net tariff for canola at the Port of Vancouver deducting diversion premiums from tariffs and adjusting for CPI.[46] Once again, the trend is upward, even after adjusting for changes in CPI.

33. As a partial check for the possibility that the price increases can be explained by cost increases, I deflated the prices net of the diversion premiums by the BC union wage index rather than the CPI. The results are shown in Figures 6 and 7 (attached). While I have not undertaken an investigation of changes in costs facing suppliers, these figures continue to show rising tariffs relative to wage labour costs.

34. In summary, the available information on real prices for port terminal handling services shows <u>rising</u> real prices. After adjusting for inflation, the CWB paid 7.4% more[47] for wheat elevation services at Vancouver ports at the end of the 2004/05 crop year than it did at the time of the Consent Agreement. In the case of non-CWB grains where Non-

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44 Tariffs may change throughout the year. In order to calculate an annual tariff, I weight different tariffs at different points of the year by the number of weeks these tariffs are in effect. Thus, if there is one tariff change occuring mid-way through the crop year, the average annual tariff is equal to the sum of the two tariffs divided by two.

45 The tariffs in respect of additional port terminal handling services, such as cleaning and storage, have risen as well over this time period, by the same order of magnitude in nominal terms.

46 The calculation is as follows. First the diversion premiums for canola are obtained from new handling agreements. I used clean canola diversion premiums and if canola was not specified, I used the diversion premium indicated for non-Board clean grain. The elevation tariff for the relevant port terminal is then obtained for the beginning of the handling agreement period. The diversion premium is subtracted from the elevation tariff. The difference is then CPI adjusted. For a given year, we average different port terminals CPI adjusted net tariffs to obtain a single number for the year. The average tariff is only for contracted canola that has non-zero diversion premiums stated explicitly in the handling agreements.

47 This is based on an average of all five port terminals' tariffs, CPI adjusted.

integrated Grain Companies may purchase the port terminal handling services, after adjusting for inflation, the cost for canola elevation net of average weighted diversion premiums today was 6% higher at the end of the 2004/05 crop year than at the time of the Consent Agreement. These data do not support a claim that buyers in the Port of Vancouver continue to have access to port terminal services at competitive rates.

(ii) Handling Agreement Terms

35. Agricore argues that since the Consent Agreement was registered with the Tribunal, the length of long-term handling agreements between port terminals in Vancouver and Non-integrated Graincos have increased dramatically with two consequences: (1) there is no longer a need for a divestiture because: "Independent Grain Companies continue to have access to port terminal grain handling services in the Port of Vancouver at competitive rates";[48] and (2) insufficient volume is available to make a divestiture of the UGG Terminal viable.[49] In this section, I address whether the first claim is true; whether the changes in contract length make the divestiture not viable is addressed in the next section.

36. Can long-term contracts, as a matter of economic theory, have an impact on an appropriate competition remedy? There is a narrow theoretical situation where long-term contracts can have an impact on an appropriate competition remedy. It is the length of time remaining in existing contracts that is relevant to the need for or benefits of a remedy to an SLC. If all buyers in the market (including the CWB) had long-term exclusive contracts in place with the Vancouver port terminals with expiry dates that stretched far into the future then competition policy could have very little influence on the options available to buyers. If, to take a hypothetical example, buyers in this market were committed to particular suppliers through contracts with a minimum of 20 years left, then the market would yield zero transactions for the next 20 years, and competition policy could therefore have no effect for at least 20 years. In such circumstances,

48 *UGG Statement of Grounds and Material Facts*, paragraph 9.

49 *UGG Statement of Grounds and Material Facts*, paragraph 7.

competition authorities might well refrain from imposing any remedy given the difficulty in predicting the possible market structure and market conditions 20 years hence.[50]

37. On the other hand, if the remaining time on most buyers' contractual commitments to suppliers is three years or less then competition policy can influence market outcomes in markets such as the market for port terminal services. A divestiture in circumstances in which a merger causes an SLC will render the market more competitive by providing buyers coming off contract with an alternative supplier.

38. While the length of time remaining in a contract may have an impact on an appropriate competition remedy, nothing about the length of contract *per se* is relevant to the need for the remedy. Consider an extreme hypothetical example. If the original contracts were 40 years in duration but most were coming due within three years, then any SLC in the market, unmitigated by a remedy, would impact buyers coming off contract. Nothing in the fact that buyers have been in long-term contracts or have the option to negotiate future long-term contracts protects buyers against the exercise of market power.

39. In short, the critical evidence pertaining to the issue of whether long-term contracts have eliminated the <u>need</u> for a divestiture remedy is the length of time remaining in contracts or, equivalently, the number of contracts coming due at various times in the future. I turn to this evidence next.

40. Figure 8 (attached) plots the cumulative number of expiring handling agreements between Non-integrated Grain Companies and Vancouver port terminals by week beginning from October 2002 when the Consent Agreement was filed, and beginning from August 2005 when AU's section 106 Application was filed for a rescinding of the Consent Agreement taking into account the early termination situations noted above. Figure 8 reveals that there are handling agreements with Non-integrated Grain

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[50] Note that it would be misleading to state that competition policy is ineffective or not needed in this circumstance because buyers have secured access through long-term contracts. Competition policy would have little impact because buyers are "stuck with", or committed to, the prices in the contracts even when these prices are high because of the exercise of market power. The theoretical situation in which competition policy can have an impact is even narrower than described in the text because competition authorities can order that long-term contracts not be binding.

Companies expiring over time.[51] With each expiring handling agreement a new agreement will be struck in which the terms – the diversion premium specifically – are affected by any exercise of market power in the market for port terminal grain handling services. Figure 9 (attached) provides the cumulative annual volumes associated with these expiring handling agreements, taking into account early termination options.[52]

41. As evident from Figure 9 there is very little difference in the number of weeks over which the cumulative annual volume of various amounts become uncommitted as a result of expiring handling agreements. Within three years close to 1 million tonnes of grain shipped through Non-integrated Graincos, representing over 50% of the volumes under contract, is released from expiring handling agreements and is exposed to any market power that suppliers exercise.

42. In sum, the only aspect of contract lengths that could be relevant to the issue of whether the need for a divestiture has been eliminated is the length of time remaining in contracts. If all contract termination dates were very far into the future, then a competition policy remedy might not be needed because it would not be effective: the remedy could not have an impact on market transactions for a long time. However, the evidence shows that there are handling agreements terminating steadily over time. Over 50 percent of the annual volume associated with existing handling agreements with Non-integrated Graincos will terminate within three years once early termination options are taken into account, and at the end of these agreements these buyers will be vulnerable to whatever SLC has arisen from the higher concentration in the market after the Acquisition should no remedy be implemented. In addition, because the largest buyer of port terminal handling services in Vancouver – the CWB – has no long-term handling

51 While the figures and table referred to in this paragraph will be relevant for the issue of viability of the divestiture as well, here I focus on whether the need for or benefits of a remedy are eliminated because of long expiration times in contracts.

52 Early termination options are incorporated because if buyers, currently in contracts with high prices (as a result of the exercise of market power) have the <u>option</u> to exit early, the effectiveness of competition policy is not precluded. The volumes associated with expiring contracts beginning from October 2002 are taken from the totals shipped by each shipper through the port terminal with the expiring contract for the 2001/02 crop year. The volumes associated with expiring contracts beginning from August 2005 are taken from the totals shipped by each shipper through the port terminal with the expiring contract for the 2003/04 crop year, where details by shipper and port terminal are available. This is then scaled up by 8% to account for the fact that total volumes shipped in 2004/05 were 8% higher than 2003/04. I choose a date earlier than the time of the Consent Agreement to avoid including grain volumes through the port of Vancouver during the labour unrest in 2002 and the unusually poor harvest during the 2002/03 crop year.

agreements with port terminals in Vancouver, the CWB will be subject to whatever SLC has arisen from the increased concentration in the market after the Acquisition should no remedy be implemented. In short, there is no basis in the evidence to conclude that the need for a remedy has been eliminated in the market as a result of changes in contract lengths.

43. This conclusion stands in sharp contrast to AU's claim:

> "the significantly reduced volume of uncommitted independent grain demonstrates ... that Independent Grain Companies continue to have access to port terminal grain handling services in the Port of Vancouver at competitive rates."[53]

44. Quite apart from the lack of support for the premise that contract lengths (or contract lengths remaining) have undergone a substantial increase, I find this conclusion to be a *non sequitur*. A substantial increase in contract lengths (or contract lengths remaining), even if it were factually correct, would not in any way guarantee that rates are competitive. The ability of a buyer in any market to negotiate a long-term contract does not provide the buyer with the power to insist on competitive prices. No economic basis exists for linking the observation of longer term contracts to competitive pricing. It is noteworthy, as I discuss below, that the Applicant's economic expert does not make the same claim.

B. IS THE DIVESTITURE NO LONGER VIABLE DUE TO CHANGED CIRCUMSTANCES?

45. Agricore further alleges that the changed contract lengths make the divestiture non-viable due to a lack of available demand for the new owner of the divested terminal.

46. To assess Agricore's allegations, I examine evidence in this section pertaining to the absence of any significant change in the viability of a divestiture. In particular, I consider the available flows of uncommitted grain over time and market interest in the asset to be divested. It is important to note at the outset, however, that as an economic expert I am

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53 *UGG Statement of Grounds and Material Facts*, paragraph 9 (emphasis added).

merely adding to direct evidence provided by market participants themselves. There have been several offers of interest to purchase the UGG Terminal[CONFIDENTIAL].[54] [CONFIDENTIAL].[55]

47. In this section, I also respond to AU's claim that, should the divestiture remedy involve a handling agreement with the CWB, it would undermine the objectives of the Consent Agreement.

(i) Flows versus Stocks of Uncommitted Grain

48. As a matter of economic theory, an entrant can be deterred from a market by the fact that buyers are all committed to contracts with lengthy terms remaining. However, an entrant will look to gaining customers from the demand that is currently uncommitted (the stock of currently uncommitted demand) and the buyers that will be uncommitted in the relatively near future (an accumulation of the flow of buyers as their commitments end). Two relevant questions for this case arise from this economic principle:

    i) Has the distribution of demand available to an entrant as a function of "waiting time" after entry changed significantly between the time of the Consent Agreement and the date of the Application?

    ii) If the distribution of demand has changed, is the change significant enough to make entry not viable?

49. The demand available to the divested UGG Terminal may come from the CWB; it may be non-CWB grain that is obtained from Non-integrated Grain Companies; or a combination of the two.[56] The owner of the divested UGG Terminal will be in a position to compete for the handling of CWB and non-CWB grains either through Integrated or Non-integrated Graincos' primary elevator operations.

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54 [CONFIDENTIAL] Commissioner's Disclosure Statement, Tab 290.

55 [CONFIDENTIAL] (AU Disclosure Statement, AU-418); [CONFIDENTIAL] (AU Disclosure Statement, AU-393).

56 There may also be some volumes from producer cars.

50. I turn next to evidence on the flow of uncommitted grain to assess AU's allegation that there is insufficient volume to allow a viable purchase. This evidence takes the form of estimates of the times that a purchaser would have to wait to attract various volumes of demand.

51. The first question that arises is how much volume a purchaser would need or plan to attract in the steady state, i.e. once the "waiting period" is over. This is a question that cannot be answered precisely in a market with the variability in demand faced in port terminal handling services (a variability that stems, of course, from the variation in harvests year to year).

52. Certainly, an indication of what would be the sufficient volume for viability can be found simply in the volumes of demand that the current owner has been able to handle at the UGG Terminal, although these are likely to be greater than the minimum viable volumes. Table 6 (attached) shows the volumes of grain handled by the UGG Terminal in recent years [CONFIDENTIAL][57] As long as a purchaser can attract the same volumes and operate at close to the same cost efficiency, the divestiture must be considered viable. Indeed, because these volumes are demonstrably <u>sufficient</u> for viability, the minimum viable outputs are likely to be less.

53. Evidence on the changes in waiting times to achieve various volumes of demand goes directly to the issue of whether changes in the length of handling agreements have increased the scarcity of uncommitted grain and so rendered a divestiture not viable. As noted above in Figure 9, there is no material difference in the number of weeks required to accumulate volumes of grain from expiring handling agreements with Non-integrated Graincos, once early termination options are taken into account, for volumes just below 1 million tonnes. At volumes greater than 1 million tonnes, there is a longer waiting period following August 2005 compared to the time of the Consent Agreement, if reliance is solely on expiring handling agreements with Non-integrated Graincos. (However, as discussed below, restricting consideration to only those volumes through Non-integrated Graincos is not reasonable.)

54. In addition to these volumes, however, it is also important to note that, while potential buyers [CONFIDENTIAL].[58] Figure 10 (attached) includes this volume in the cumulative volumes potentially available to an owner of the UGG Terminal. [CONFIDENTIAL] the impact is clear. If such volumes are made available, the waiting time to have up to [CONFIDENTIAL] million tonnes available from expiring handling agreements is shorter following August 2005 than it was at the time of the Consent Agreement. [CONFIDENTIAL]

55. Thus far, the volumes I have discussed are only those associated with expiring handling agreements between Non-integrated Grain Companies and Vancouver port terminals. But this is <u>not</u> the total available grain volume to the owner of the divested terminal. CWB shipments that currently flow through Integrated Graincos are another available source of potential demand for the new owner of the UGG Terminal since these shipments could be directed by the CWB to the UGG Terminal. As discussed in the next section, a substantial volume of CWB grains is available to a prospective purchaser of the UGG Terminal.

56. In order to account for additional volumes of grain that may be available from the CWB beyond those through handling agreements with Non-integrated Graincos, Table 7 (attached) examines the change in waiting times to meet various volume requirements if reliance is placed solely on directed CWB grains. Specifically, this table compares the cumulative number of weeks starting from August 2001 (prior to the Consent Agreement)[59] compared to those starting from August 2004 to have 750,000, 1,000,000, and 1,500,000 tonnes of CWB grains potentially available to a purchaser of the UGG Terminal. If all CWB volumes were available to the UGG Terminal, one million tonnes of CWB grains would have been available within ten weeks of August 2004, while this volume was available within eight weeks of August 2001. A difference of two weeks is clearly not material when considering potentially available volumes.

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57 [CONFIDENTIAL]

58 [CONFIDENTIAL], Commissioner's Disclosure Statement, Tab 2, page 2, at NCBK 5750.

59 I use the 2000/2001 crop year rather than the 2002/2003 crop year given the lock-out at the Port of Vancouver significantly lowered grain volumes passing through the port in the fall of 2002.

57. As it is not realistic to assume all CWB volumes would be available to the UGG Terminal for any given week, the right hand columns of Table 7 show the number of weeks needed to accumulate 750,000 and 1,000,000 tonnes[60] of CWB grains if the CWB directs CWB grains to the UGG Terminal in proportion to each port terminal's share of capacity devoted to handling CWB grains. As Table 2 shows, [CONFIDENTIAL]. I assume therefore that four terminals will handle CWB grains in Vancouver (UGG, Cascadia, SWP and JRI). The UGG Terminal's share of capacity among these four terminals is [CONFIDENTIAL]. I use [CONFIDENTIAL] then as the volume of CWB grain that might be directed to the UGG Terminal by the CWB, should the CWB have a handling agreement with the new owner of the terminal.[61] As Table 7 indicates, the new owner of the UGG Terminal need wait only 59 weeks from August 2004 to obtain 1 million tonnes of CWB grains, while as of August 2001, it would have had to wait 54 weeks for this volume. A difference of 5 weeks is immaterial, and does not represent a significant change in circumstances from the time of the Consent Agreement.

58. Non-CWB grains through Non-integrated Grain Companies would, of course, be an additional source of demand to any prospective owner of the UGG Terminal where these volumes are coming from expiring handling agreements. Thus, we expect that some combination of CWB and Non-integrated Grainco volumes (in Table 7 and Figures 9-10) would be available to the new owner of the UGG Terminal.

59. It is important when considering these results to remember that entrants into almost any market expect to experience some delay before they reach full demand. Even if it took two to three years to overcome the disadvantages faced by an entrant due to existing commitments by buyers in the market (which it does not), the effective cost to the entrant does not constitute a major barrier to entry. Some perspective on this issue can be offered by considering the reduction in "steady-state" revenue that is equivalent to a delay of various times to accumulate the steady state revenue. Table 8 (attached) provides the percentage loss in volume for a firm experiencing zero waiting time

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60 Beyond 1 million tonnes following August 2005 we have insufficient data to obtain an estimate of weeks for 1.5 million tonnes. [CONFIDENTIAL]

61 This is a very conservative assumption on my part, as a new entrant in almost any market will normally to adopt a more aggressive pricing strategy in order to attract customers' business quickly.

equivalent (in present value terms) to the loss due to waiting particular periods while demand builds up steadily.[62]

60. A delay of two years, for example, while buyers steadily came off contracts to overcome the disadvantage of facing committed buyers, is approximately equivalent (in terms of present value) to a reduction in revenue from the outset of 3.5 percent for a firm that faced no such delay. Given that grain volumes through individual Vancouver port terminals can fluctuate substantially from one year to the next, it is highly unlikely that a disadvantage of 3.5 percent would deter an otherwise viable purchase of the UGG Terminal. As a general matter, a disadvantage of 3.5% in revenue would not be considered a significant barrier to entry into a market. In short, even if a purchaser had to wait two years for Non-integrated Graincos to come off contract before overcoming the disadvantage of buyer commitments – that is, even if the purchaser completely ignored the volume available from CWB directed shipments and the fact volumes would steadily be becoming available from Non-integrated Graincos – the cost of delay would be small. Entrants face delays in building up demand in almost any market, and the cost of a delay in this market is small.

61. Significantly, for the purposes of AU's claimed changes in circumstances, it is clear from these tables that no substantial and relevant change has occurred in the entry barrier created by long-term contracts, i.e., in the distribution of contract lengths since the Consent Agreement. While the period of time an entrant would need to wait to have a volume of CWB and non-CWB grain available that is comparable to the total volume handled by the UGG Terminal varies depending on the harvest volumes available in any single crop year, there is no substantial change in the waiting period, whether this is for volumes coming off expiring handling agreements and those with early termination options or waiting for directed CWB grains.

62. The conclusion that the divestiture is viable is strengthened if one incorporates the possibility of contracting with buyers <u>before</u> entry. In such circumstances, no capital

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[62] This calculation assumes a real interest rate of 4 percent. The results are not strongly sensitive to this assumption. At a real interest rate of 6 percent, the cost of a 2 year delay to reach full revenue is equivalent to a 5 percent decrease in volume with zero wait. The calculations in this table reflect a conservative assumption that all costs are fixed.

needs to be committed to entry until buyers are lined up. As a general observation, the ability to get commitment from buyers prior to entry is relatively rare for new entrants into markets.[63] Where it does occur, one can say that the prospective entrant is at little or no contracting disadvantage to incumbent firms. In the current context, if the purchaser of the UGG Terminal could line up buyers prior to making its purchase, then even the remote risk of an insufficient volume of demand is removed.

63. The possibility of lining up buyers, or a large buyer, prior to entry is not merely hypothetical. [CONFIDENTIAL].[64] The same strategy would be available to other purchasers.

(ii) Market Interest in the UGG Terminal

64. The data on waiting times for a sufficient volume of grain to become available to attract buyers corroborates the market evidence of the viability of the divestiture that is revealed by the interest expressed in the asset. It is [CONFIDENTIAL],[65] [CONFIDENTIAL][66] [CONFIDENTIAL][67] that there is market interest in the UGG Terminal. There can be no more direct evidence of the viability of a divestiture than, simply, offers to purchase the assets. Whether the dates on these offers are extended or not, these offers indicate substantial interest. The market has signaled that the divestiture is viable.

65. It is useful to examine [CONFIDENTIAL] as an example of an arrangement that seeks buyer volume commitments prior to purchase. I do this for illustrative purposes [CONFIDENTIAL].[68] [CONFIDENTIAL].[69] [CONFIDENTIAL].[70]

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63 For example, a new entrant into the automobile market could not reduce uncertainty through commitments from prospective buyers prior to investment.

64 [CONFIDENTIAL], Commissioner's Disclosure Statement, Tab 290.

65 [CONFIDENTIAL]

(Commissioner's Disclosure Statement, Tab 94, page 12, at NCBK7575).

66 [CONFIDENTIAL] (see Commissioner's Disclosure Statement, Tab 216) [CONFIDENTIAL] (Commissioner's Disclosure Statement, Tab 216, page 2, at NCBK 9544). [CONFIDENTIAL] (see Commissioner's Disclosure Statement, Tab 289, NCBK 9863).

67 [CONFIDENTIAL] (Disclosure Statement, AU-418) [CONFIDENTIAL] (Disclosure Statement, AU-393).

68 [CONFIDENTIAL], Commissioner's Disclosure Statement, Tab 290, page 17, at NCBK 9880.

(iii) A Handling Agreement with the CWB would be Procompetitive

66. Although AU's expert is silent on the point, Agricore alleges that a handling agreement of the type contemplated [CONFIDENTIAL] would adversely affect the western Canadian grain handling industry, including the Non-integrated Grain Companies, and hence "it would be inconsistent with, and undermine the objectives of the Consent Agreement."[71] This allegation of damage to the market by a divestiture supported by a long-term handling agreement with CWB is a central part of Agricore's basis for its application. I assess this claim below.

67. Before undertaking this assessment, however, I note that the [CONFIDENTIAL] arrangement is not the only viable option for divestiture. There have been other offers for the UGG Terminal that have not explicitly involved a handling agreement with the CWB.[72] Furthermore, facilitating the purchase with a long-term contract with the largest buyer in the market was such an obvious strategy at the time of the Consent Agreement for any prospective new owner of the UGG Terminal – and the viability of such an arrangement had already been demonstrated by [CONFIDENTIAL][73] – that this type of strategy was both foreseeable and likely at the time the Consent Agreement was entered into.

68. Two sources of evidence suggest that the support of a long-term agreement with the CWB was, as a strategy, equally obvious at the time of the Consent Agreement than it is now. First, CWB was the largest buyer then as it is now.[74] Second, as demonstrated by Figure 9, the accumulated volumes of grain available for an entrant solely from Non-integrated Graincos within one year of the Consent Agreement were less than 500,000 tonnes. A long-term agreement with the CWB is not a strategy that has emerged

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69 [CONFIDENTIAL], Commissioner's Disclosure Statement, Tab 290, page 25, at NCBK 9888.

70 [CONFIDENTIAL], Commissioner's Disclosure Statement, Tab 290, pages 25, 32-22, at NCBK 9888 and NCBK 9895-9896.

71 *UGG Statement of Grounds and Material Facts*, at paragraph 8.

72 [CONFIDENTIAL]. (See Commissioner's Disclosure Statement, Tab 137, at NCBK 8153). [CONFIDENTIAL]. (See Commissioner's Disclosure Statement, Tab 139, at NCBK 8156.)

73 [CONFIDENTIAL].

74 During the 2001/02 crop year, the CWB represented 75% of grain shipments to the Port of Vancouver port terminals (CGC Weekly Statistics).

because of the drying up of uncommitted grain. Such an agreement was an obvious entry strategy for a prospective purchaser at the time of the Consent Agreement.

69. I turn now to an assessment of the AU's claim that the type of handling agreement [CONFIDENTIAL] would be detrimental to the market. This claim, I suggest, is not supported by available evidence. It is critical when considering AU's allegations to use the criterion that is relevant for an assessment of the effectiveness of this type of divestiture. This criterion is the divestiture's impact on the competitiveness of the market and related markets in the industry. The various possible market outcomes that would result from a CWB-supported divestiture must be assessed with respect to this criterion.

70. My assessment starts with the simple observation that the CWB is evidently in favour of such an arrangement. The arrangement, from the perspective of the largest buyer in the market, provides a more competitive (lower-priced) alternative than the current market. And all buyers, including Non-integrated Graincos selling non-CWB grains, would benefit from the increase in competition.

71. AU alleges that the loss of diversion premiums from CWB grain that is directed by the CWB to the purchaser of the UGG Terminal, [CONFIDENTIAL], would harm the Non-integrated Graincos, owing to reduced diversion premium payments on directed CWB grains. When the CWB directs grain [CONFIDENTIAL] it must decide which Grain Companies are to have volumes directed to the specified port terminal. The CWB will face the same decision if the CWB supports a divestiture in the Port of Vancouver with a long-term contract. The requirement to ship to the specified terminal (which I shall refer to as the "direction requirement") carries with it a loss in diversion premiums for Non-integrated Graincos if they are the primary elevators from whom the volume is directed. In the case of Integrated Graincos with any directed CWB volumes from their primary elevators, the Integrated Grainco loses the port terminal revenues that it would have otherwise obtained had it handled the grain entirely within its integrated system.

72. As a matter of practice, the CWB attempts to allocate the direction requirement in proportion to the volume of CWB grain shipped.[75] This policy cannot be implemented down to the nearest 1 percent because shipments are lumpy. But to the extent that it is approximately implemented, then the effect of the requirement is to raise the marginal cost incurred by all Grain Companies for the combined services of elevating, cleaning and having the CWB grain shipped to the Port. Whether a particular geographic upstream market for elevator service is highly competitive or not, the impact of this increase will be to raise the net marginal costs and therefore the price in this upstream market, i.e., the price that is charged by primary elevators for their entire set of services. Prices adjust to changes in marginal cost, as in any market.

73. I elaborate here on the adjustment in upstream markets to the increase in net marginal costs (from the loss in diversion premiums) that a CWB-supported divestiture would involve. If a particular upstream market is competitive, then the price will adjust <u>fully</u> to the increase in marginal cost – as this increase in marginal cost is the same for all upstream suppliers if the CWB allocation of the direction requirement is pro rata. Suppliers are no worse off. With a competitive market upstream, farmers lose on the one hand from the loss in diversion premiums that were previously passed upstream to them through incentives delivered by primary elevators, but farmers gain on the other hand from improved prices paid by the CWB as a result of the favourable agreement struck with the terminal to which shipments are directed. No anticompetitive effects are manifest. While individual farmers may be better or worse off, as a group they are better off when the CWB, acting in the interests of farmers, chooses to support a divestiture with a long-term contract.

74. If a particular upstream market is not competitive then prices might not fully adjust to the increase in net marginal costs resulting from the loss in diversion premiums. The impact is a smaller price-cost margin for Grain Companies. This is a procompetitive effect. It may be in this case that some firms in the market are forced to exit because the lower prices do not allow them to cover costs. But this will only be the case in local geographic markets where there is excess capacity (if all capacity is needed, there will be no exit).

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[75] This statement is based on interviews with CWB representatives.

Exit from any local markets with excess capacity by the marginal (i.e. the highest cost) firms does not represent an anticompetitive effect.[76] It represents the rationalization of capacity in the market. The role of a competition policy remedy is not to ensure that the highest cost firms survive in a market in spite of excess capacity. It is to protect competition.

75. In addition to the upstream effects outlined in the previous two paragraphs, the remedy carries, of course, procompetitive effects downstream in the port terminal handling services market. This is indeed the main effect of the divestiture. In short, where the CWB chooses to follow the practice of allocating the direction requirement proportionately, in the downstream markets for port terminal handling services the impact of the CWB-supported divestiture is procompetitive; the impact in the upstream elevator services market is either procompetitive or neutral; and the impact on the furthest upstream market, farming, is, on aggregate, procompetitive.

76. If the CWB, for some reason, were to adopt an asymmetric allocation rule for the direction requirement, then the impact of the divestiture would still be procompetitive if the marginal suppliers in any local upstream market bore at least a pro rata share of the direction requirement. Prices would fully adjust to changes in the increase in the net marginal costs of the marginal suppliers if a particular local market is competitive (and a partial adjustment is possible if the market is not competitive).[77]

77. In all of the circumstances involving the possibility of exit of marginal firms, the ultimate effect of any CWB-supported divestiture may be a more concentrated market structure in local upstream markets. But these markets nonetheless involve lower prices for the set of all services that the CWB requires for its grain (the CWB being a supporter of the divestiture) and the markets are therefore more competitive in performance. The aim of

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[76] Note that the economic terminology of a "marginal" firm does not carry the negative connotation of the common business use of this language. A marginal firm in a competitive market earns a normal, risk-adjusted rate of return, but is simply the highest cost firm in the market. In competitive markets where all firms are identical, all are marginal.

[77] The only theoretical possibility of an anticompetitive impact is a situation in which the CWB asymmetrically imposed the direction requirement on inframarginal (low cost) suppliers – in the elevator services these are the high-volume throughput elevators) – to such an extent that these efficient suppliers were driven from the market or their market share substantially reduced. I find no evidence to suggest a new CWB policy targeting high-volume throughput elevators.

a competitive remedy is never to protect marginal firms (or an unconcentrated "competitive market structure") at the cost of a less competitive performance.

78. Thus, a long-term handling agreement between the CWB and a purchaser of the UGG Terminal would not undermine the objectives of the Consent Agreement. In contrast, the agreement would be evidence that the objectives of the Consent Agreement in enhancing competition have been fulfilled.

79. In sum, I find no support in the evidence for the claim that the divestiture of the UGG Terminal is no longer viable. Indeed, the evidence supports the conclusion that the divestiture is fully viable. Market participants have already offered to purchase the terminal. The flow of grain coming off expiring handling agreements following the date of the Application is not substantially different from the flow at the time of the Consent Agreement.

80. As a final point, I note that economic theory would predict reluctance on the part of a dominant firm to sell an asset for a price that a new entrant would be willing to pay. An asset is always worth more to a dominant firm than it is to a prospective entrant of equal efficiency: for the incumbent dominant firm, retaining control over the asset has the benefit of protecting any ability to exercise market power, whereas the prospective entrant is purchasing entry into a more competitive market.[78] The purpose of a divestiture remedy to an SLC, however, is never to find a sale of assets at a price with which both the seller and the buyer would be satisfied. The purpose of the divestiture is to eliminate the effects of the SLC.

IV. ASSESSMENT OF DR. WARE'S EXPERT REPORT

81. In his expert report, Dr. Ware concludes that: (i) Non-integrated Graincos have secured for themselves greater access to port terminal handling services in the Port of Vancouver; (ii) PRG Terminal should now be included in the same geographic market for

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[78] This economic principle can be expressed most simply as the following: a plant owned by a monopolist is worth more to the monopolist than it is to a prospective entrant because the entrant would value the asset on the basis of duopoly profits, whereas the monopolist's opportunity cost of selling the asset is the difference between monopoly and duopoly profits. This difference is always higher in a market where the products are not highly differentiated.

the provision of port terminal handling services as the Vancouver port terminals. Dr. Ware argues that this second factor, together with an increase in the unloading capacity at the SWP terminal, has "increased dramatically the degree of excess capacity" in the market.[79] I discuss Dr. Ware's conclusions below in sections on the need for a divestiture and on the viability of a divestiture remedy.

82. In respect of the need for the remedy, Dr. Ware alleges that two changes in the western Canadian port terminal grain handling industry have led to an increase in actual or future competition in the industry.[80] One, he contends that since the Consent Agreement was entered into, there has effectively been a major increase in the degree of vertical integration in the industry in the form of longer term contracts between Non-integrated Graincos and Integrated Graincos for the supply of port terminal handling services. Two, Dr. Ware contends that the May 1, 2005 change in CN railcar rates for shipping grain to the PRG Terminal and an increase in unloading capacity at the SWP Terminal will likely increase competition in the industry.

83. On the second issue – the viability of the divestiture – Dr. Ware claims that a divestiture is rendered less viable in the Port of Vancouver because of a reduction in the volume of uncommitted grain in the market for which a new owner of the UGG Terminal could compete.

84. When considering Dr. Ware's evidence on these two questions, it is important to be clear about what he does <u>not</u> claim in his report.

    i) Regarding longer term contracts, Dr. Ware concludes that this alleged change has increased competition in the industry. Dr. Ware does <u>not</u> conclude that the market <u>is</u> in fact competitive. Dr. Ware does not claim that the SLC resulting from the Acquisition has been eliminated, nor does he claim that a divestiture remedy would no longer mitigate a remaining SLC. His conclusion, namely that vertical integration by contract has had *some* positive impact on competition, does not lead to the conclusion that the divestiture remedy is no longer needed.

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79 Ware Report, paragraph 6.

80 Ware Report, paragraph 18.

In other words, he has not concluded that the lessening of competition found by the Tribunal from the Acquisition is no longer substantial;

ii) Regarding the alleged changes in excess capacity, Dr. Ware claims to demonstrate that the effect of the dramatic increase in the degree of excess capacity "will likely be to increase competition among the Canadian West Coast port terminals."[81] Yet in the text of his analysis, Dr. Ware does not conclude that competition has increased. He states:

> "One unambiguous conclusion may be stated: in itself, the addition of excess capacity will never lead to an increase in market power or a decrease in competition."[82]

Again, Dr. Ware does not address whether competition has increased such that the Tribunal's finding that a divestiture was needed to remedy the SLC is no longer required. In short, Dr. Ware analysis regarding the alleged inclusion of the PRG Terminal in the market or the alleged increase in capacity at the SWP Terminal does not address the need for a remedy.

iii) While Agricore claims that the only realistic prospect for a purchase of the UGG Terminal, i.e. for the divestiture, is by a purchaser who enters into a handling agreement with the CWB; and claims that this arrangement would adversely affect the grain handling industry and undermine the objectives of the Consent Agreement,[83] Dr. Ware does not discuss these claims.

85. I turn now to addressing Dr. Ware's analysis in greater detail.

MY ASSESSMENT

A. The Alleged Change in the Need for a Divestiture Remedy

86. Dr. Ware makes several propositions regarding the current state of the market, but he does not in fact reach a conclusion that a remedy is no longer required. I assess in this

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81 Ware Report, paragraph 6(d).

82 Ware Report, paragraph 25.

83 *UGG Statement of Grounds and Material Facts*, paragraph 8.

section two of Dr. Ware's propositions related to AU's allegation: his claim of vertical integration through longer term contracts, and his claim of a dramatic increase in the degree of excess capacity.

(a) Long-term Contracts – Measurement and Theory

(i) Assessment of Dr. Ware's measurement of contract length

87. Dr. Ware's evidence on contract length depends on the following:

- Dr. Ware emphasizes alleged changes in the length of time remaining in contracts outstanding since the date of the Consent Agreement;[84]
- Dr. Ware relies on changes in the average such time remaining in contracts as a summary indicator of the extent of changes;[85]
- Dr. Ware measures the percentage change, as opposed to the absolute number of years of change, in the average time remaining in contracts;[86]
- Dr. Ware considers only grain flowing through Non-integrated Grainco contracts for port terminal services. He ignores the right of the largest buyer, the CWB, to direct shipments to a new purchaser.

88. As I discussed the first of these premises earlier in this report, below I focus on the remaining premises.

1. The use of average time remaining in contracts as a summary statistic

89. The change in the *average* contract length (weighted or simple) is misleading as a summary of the trend in the lengths of contracts that is relevant to determining the competitive effects of greater use of longer term contracts. If the average is to be valid as a summary measure of the entire distribution of contract lengths, then as a matter of logic it must be valid for any distribution of contract lengths. (It would not be enough to

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84 Ware Report, paragraph 13.

85 *Ibid.*

86 Ware Report, Table 1b.

show that this measure sometimes gives the right answer to the question of whether competitive effects have changed.)

90. The weakness of the average as a measure can be illustrated with the following hypothetical example.[87] Consider, a market starting from a configuration of spot market contracts (very short term contracts) in which 10 percent of the transactions move to 40 year contracts. The average contract length has increased from 0 to 4 years. Yet whatever the competitive protection provided to buyers from long-term contracts in the 10 percent of the transactions, 90 percent of the buyers remain unprotected. The *average* contract length has increased significantly, yet almost all buyers remain in the same contracts. There is no sense in which the average contract length can be associated with a decrease in prices in the market, i.e. with an increase in the competitiveness of the market.

2. Use of percentage increases in contract length

91. Dr. Ware uses the percentage change in contract terms to summarize the change in contract lengths. The meaningful measure, in my view, is the *absolute* change in the contract terms. A large percentage change can be a misleading indicator of a change in a small number of years if the initial contract is of short duration. Suppose, for example, that the average time remaining had changed from 6 months to 2 years. This would represent an increase in percentage terms of 300 percent, yet the absolute increase of 1.5 years would be far too small an increase to now regard the contracts as being of such long duration that a divestiture is incapable of being an effective means of redressing the SLC.

3. Consideration of only Non-integrated Grainco contracts

92. The largest buyer of port terminal services is the CWB, which operates on behalf of individual farmers and has accounted for, on average, 65-75 percent of the annual demand for port terminal handling services in Vancouver over the past five years. A

[87] The use of a hypothetical example to consider the theoretical foundation of a summary measure (or lack thereof) is valid because if the measure is valid as the summary of a distribution, its validity would not depend upon the particular data or distribution being summarized.

convincing demonstration that market contracts have changed in a way that benefits buyers is not possible without consideration of the impact on the CWB. I understand that the CWB invoiced the port terminals on a short-term basis at the time of the Consent Agreement and they continue to do so today. There are no long-term contracts that provide the CWB with secure access to port terminal handling services in Vancouver at competitive rates.

93. The CWB is clearly better off in the event that it attains a handling agreement with the new owner of divested UGG Terminal. It is not necessary to analyze market conditions to reach this conclusion. By revealed preference, the CWB would benefit from the divestiture.

(ii) Assessment of Dr. Ware's Theoretical Conclusions on Contract Length

1. The concept of double marginalization

94. Dr. Ware's theory of why increases in contract length or the time remaining in contracts prior to expiry should increase the competitiveness of the market is based on double marginalization.[88] To assess this theory, it is helpful to describe what double marginalization means. Double marginalization occurs, as Dr. Ware indicates,[89] in a non-integrated vertical structure as upstream firms mark up their prices and downstream firms, taking upstream prices as their unit costs, mark up prices a second time. Where significant market power exists at different vertical stages of a supply chain, the final price will be higher than if the firms were vertically integrated, because there are two mark ups of the original input cost as opposed to only one mark up in the case of vertically integrated firm.

95. A numerical example may be helpful. Consider a two-stage setting with a monopoly at each stage. Suppose that the marginal cost of production for an upstream firm is $1.00 and that the elasticity of demand in the market is 3 (for simplicity, at every price).[90] The upstream firm will mark up its cost by 50 percent and charge a price of $1.50.[91] If the downstream monopolist has no other costs, then it will mark up its cost of $1.50 by 50 percent as well and charge a final price of $2.25. If the firms vertically integrate, however, the cost of $1.00 would be marked up only once and the final price would be $1.50.

2. Implications of the double marginalization theory for the s.106 Application

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88 Referring to the economic theory of competition in industries that compromise both horizontal and vertical components, Dr. Ware states: "[A] general result is that, as the structure becomes more vertically integrated, a reduction in 'double marginalization' occurs and more competitive prices will result to the final consumer. Roughly speaking, this occurs because in a non-integrated structure, upstream firms mark-up their prices, leading to a second mark-up by downstream firms who take the upstream prices as their unit costs. The likelihood is that increased vertical integration by contract in the Western Canadian grain handling industry will lead to greater efficiency and an increase in competition with respect to the provision of port terminal grain handling services in the Port of Vancouver." (See Ware Report, paragraph 18.)

89 Ware Report, paragraph 18.

90 The elasticity of demand is commonly expressed in absolute value. It is in fact a negative number for normal goods, as it measures the percentage decrease in the quantity demanded of the good for a 1% increase in the price of the good.

91 This follows from the fact that a profit-maximizing firm will set its markup of price over cost, as a proportion to price, equal to the inverse of the elasticity of demand. See R.S. Pindyck and D.L. Rubinfeld, *Microeconomics*, 6th ed: 353.

96. Before assessing the empirical validity of this theory for Vancouver port terminals, it is important to note that Dr. Ware's argument double marginalization is important in this industry is an argument *against* AU's section 106 Application. If double marginalization is important in this industry, as argued by Dr. Ware, then there must be significant market power at both the upstream and downstream sectors in which the firms, being vertically integrated, operate. To illustrate this principle, consider the hypothetical example of paragraph 95. If pricing in either (or both) of the vertical sectors were competitive, the final price would be the same with or without vertical integration. And note that in the numerical example, the final price after vertical integration is the monopoly price: eliminating double marginalization simply prevents prices from being *higher* than the monopoly price. In general, an argument that double marginalization is important is an argument that market power remains substantial even after vertical integration eliminates double marginalization. This contradicts AU's claim that a divestiture is not needed because Non-integrated Graincos have access to port terminal handling services in Vancouver at competitive rates.

3. The theory requires market power in the market for elevator services

97. While I accept Dr. Ware's assumption that market power is and will remain substantial in the market for port terminal handling services in Vancouver, I note that he has not demonstrated that substantial market power exists in the various geographic markets for elevator services on the prairies. This assumption is also necessary for his theory of more competitive pricing through the elimination of double marginalization.

4. Applicability of the double marginalization to contracts of the length observed in the port of Vancouver port terminal services market

98. Vertical integration, in theory, does eliminate double marginalization, if double marginalization exists. And vertical integration may be achieved through long-term contracts, a concept that is well established in the economic literature. But when economists speak of "vertical integration by contracts", we generally refer to much longer term contracts – 10 to 50 year contracts – than those observed here.[92] Contracts of

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[92] The emphasis is on long term contracts as a resolution of issues associated with relationship-specific investment, although in principle double marginalization is a problem that could also be resolved through such long term contracts. The classic

terms less than three years, however, which includes most of the contracts in the port terminal handling services market, will not resolve a double marginalization problem if these contracts continue to involve uniform pricing, i.e. a price that applies to each unit of the quantity transacted. Even in a three-year contract, a price for an upstream product will be marked up over marginal cost; and the downstream firm will set its price via a markup over the price established in the contract. The double marginalization problem (if indeed it is a problem in the market) is highly unlikely to be resolved via contracts with terms of three years or less.

5. Contracts that do resolve double marginalization

99. There is a type of contract that, in theory and under ideal conditions, would resolve double marginalization: two-part pricing. Under some assumptions, including conditions of certainty about future demand, a firm with market power will set for each buyer a two-part price consisting of a fixed fee and a variable price equal to its marginal cost.[93] This type of contract (or a more general form known as non-linear pricing) eliminates the double-markup problem because the downstream firm sets the variable price as its marginal cost, which is therefore the same for both firms. Any contract, whether short or long term, can resolve the double marginalization problem only to the extent that it involves nonlinearity of pricing.

100. I have examined the pricing in the set of contracts for Vancouver and only [CONFIDENTIAL] have some form of non-linear pricing. If double marginalization were a problem – and Dr. Ware adopts it as the basis for his claim that lower prices are likely to emerge in the market – one would expect to see substantially more non-linear pricing. These are the contracts that solve the double marginalization problem.

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reference is Paul Joskow, "Contract Duration and Relationship-Specific Investments: Empirical Evidence from Coal Markets," *American Economic Review* 77, No.1 (1987): 168-185.

93 R.S. Pindyck and D.L. Rubinfeld, *Microeconomics*, 6th Edition: 398.

(iii) Alleged Dramatic Expansion of Excess Capacity

101. The second set of changes in industry conditions that Dr. Ware alleges will likely increase competition in the industry are the May 1, 2005 change in CN railcar rates for shipping grain to the PRG Terminal and an increase in unloading capacity at the SWP Terminal. Since Dr. Ware offers no evidence or analysis on an increase in capacity at the SWP terminal, I do not address this alleged source of increase in excess capacity.

102. Dr. Ware calculates the capacities and quantities of grain handled in Vancouver and Prince Rupert in 2001/02 and 2004/05 to be those reproduced in Table 9 (attached).

103. Dr. Ware alleges that because CN rail rates for shipping grain in Western Canada to Prince Rupert and Vancouver are now the same, the PRG Terminal must now be included in the same geographic market as the Vancouver port terminals. Dr. Ware calculates the increase in excess capacity as 2.2 million tonnes (= 7.9 - 5.7), or 38.6%, as indicated above. Dr. Ware alleges that these changes "have dramatically increased the degree of excess capacity at Canadian West Coast port terminals."[94]

104. The increase of 2.2 million tonnes in excess capacity would be a relevant measure of the change in excess capacity in the market (accepting, *arguendo*, Dr. Ware's argument that the geographic market has expanded to include PRG) if the increase in excess capacity were simply introduced to the market and applied to the same demand. But the addition of the PRG Terminal does not represent merely the addition of this amount of capacity to the market. The addition of PRG brings an increase in demand as well. A measure of the change in excess capacity *relative* to total capacity or to total demand captures the proportionate increase in excess capacity. In Table 10 (attached), I compare the rates of capacity utilization[95] in 2001/02 and 2004/05, using Dr. Ware's inputs.

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[94] Ware Report, paragraph 6(d).

[95] Capacity utilization is equal to one minus the rate of excess capacity expressed in percentage terms.

105. Under Dr. Ware's assumptions, there is virtually no change at all in the rate of excess capacity[96] in the market.

106. While Dr. Ware does not claim that the entry of the PRG Terminal would reduce concentration in the market, it is worth emphasizing that the addition of this terminal would not represent the addition of a new entrant into the market. The PRG Terminal is jointly owned by all of the terminals in the Port of Vancouver. If I accept Dr. Ware's argument that the PRG Terminal should be considered part of the relevant market (which is in dispute), Agricore would hold a substantial share of 2003/04 port terminal handling shipments through Vancouver and Prince Rupert, as evident in Table 11 (attached).

107. In the penultimate paragraph of his report, Dr. Ware claims only that economic theory offers "one unambiguous conclusion": "the addition of excess capacity will never lead to an increase in market power or a decrease in competition."[97] But under a coordinated-effects theory of SLC (or in the terminology of economic theory, a cartel), it could be argued that, with the addition to a market of a jointly owned plant, the challenge of a cartel in reaching agreement on which prices to charge becomes *easier* since the owners can legitimately meet and discuss the price to set at the new plant. The prices at the jointly owned plant could then serve the role of price leadership in the market. This suggests that the type of change caused by an introduction into the market of a jointly owned plant could, in theory, lead to an increase in market power. I do not investigate this hypothesis, but conclude simply that Dr. Ware's evidence on changes in excess capacity does not demonstrate a change in the need for a divestiture remedy.

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96 As noted earlier in my report, I use 2001/02 as this is prior to the Consent Agreement and does not involve any period of labour unrest.

97 Ware Report, paragraph 25.

B. The Change in the Viability of a Divestiture Remedy

108. Dr. Ware's claim of reduced viability of the divestiture is based on:

i) A snapshot measure of the stock of uncommitted grain on a particular date, and his rejection of the measurement of the flow of grain coming off contract during any given period;[98]

ii) The premise that changes in the average time remaining on a contract is a meaningful summary indicator of the reduction in available or uncommitted grain;[99]

iii) The percentage change, as opposed to the absolute number of years of change, as a measure of the average time remaining in Non-integrated Grainco contracts;[100]

iv) The restriction to Non-integrated Grainco contracts for port terminal handling services in Vancouver. He ignores the right of the largest buyer, the CWB, to direct shipments to a new owner of the UGG Terminal;

v) The implicit assumption that a new owner is limited to competing for uncommitted grain once the terminal is purchased, ignoring the option of obtaining commitment from a buyer or buyers with long-term contracts prior to purchasing the terminal;

vi) [CONFIDENTIAL]; and,

vii) Ignoring the existence of actual offers to purchase the UGG Terminal.

In addition, Dr. Ware claims that the PRG Terminal is now in the geographic market for port terminal handling services in the Port of Vancouver and that this reduces the viability of a divestiture because:

> "the addition of such a large amount of excess capacity to the relevant market reduces the prospects for a viable and effective divestiture of the AUV Terminal,

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98 Ware Report, paragraphs 10-11.

99 Ware Report, paragraphs 13 and 15.

100 Ware Report, page 8, Table 1b.

as any prospective purchaser must now compete for every tonne of grain with significantly greater excess capacity in the hands of rival firms."[101]

109. I have discussed above the issue of whether excess capacity was added to the market. Below I assess the premises (i) through (iv).

My Assessment

(i) Stock versus Flow of Uncommitted Grain

110. As I indicated earlier, a prospective buyer of the UGG Terminal will not consider merely the stock of uncommitted grain available at a particular point in time. Indeed, a contract in this market between a Non-integrated Grainco and a supplier of port terminal services (the only type of contracts that Dr. Ware considers) are, I understand, generally entered into before the Non-integrated Grainco's previous contract expires. This makes the stock of uncommitted grain available at any time equal to zero, or nearly so. I suggest that no rational entrant into any market would ignore the flow of demand coming into the market in its entry decision.

(ii) The use of average time remaining in a contract as a measure of the change in uncommitted available demand

111. I have discussed this assumption with respect to the issue of the need for a divestiture in paragraphs 89-90, i.e. whether an increase in the average length of contracts outstanding obviates the need for a remedy to the SLC. Here I suggest that the measure is also problematic when used as a summary of changes in the distribution of remaining contract lengths with respect to the issue of the viability of a divestiture. (Dr. Ware joins the two issues, but they are more clearly analyzed separately.)

112. As a summary statistic, the average (weighted or not) places too much weight on the longest term contracts to be helpful.[102] A prospective purchaser of the UGG Terminal would consider the entire distribution over time of uncommitted grain as it comes off

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[101] Ware Report, in paragraph 26.

[102] To recall my earlier numerical example, if 10 percent of the contracts had 40 years left and the remaining 90 percent were spot contracts then the average contract length would be 4 years. Yet 90 percent of the grain would be uncommitted at any time.

contract, as referenced in Figures 9 and 10. The "average" time remaining in contract provides little information about the viability of purchasing the UGG Terminal.

(iii) Percentage change

113. As discussed above, any change in the viability of the divestiture is related to the absolute change (in months) in the time remaining in contracts, not the percentage change.

(iv) Consideration of only Non-integrated Grainco contracts and the assumption that contractual commitment prior to purchase is impossible

114. I consider together these two (implicit) assumptions of Dr. Ware's argument linking a decreased viability of the divestiture to the alleged reduction in uncommitted grain, because both of these assumptions are directly contradicted by the potential long-term handling agreement [CONFIDENTIAL]. I do not need to investigate as an expert whether the market conditions allow prior contracting: an offer to purchase reveals that prior contracting is an option. [CONFIDENTIAL].

115. It is important to note that the [CONFIDENTIAL] is evidence of the viability of the divestiture. The viability is revealed by the proposed arrangement itself.

V. COMMENTS ON MARTYSZENKO REPORT

116. In this section, I discuss certain economic principles that bear on the results discussed in the Martyszenko Report. I do not comment on the accounting assumptions or methodology employed by Martyszenko.

117. In his report, Mr. Martyszenko states the conclusion that a purchaser of the UGG Terminal would have to attain a volume of [CONFIDENTIAL] to cover its operating costs, depending on assumptions as to the shipper incentives that the UGG Terminal owner would pay to Non-integrated Grain Companies (or for that matter the CWB) for its services ([CONFIDENTIAL] dollars per tonne) and the mix of wheat versus other grains handled.

118. The question underlying Mr. Martyszenko's calculation of breakeven volumes is whether a new purchaser could be found even at zero cost. However, potential purchasers, with substantial purchase prices, have already identified themselves: [CONFIDENTIAL]. We already have a market assessment of whether a new owner could find enough demand to justify investment in the plant. In such circumstances, the breakeven calculation in the Martyszenko Report becomes irrelevant in such circumstances. Given the choice between the assessment of an outside expert, or the assessment by informed insiders (an assessment backed by offers [CONFIDENTIAL]) I attach more credibility to the latter.

119. If a new owner is as efficient in terms of providing the grain handling service at the terminal as Agricore has been then its operating costs would be no higher than those of AU. By way of example only, should the new owner become [CONFIDENTIAL], it will have [CONFIDENTIAL]. In a market where both vertical integration and non-integration survive as organizational forms, then as a matter of economic theory, there is unlikely to be a significant cost advantage to either form. Therefore it is reasonable to assume that [CONFIDENTIAL] would have the same costs as AU had, particularly as its throughput

will be at comparable levels or higher levels that the UGG Terminal's past annual volumes.[103] At the volumes that AU produced, this new owner certainly would be viable.

V1. CONCLUSIONS

120. I find no basis in evidence to support the proposition that a remedy to the SLC associated with the acquisition of Agricore by UGG is no longer needed.

121. The high level of concentration resulting from the merger has not changed and the rise in real prices since the merger does not support the AU's claim that "Independent Grain Companies continue to have access to port terminal services in the Port of Vancouver at competitive rates."[104] Real prices have increased. Nor is there a basis for concluding that long term contracts have protected buyers from an SLC. As a matter of economic theory, long-term contracts, as such, do not provide buyers with the power to insist on competitive prices. If the length of time remaining (the relevant aspect of contract length) were very high for all contracts, then competition policy would not be effective in establishing a remedy. However, the evidence shows that most contracts in this market remain short to medium term. Over 50 percent of the annual volume associated with existing handling agreements with Non-integrated Graincos will expire within three years, once early termination options are taken into account and, at the end of these agreements, buyers will be vulnerable to the SLC that has arisen from the Acquisition.

122. I find no basis in evidence for concluding that the divestiture remedy contained in the Consent Agreement is no longer viable.

123. The most direct evidence of the viability is in expressions of interest and offers from market participants to purchase the UGG Terminal.

124. AU alleges a change in market circumstances in the form of longer term contracts by Non-integrated Grain Companies, and claims that two consequences follow from this change: (i) that the only viable purchase of the UGG Terminal would be one that relies

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[103] [CONFIDENTIAL].

[104] *UGG Statement of Grounds and Material Facts*, paragraph 8.

on a long term handling agreement with the CWB because of the lack of uncommitted grain in the market; and (ii) that such an arrangement would be detrimental to the market and would therefore not have been agreed to by the Commissioner under the current circumstances. As to (i), I find no basis in the evidence to support the allegation of a lack of uncommitted grain in the market. The numbers of weeks that a purchaser would have to wait for various volumes to come on market are comparable to what they were in October 2002, and these waiting times do not give rise to prohibitive barriers to entry.

125. As to (ii), even if the divestiture relies on a long-term agreement with the CWB (an obvious purchase strategy at the time of the Consent Agreement and now) it would not be detrimental to competition in the market. The largest buyer, the CWB, has revealed that it would be better off. Purchasers of services for non-CWB grains would benefit from the additional competition in the market. Should diversion premiums to Non-integrated Graincos fall, then in the upstream markets for elevator services prices would adjust so as to mitigate the loss in diversion premiums. I analyze the impact on the upstream markets of a divestiture supported by a long-term agreement with the CWB and conclude that this impact would be procompetitive or neutral.

126. In sum, the evidence does not support a proposition that the remedy is no longer necessary; nor does it support a claim that the divestiture of the UGG Terminal is no longer viable.

Table 1: Integrated Grainco Shares of Storage Capacity and Shipments Through Port of Vancouver

Port Terminal	Ownership Interests [1]	Storage Capacity [1]		2001/02 Shipments [2]		2004/05 Shipments [3]	
		Tonnes	Share	Tonnes	Share	Tonnes	Share
UGG	100% AU	102,070	11.0%	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Pacific	100% AU	199,150	21.4%	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Cascadia	50% AU, 50% Cargill	282,830	30.4%	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
SWP	100% SWP	237,240	25.5%	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
JRI	100% JRI	108,000	11.6%	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Total		929,290		[CONFIDENTIAL]		[CONFIDENTIAL]	
Combined UGG/Pacific/Cascadia		584,050	62.8%	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]

Notes and Sources:

[1] See Commissioner's Response at Paragraph 111 (Commissioner's Disclosure Statement, Tab 50).
Pacific terminal owernship interests have changed from those stated in Tab 50 and is now 100% AU. (Competition Bureau).

[2] Commissioner's Disclosure Statement, Tab 109 (NCBK 80198020). For UGG data is from UGG Terminal Income Statements (AU-402).

[3] Data for crop year 04/05 is from West Coast Grain Shipments, Canadian Wheat Board, Commissioner's Disclosure Statement, Tab158-165 (NCBK 8665).
For UGG data is from UGG Terminal Income Statements (AU-402).

Table 2: Vancouver Port Terminal Shipments of CWB and Non-CWB Grain for Crop Years with Available Data

Port Terminal	1998-1999	1999-2000	2000-2001	→	2003-2004[6]	2004-2005[7]
UGG [1]						
CWB Grain (metric tonnes)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
Non CWB Grain (metric tonnes)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
CWB Grain (% Share)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
Non CWB Grain (% Share)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
Pacific [2]						
CWB Grain (metric tonnes)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
Non CWB Grain (metric tonnes)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
CWB Grain (% Share)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
Non CWB Grain (% Share)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
Cascadia [3]						
CWB Grain (metric tonnes)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
Non CWB Grain (metric tonnes)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
CWB Grain (% Share)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
Non CWB Grain (% Share)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
SWP [4]						
CWB Grain (metric tonnes)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
Non CWB Grain (metric tonnes)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
CWB Grain (% Share)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
Non CWB Grain (% Share)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
JRI [5]						
CWB Grain (metric tonnes)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
Non CWB Grain (metric tonnes)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
CWB Grain (% Share)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]
Non CWB Grain (% Share)	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]		[CONFIDENTIAL]	[CONFIDENTIAL]

Notes and Sources:

[1] Data for crop years 98/99, 99/00 and 00/01 is from Section 11 order responses, Commissioner's Disclosure Statement Tab 291 (NCBK 9904).
[2] Data for crop years 98/99, 99/00 and 00/01 is from Section 11 order responses, Commissioner's Disclosure Statement Tab 293 (NCBK 9974-9975).
[3] Data for crop years 98/99, 99/00 and 00/01 is from Section 11 order responses, Commissioner's Disclosure Statement Tab 293 (NCBK 9974-9975).
[4] Data for crop years 98/99, 99/00 and 00/01 is from Section 11 order responses, Commissioner's Disclosure Statement Tab 292 (NCBK 9946).
[5] Data for crop years 98/99, 99/00 and 00/01 is from Section 11 order responses, Commissioner's Disclosure Statement Tab 294 (NCBK 10000).
[6] Data for crop year 03/04 is from excel file "Grain vols - Bd-Non Bb.xls" provided by the Competition Bureau and for UGG data is from UGG Terminal Income
[7] Data for crop year 04/05 is from West Coast Grain Shipments, Canadian Wheat Board, Commissioner's Disclosure Statement Tab158-165 (NCBK 8665). For UGG data is from UGG Terminal Income Statements (AU-402).

Table 3: Breakdown of Own, Other Integrated, and Non-integrated Shipments by Port Terminal and Crop Year (%)

Vancouver Port Terminal	Shipper	1998-1999 [1]	1999-2000 [2]	2000-2001 [3]	2001-2002 [4]	2002-2003 [5]	2003-2004 [6]
UGG	Own Shipments	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]
	Integrated to Integrated	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]
	Non-Integrated	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]
Pacific	Own Shipments	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]
	Integrated to Integrated	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]
	Non-Integrated	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]
Cascadia	Own Shipments	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]
	Integrated to Integrated	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]
	Non-Integrated	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]
SWP	Own Shipments	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]
	Integrated to Integrated	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]
	Non-Integrated	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]
JRI	Own Shipments	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]
	Integrated to Integrated	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]
	Non-Integrated	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTI/	[CONFIDENTIAL]

Notes and Sources:

[1] See Commissioner's Disclosure Statement Tab 286 (NCBK 9857-9858).
[2] See Commissioner's Disclosure Statement Tab 287 (NCBK 9859-9860).
[3] See Commissioner's Disclosure Statement Tab 288 (NCBK 9861-9862).
[4] See Commissioner's Disclosure Statement Tab 109 (NCBK 8019-8020).
[5] See Commissioner's Disclosure Statement Tab 110 (NCBK 8021).
[6] See Commissioner's Disclosure Statement Tab 111 (NCBK 8022); The UGG Terminal total volumes were changed to those that appear in the document "UGG Terminal Income Statements" (AU-402). The difference is attributed to UGG Own shipments.

Table 4: Vancouver Port Terminal Shipments of CWB and Non-CWB Grain by Shipper Type, 2003-2004 Crop Year [1]

Port Terminal	Shipper	CWB (metric tonnes)	Non-CWB (metric tonnes)	CWB (% Share)	Non-CWB (% Share)
UGG [2]	Own Shipments	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Integrated to Integrated	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Non-Integrated	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Total	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Pacific	Own Shipments	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Integrated to Integrated	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Non-Integrated	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Total	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Cascadia	Own Shipments	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Integrated to Integrated	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Non-Integrated	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Total	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
SWP	Own Shipments	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Integrated to Integrated	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Non-Integrated	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Total	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
JRI [3]	Own Shipments	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Integrated to Integrated	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Non-Integrated	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
	Total	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]

Notes and Sources:

[1] From excel file "Grain vols - Bd-Non Bb.xls" provided by the Competition Bureau.

[2] UGG terminal total volumes are from "UGG Terminal Income Statements" (AU-402). The difference is attributed to AU shipments to UGG

[3] 2003-2004 crop year total is from Commissioner's Disclosure Statement Tab 111 (NCBK 8022). Total crop year to date receipts at the Vancouver Port for the week ending July 31, 2004 (See Commissioner's Disclosure Statement Tab 178 (NCBK 8836) provide totals by grain type, which are then adjusted (by scaling) to account for the 5 Vancouver port terminals only. JRI grain volume by grain type is the residual once the grain type volumes of UGG, Pacific, Cascadia and SWP Terminals are subtracted from the total.

Table 5 - List of Days Remaining in Each Non-integrated Grain Company Handling Agreement as of August 12, 2005

	Port Terminal	Non-integrated Grain Company	Dated	Start	End	Days Left as of August 12, 2005	Early Termination Notice Periods
[1]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[2]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[3]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[4]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[5]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[6]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[7]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[8]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[9]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[10]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[11]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[12]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[13]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[14]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[15]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[16]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[17]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	[CONFIDENTIAL]
[18]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	
[19]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	
[20]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	
[21]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	
[22]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	
[23]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTI	[CONFIDENTI	[CONFIDENTI	[CONFIDENTIAL]	

Notes and Sources:

[1] Commissioner's Disclosure Statement Tab 34
[2] Commissioner's Disclosure Statement Tab 293
[3] [CONFIDENTIAL]

[4] Commissioner's Disclosure Statement Tab 13
[5] Commissioner's Disclosure Statement Tab 7
[6] [CONFIDENTIAL]

[7] [CONFIDENTIAL]

[8] [CONFIDENTIAL]

[9] Commissioner's Disclosure Statement Tab 37
[10] [CONFIDENTIAL]

[11] [CONFIDENTIAL]

[12] [CONFIDENTIAL]

[13] Commissioner's Disclosure Statement Tab 14
[14] Commissioner's Disclosure Statement Tab 19
[15] Commissioner's Disclosure Statement Tab 12
[16] Commissioner's Disclosure Statement Tab 9
[17] [CONFIDENTIAL]

[18] Commissioner's Disclosure Statement Tab 8
[19] [CONFIDENTIAL]

[20] Commissioner's Disclosure Statement Tab 11
[21] Commissioner's Disclosure Statement Tab 10
[22] Commissioner's Disclosure Statement Tab 18
[23] Commissioner's Disclosure Statement Tab 40
[24] [CONFIDENTIAL]

Table 6: Volumes of Grain Shipped by the UGG Terminal in Recent Years [1]

Crop Year	CWB (metric tonnes)	Non-CWB (metric tonnes)	Total (metric tonnes)
2001-2002	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
2002-2003	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
2003-2004	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
2004-2005	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]

Source:
[1] See UGG Terminal Income Statements (AU-402)

Table 7: Weeks To Accumulate Various Volumes of CWB Grain [1]

	All CWB Volumes Crop Year		ɛct [CONFIDENTIAL] of CWB Volumes to U.G.G. Term Crop Year	
Weeks to Accumulate: [2]	**2001-2002**	**2004-2005**	**2001-2002**	**2004-2005**
750,000 tonnes	6	7	39	44
1,000,000 tonnes	8	10	54	59
1,500,000 tonnes	10	14	-	-

Notes & Sources:

[1] 2001-2002 and 2002-2003 Grain Statistics Weekly, Canadian Grain Commission and 2004-2005 and 2005-2006 Grain Statistics Weekly, Canadian Grain Commission, Commissioner's Disclosure Statement Tab 179-180 (NCBK 8838-8963).

[2] Weeks required to accumulate volume may exceed 52 as it may take longer than one year. Cumulative volume for 2004/05 crop year does not exceed 1.5 million tonnes and data is not available for weeks after December 12th 2005.

Table 8: Revenue Losses Equivalent to Delay to Reaching Full Demand

Months Delay	Percent Loss
12	1.5
18	2.5
24	3.5
36	5.3

Note:
Percentage loss in volume for a firm experiencing zero waiting time is equivalent to the loss due to waiting particular periods as demand builds.

Table 9: Dr. Ware's Estimates of Capacity and Volume of Grain Serviced [1]

(millions of tonnes)	Port of Vancouver (2001/2002)	Non-CWB (metric tonnes)
Capacity	14.90	20.40
Volume	9.20	12.50
Excess Capacity	5.70	7.90

Source:
[1] Expert Economic Report of Dr. Roger Ware, December 23, 2005.

Table 11: Integrated Grainco Shares of Grain Shipments Through West Coast

Port Terminal	Ownership Interests [1]	Storage Capacity [1]		2004/05 Shipments [2]	
		Tonnes	Share	Tonnes	Share
UGG	100% AU	102,070	9.0%	[CONFIDENTIAL]	[CONFIDENTIAL]
Pacific	100% AU	199,150	17.6%	[CONFIDENTIAL]	[CONFIDENTIAL]
Cascadia	50% AU, 50% Cargill	282,830	25.0%	[CONFIDENTIAL]	[CONFIDENTIAL]
SWP	100% SWP	237,240	21.0%	[CONFIDENTIAL]	[CONFIDENTIAL]
JRI	100% JRI	108,000	9.5%	[CONFIDENTIAL]	[CONFIDENTIAL]
PRG [3]	% Ownership varies with shipments shared between AU, Cargill, JRI, and SWP.	202,000	17.9%	[CONFIDENTIAL]	[CONFIDENTIAL]
Total		1,131,290		[CONFIDENTIAL]	
Combined UGG/Pacific/Cascadia/PRG [5]		672,930	59.5%	[CONFIDENTIAL]	[CONFIDENTIAL]

Notes and Sources:

[1] See Commissioner's Response at Paragraph 111, Commissioner's Disclosure Statement Tab 50.

[2] Data for crop year 04/05 is from West Coast Grain Shipments, Canadian Wheat Board, Commissioner's Disclosure Statement Tab158-165 (NCBK 8665). For UGG data is from UGG Terminal Income Statements (AU-402).

[3] PRG. storage capacity was obtained from PRG. website (http://www.rupertport.com/princerupertgrain.htm).

[4] See Grain Handling Statistics Terminal Points Western Division, Canadian Grain Commission, Commissioner's Disclosure Statement Tab 178 (NCBK 8836).

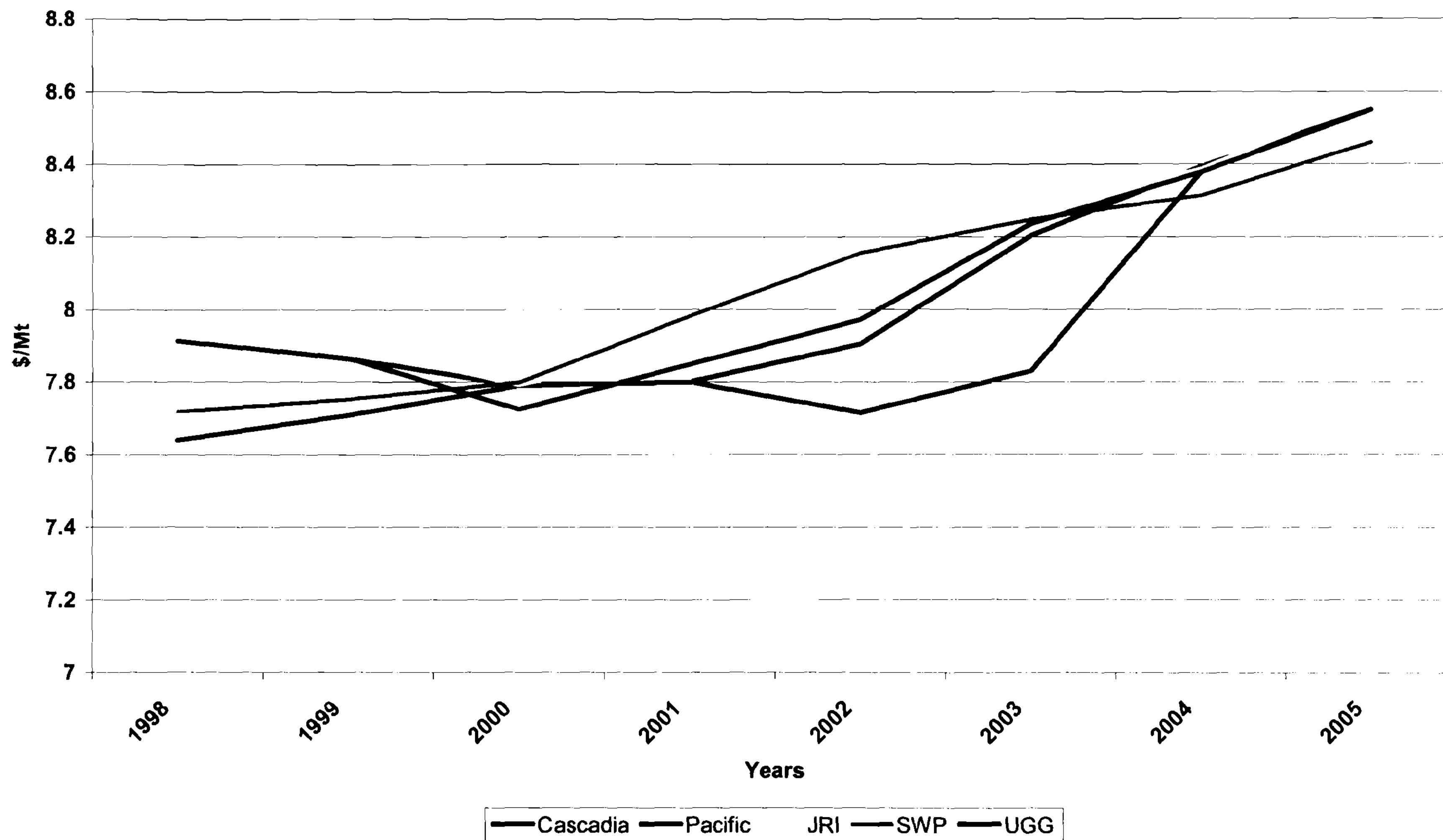
[5] Volumes by shipper through the PRG. Terminal are unavailable. I assume the Agricore/UGG share of PRG. shipments in 2003/04 is comparable to its share at the time of the Consent Agreement, which was 44%. See Wilson Affidavit, Commissioner's Disclosure Statement Tab 51 (NCBK 6466).

Table 10: The Change in Capacity Utilization Rates Under Dr. Ware's Hypothesis of an Expanded Geographic Market [1]

(millions of tonnes)	Port of Vancouver (2001/2002)	Non-CWB (metric tonnes)
Capacity	14.90	20.40
Volume	[CONFIDENTIAL]	[CONFIDENTIAL]
Capacity Utilization	[CONFIDENTIAL]	[CONFIDENTIAL]

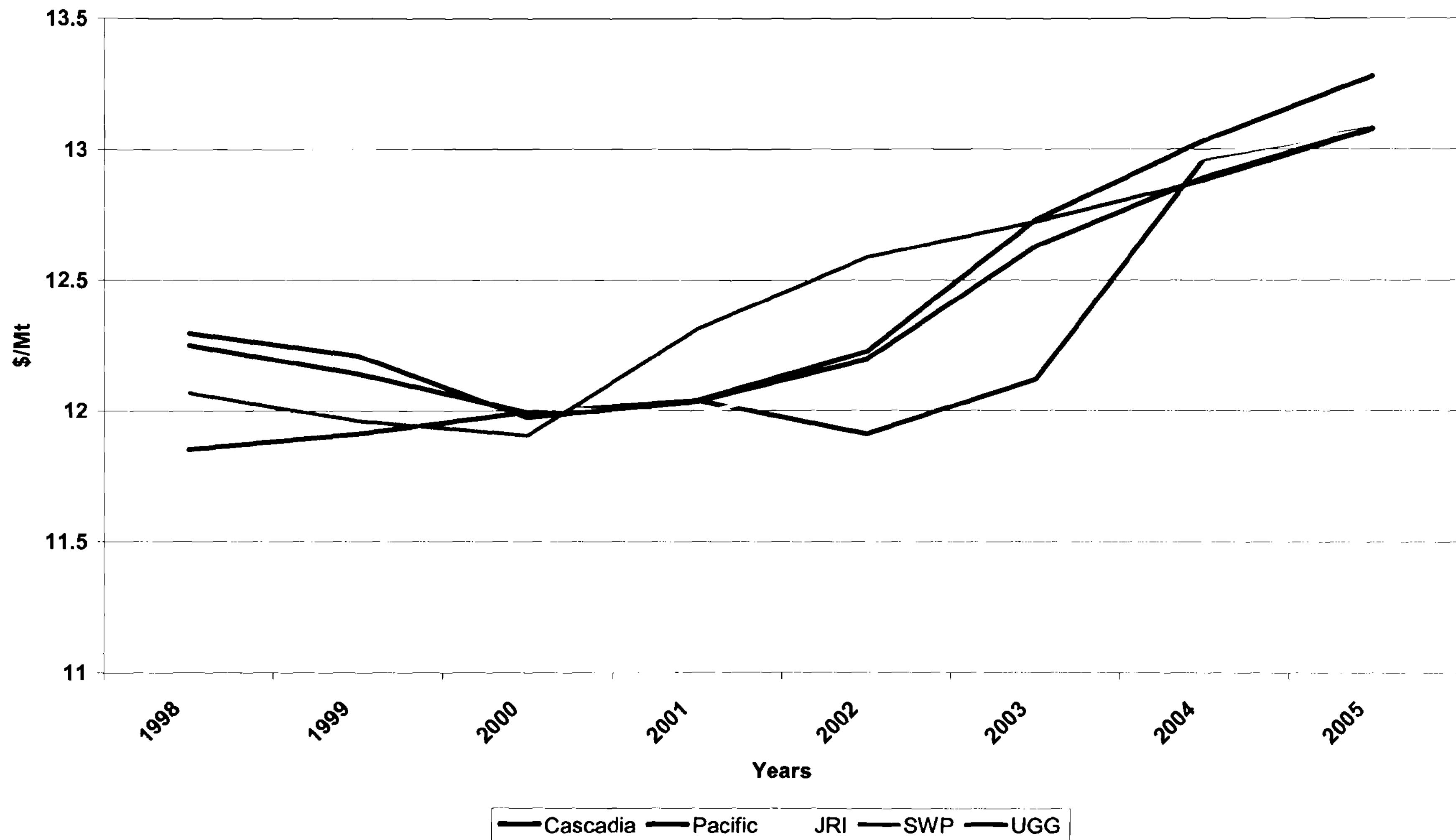
Source:
[1] Expert Economic Report of Dr. Roger Ware, December 23, 2005.

Figure 1
Weighted Average Elevation Tariff for Wheat in Vancouver Terminals, CPI Adjusted
1998-2005



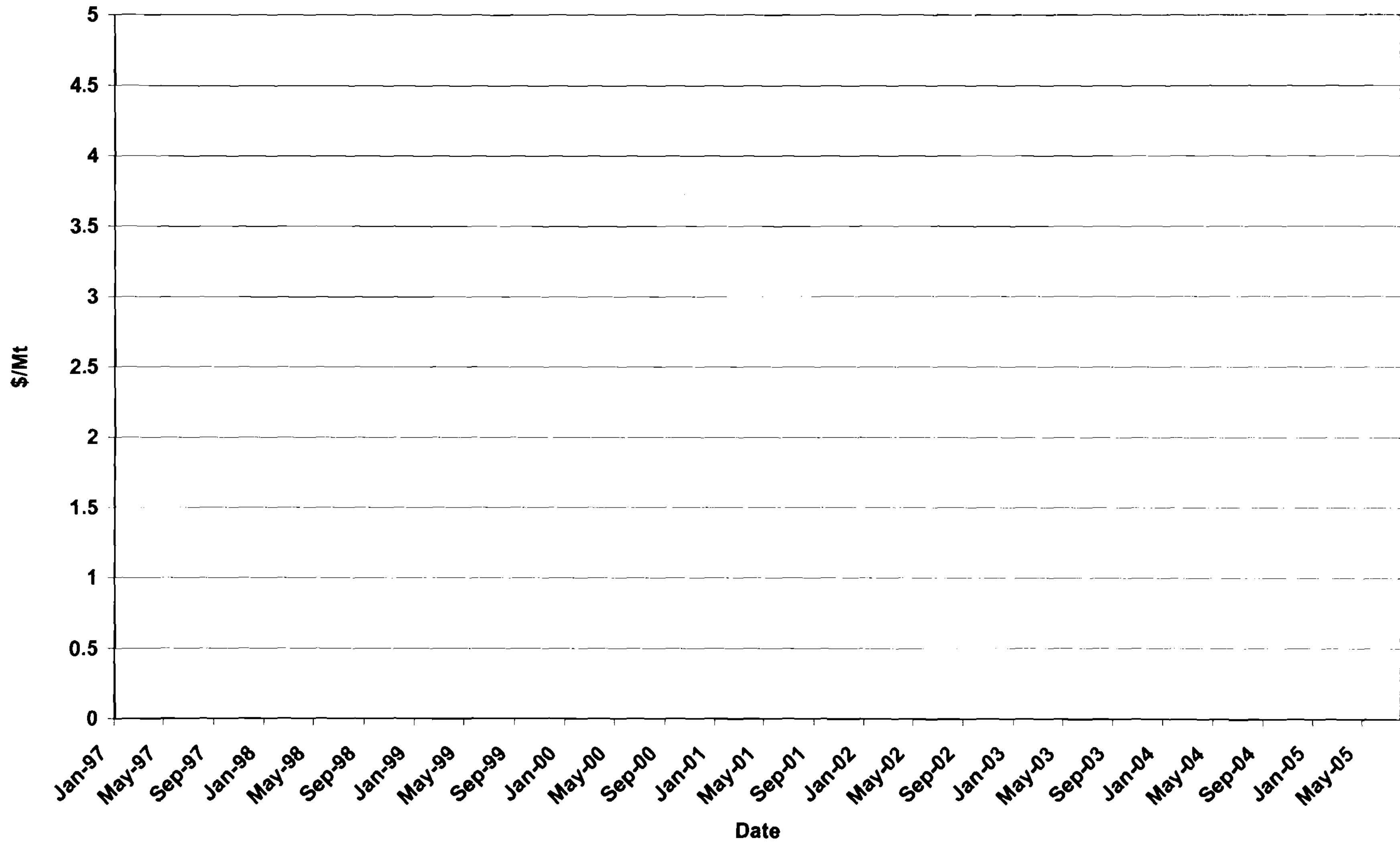
Note: Average annual tariff is weighted based on the number of days the tariff is in effect each year.
Source: Commissioner's Disclosure Statement, Tabs 54-58, 147-155, 181-213 and Statistics Canada.

Figure 2
Weighted Average Elevation Tariff for Canola in Vancouver Terminals, CPI Adjusted
1998-2005



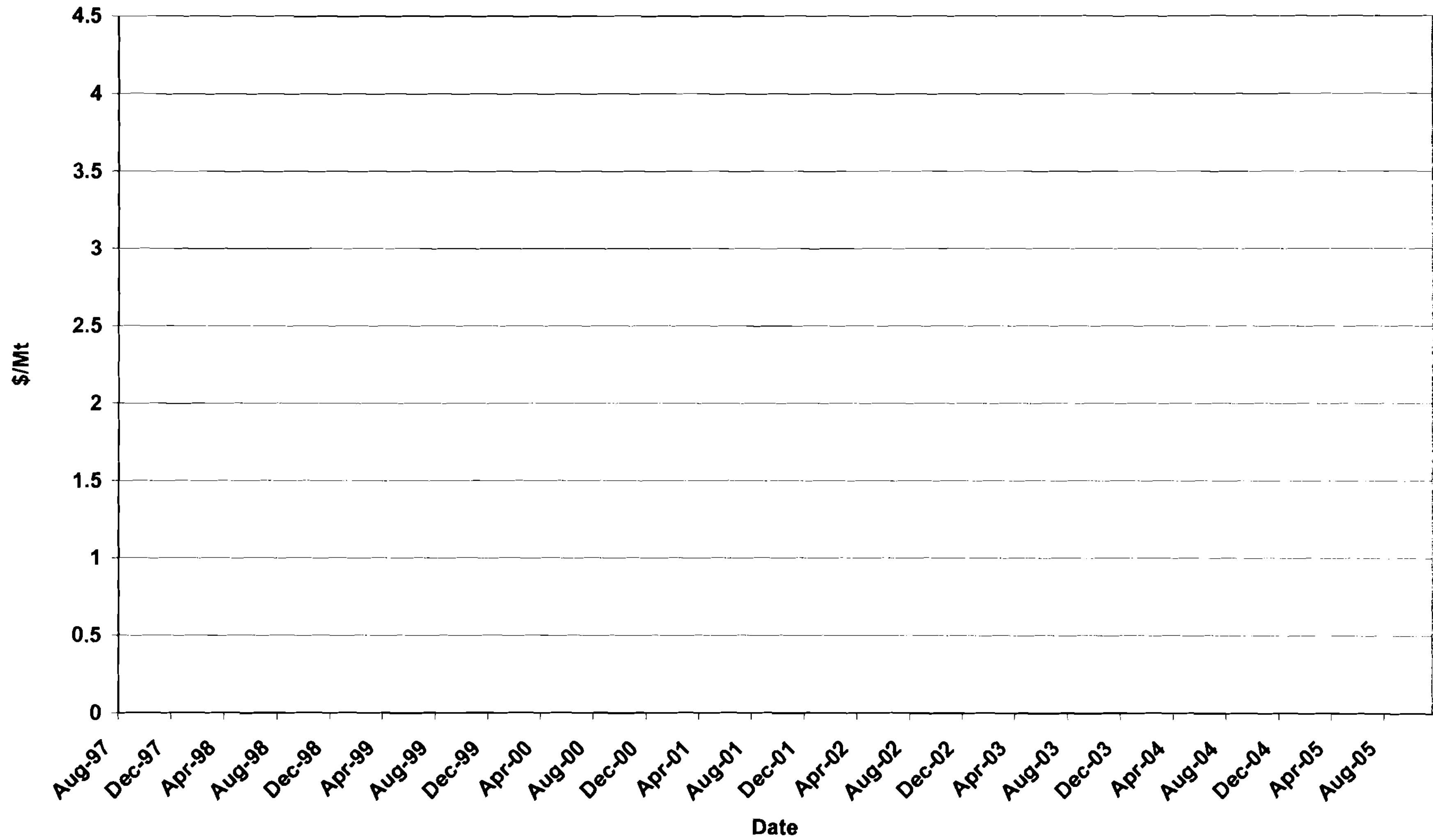
Note: Average annual tariff is weighted based on the number of days the tariff is in effect each year.
Source: Commissioner's Disclosure Statement, Tabs 54-58, 147-155, 181-213 and Statistics Canada.

Figure 3
Diversion Premiums for Canola at the Port of Vancouver



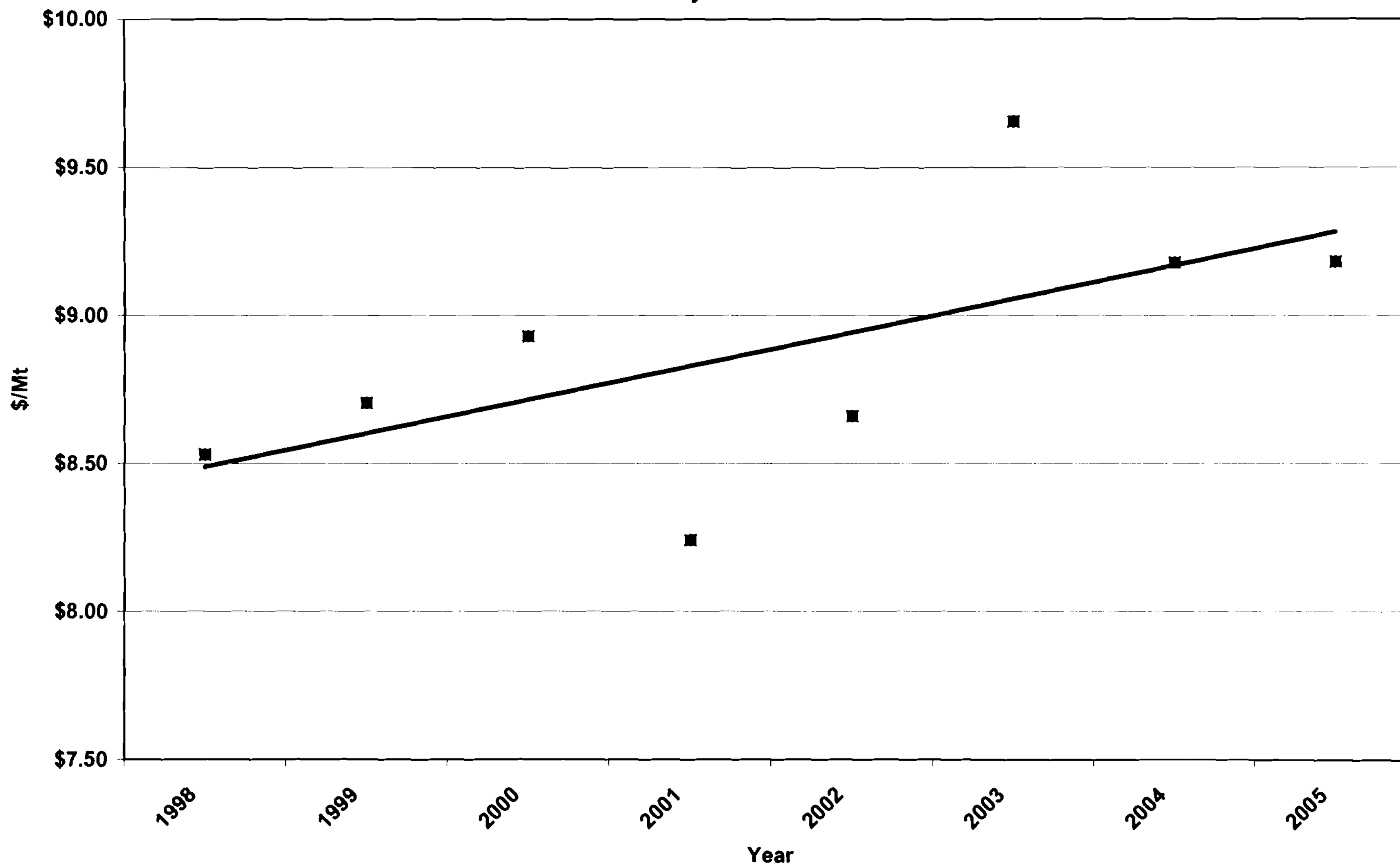
Source: [CONFIDENTIAL]

Figure 4
Diversion Premiums for Wheat at the Port of Vancouver



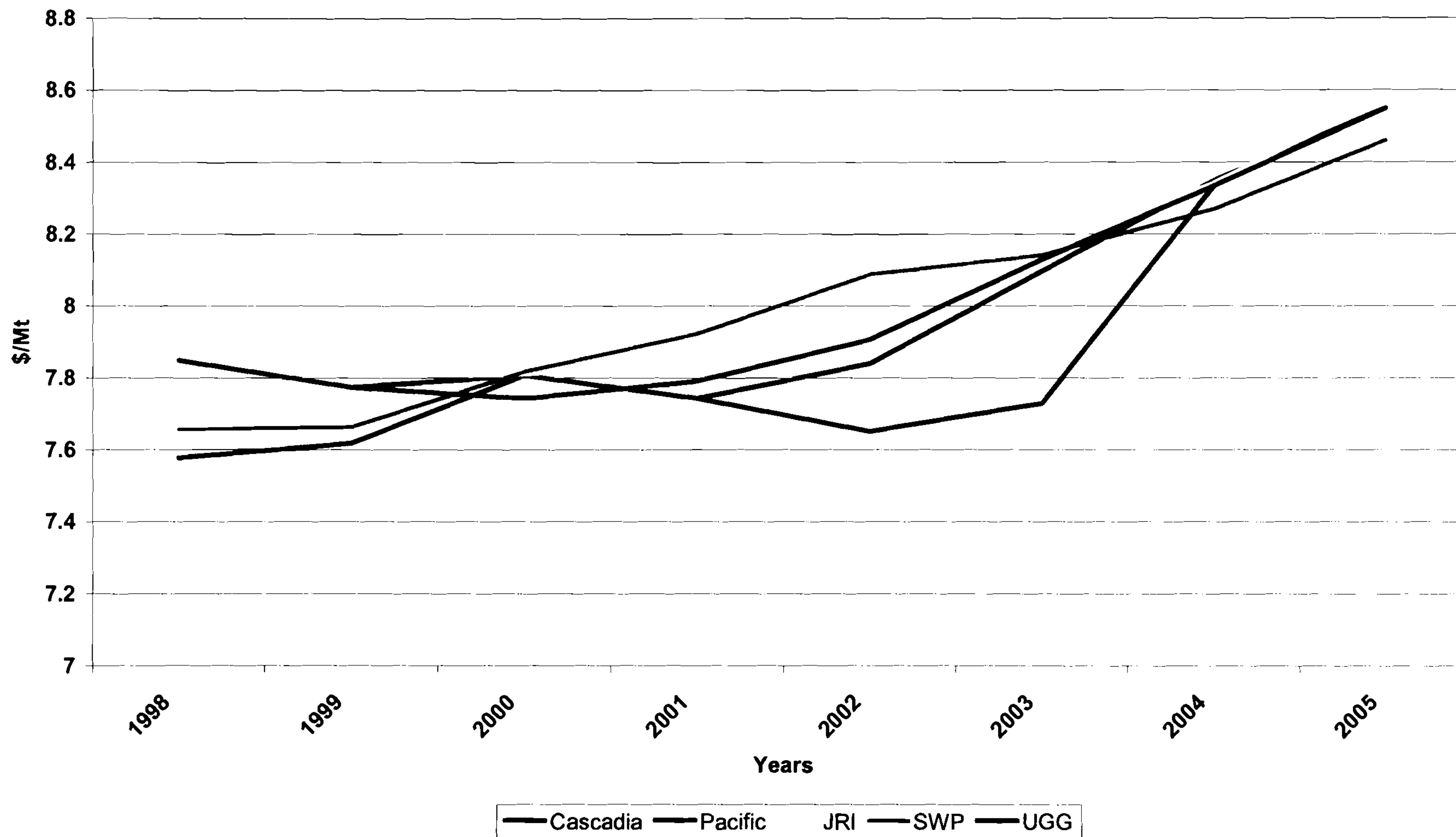
Sources: [CONFIDENTIAL]

Figure 5
Average Tariff (less Diversion Premium) for Contracted Canola at the Port of Vancouver, CPI Adjusted



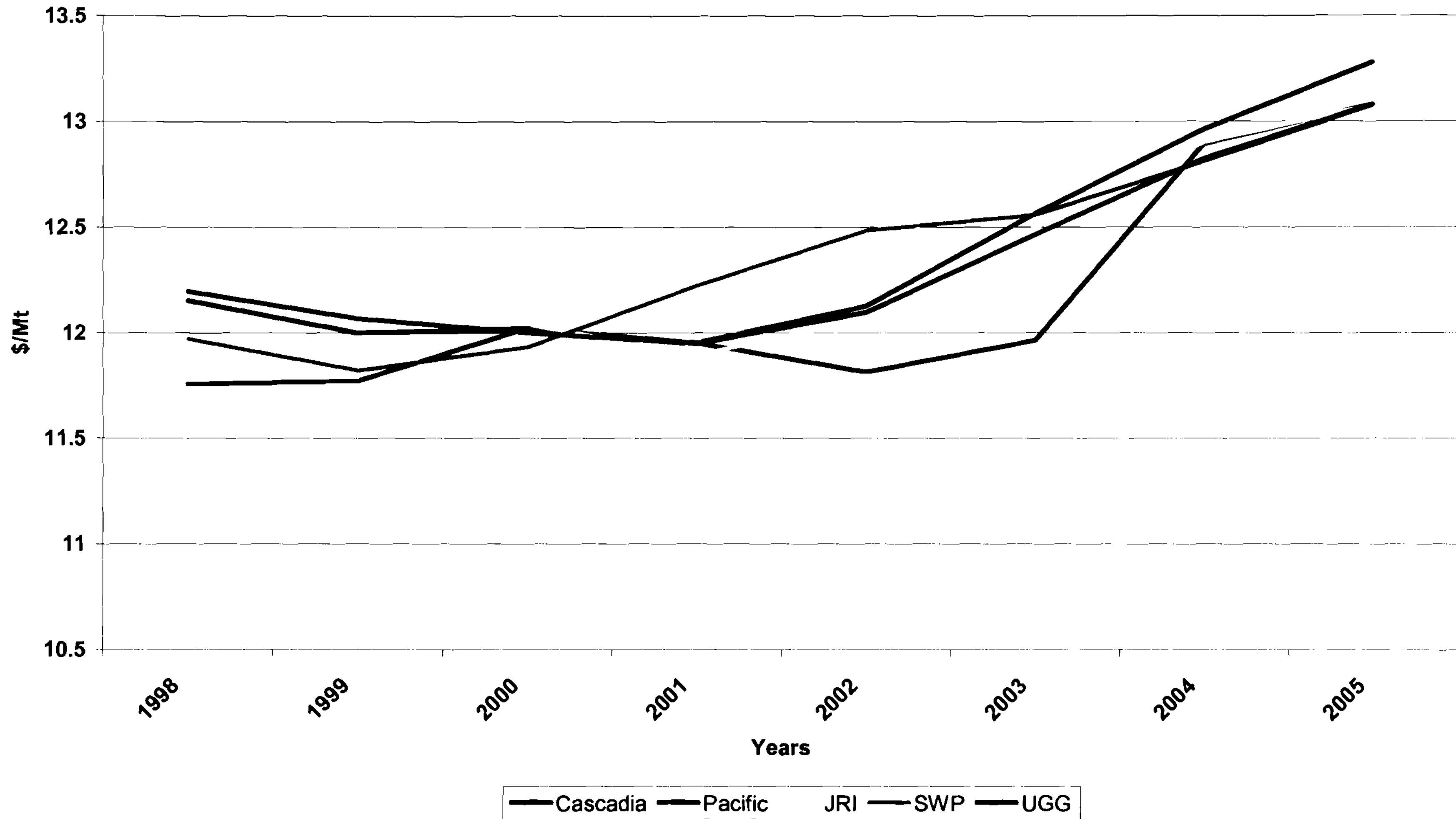
Sources: Commissioner's Disclosure Statement, Tabs 5,8,10,14,15,17-19, 22, 23, 25-30, 32, 34, 37, 40, 54-58, 108, 125, 147-155, 170-173, 175, 181-213, 293 and Statistics Canada.

Figure 6
Weighted Average Elevation Tariff for Wheat in Vancouver Terminals
Wage Adjusted for Union Changes
1998-2005



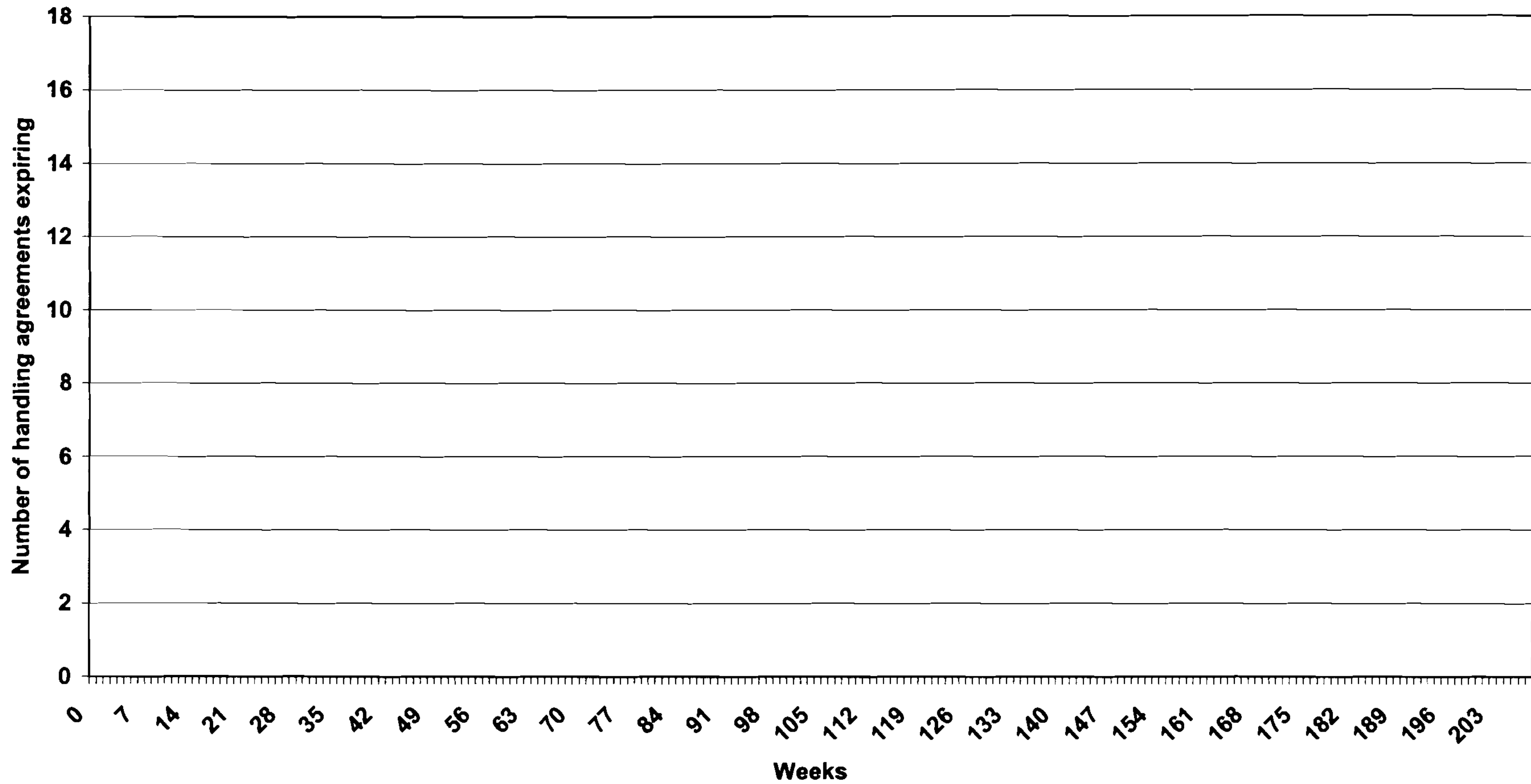
Note: Average annual tariff is weighted based on the number of days the tariff is in effect each year.
Source: Commissioner's Disclosure Statement, Tabs 54-58, 147-155, 181-213 and Statistics Canada.

Figure 7
Weighted Average Elevation Tariff for Canola in Vancouver Terminals
Wage Adjusted for Union Changes
1998-2005



Note: Average annual tariff is weighted based on the number of days the tariff is in effect each year.
Source: Commissioner's Disclosure Statement, Tabs 54-58, 147-155, 181-213 and Statistics Canada.

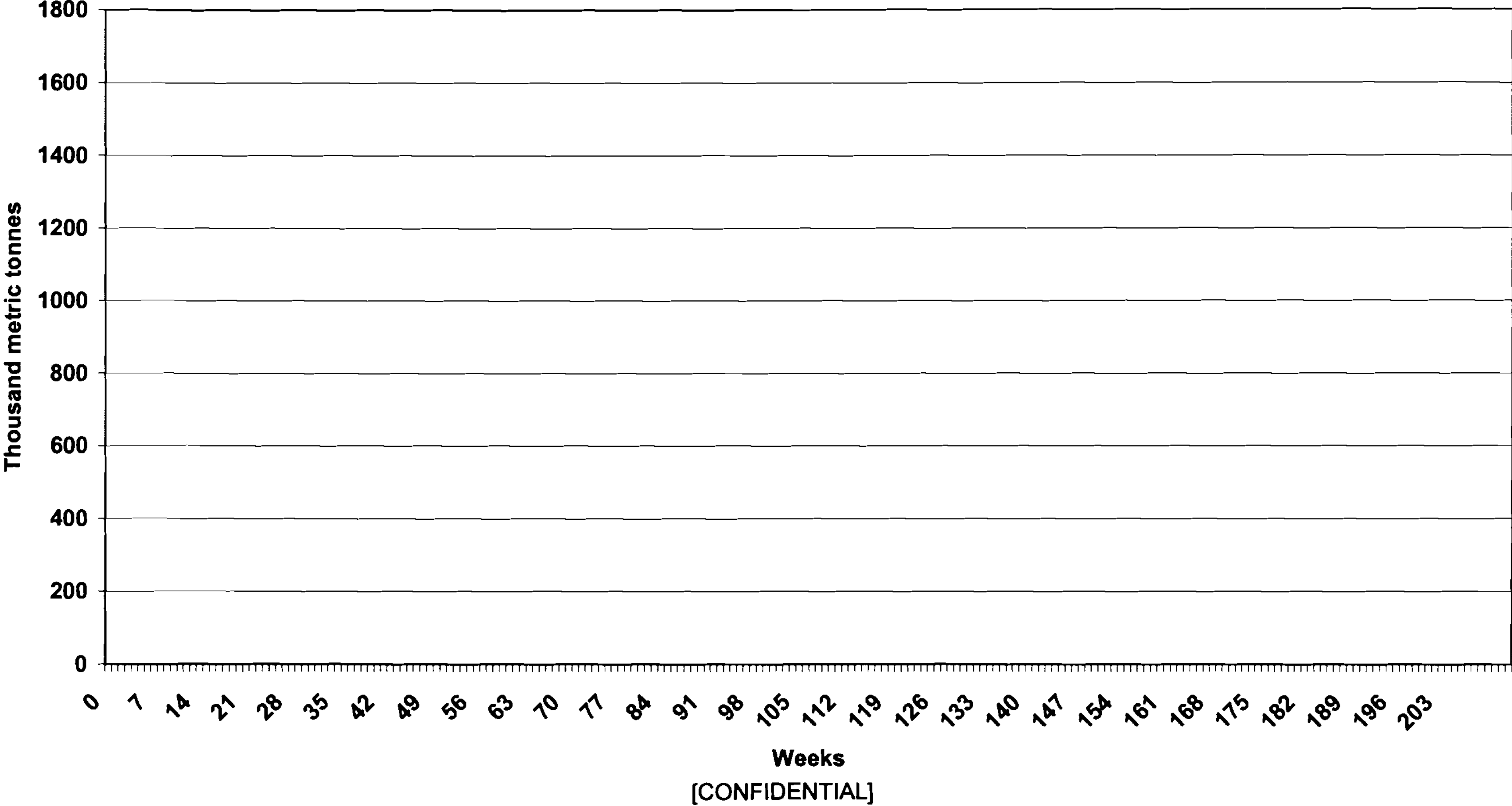
Figure 8
Cumulative Number of Expiring Handling Agreements with Independent Grain Companies After October 2002 and After August 2005 (with Early Termination) [1]



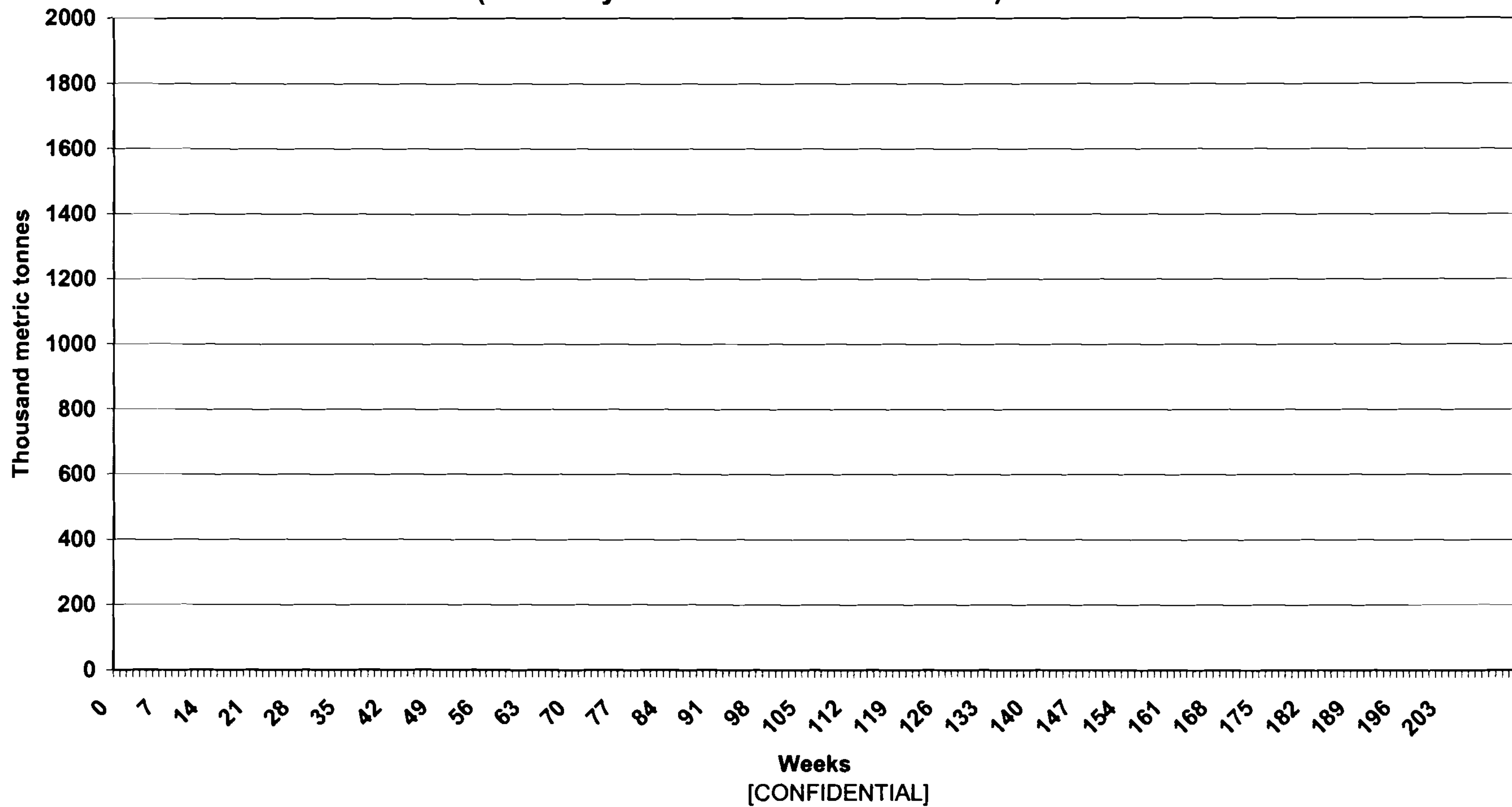
[CONFIDENTIAL]

Notes and Sources: [CONFIDENTIAL]

Figure 9
Cumulative Annual Volume of Grain Available from Expiring Handling Agreements with Independent Grain Companies After October 2002 and After August 2005 (with Early Termination) [1]



Notes and Sources: [CONFIDENTIAL]



Notes and Sources: [CONFIDENTIAL]

[Public version]
Appendix B

Payment Interactions for CWB Non-Tendered (Normal) Business

		Primary Elevators		Railway
		Integrated	Independent	
1	Farmer chooses primary elevator	Farmer receives freight discounts, grade promotions or other incentives		
2	Primary elevator handling	Farmer pays CGC tariff		
3	Primary elevator ships to Vancouver			Primary elevator pays negotiated rail rate on behalf of CWB
				Primary elevator may receive 50 car or 100 car rail incentive
4	Port terminal handling	CWB pays CGC tariff		
			Diversion premium paid	

Payment Interactions for CWB Tendered Business

		Primary Elevators		Railway
		Integrated	Independent	
1	Farmer chooses primary elevator	Farmer receives freight discounts, grade promotions or other incentives		
2	Primary elevator handling	Primary elevator/CWB pays tendered amount and Farmer pays CGC tariff		
3	Primary elevator ships to Vancouver			Primary elevator pays negotiated rail rate on behalf of CWB
				Primary elevator may receive 50 car or 100 car rail incentive
4	Port terminal handling	CWB pays CGC tariff		
			Diversion premium paid	

Payment Interactions for Non-CWB Business

		Primary Elevators		Railway
		Integrated	Independent	
1	Farmer chooses primary elevator	Farmer sells non-CWB grain to primary elevator for best price		
2	Primary elevator handling	Primary elevator covers its handling costs as reflected in filed tariffs		
3	Primary elevator ships to Vancouver			Primary elevator pays negotiated rail rate
				Primary elevator may receive 50 car or 100 car rail incentive
4	Port terminal handling	Integrated primary elevator will cover its cost of port terminaling	Independent pays for port terminaling and receives diversion premium	