PUBLIC

THE COMPETITION TRIBUNAL

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

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

AND IN THE MATTER OF a joint venture between Saskatchewan Wheat Pool Inc. and James Richardson International Limited in respect of port terminal grain handling in the Port Vancouver.

BETWEEN:

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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OTTAWA, ONT # 0001b

Amended version original
filed November 10. 2005

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

SASKATCHEWAN WHEAT POOL INC.,

JAMES RICHARDSON INTERNATIONAL LIMITED

6362681 CANADA LTD. AND 6362699 CANADA LTD.

Respondents

STATEMENT OF GROUNDS AND MATERIAL FACTS

I. INTRODUCTION

1. The Respondents each own a port terminal grain handling facility in the Port of Vancouver. There are three other port terminal grain handling facilities in Vancouver. One firm owns two and co-owns a third and another firm owns the remaining half interest in one facility.

2. If the Respondents are permitted to enter into their proposed joint venture (the "proposed JV") this will substantially lessen the competitive options available to non-integrated grain companies and to the Canadian Wheat Board ("CWB"), thus negatively impacting Canadian grain farmers.

3. Accordingly, the proposed JV will likely result in a substantial lessening or prevention of competition in the Canadian west coast port terminal grain handling services market by causing or allowing:

   the proposed JV to have an ability and incentive to increase the tariffs for port terminal grain handling services at Vancouver and Prince Rupert charged to:

      i. the CWB for the handling of CWB grain; and to

      ii. Non-Integrated Graincos for the handling of non-CWB grain;

   (b) the proposed JV to have an ability and incentive to reduce or eliminate the diversion premiums paid to Non-Integrated Graincos to induce shipment of their grain volumes (CWB and non-CWB grain) to the integrated companies' competing port grain terminals at Vancouver; and,

   (c) the proposed JV to have an incentive to increase the difficulties for Non-Integrated Graincos in obtaining terminal authorization and ready access to port terminal grain handling services, particularly during periods of high demand for such services.

4. In addition, because of the vertical relationship between port terminal grain handling service markets and primary grain elevator markets, the above noted substantial prevention or lessening of competition caused by the proposed JV is also likely to have anti-competitive effects in many local primary grain handling markets across the Prairies. Greater difficulties in obtaining ready access to port terminal grain handing services and the reduction or elimination of diversion premiums, or the increase in port terminal tariffs, will increase the costs of Non-Integrated Graincos , thereby limiting their ability and incentive to compete for grain originations in country.

5. Therefore, the Commissioner of Competition ("Commissioner") seeks an Order prohibiting the proposed JV or such other relief as the Tribunal considers appropriate to address the substantial lessening or prevention of competition which is likely to result from the Respondents' proposed JV.

II. DEFINITIONS

6. For the purposes of this application, the following capitalized terms have the following meaning:

   (a) "Act" means the *Competition Act*.

   (b) "AU" means Agricore United

   (c) "Cargill" means Cargill Limited

(d) “CGC” means the Canadian Grain Commission

(e) “CN” means the Canadian National Railway

(f) “Commissioner” means the Commissioner of Competition

(g) “CP” means the Canadian Pacific Railway

(h) “crop year” means the period commencing on August 1 in any year and terminating on July 31 in the next year

(i) “CWB” means the Canadian Wheat Board

(j) “CWB grain” means wheat and barley for export and for domestic human consumption

(k) “Diversion premium” means a premium paid by Integrated Graincos to Non-Integrated Graincos in order to attract that grain to the Integrated Grainco’s port terminal.

(l) “Graincos” means grain companies

(m) “Hold Separate” means the Consent Interim Agreement registered with the Competition Tribunal.

(n) “Integrated Grainco” means a grain company which owns both primary elevators and a port terminal elevator on the west coast.

(o) “JV Agreements” means the series of agreements between SWP, JRI, 6362681

Canada Ltd. and 6362699 Canada Ltd. creating a joint venture for the joint operation and marketing of their Vancouver port terminal facilities.

(p) "JRI" means James Richardson International Limited

(q) "Non-CWB grains" means canola, lentils, peas, and other specialty crops.

(r) "Non-Integrated Grainco" means a grain company which may own a primary elevator but does not own a port terminal on the west coast.

(s) "Pacific" means Pacific Elevators Limited

(t) "Parties" means SWP, JRI, 6362681 Canada Ltd. and 6362699 Canada Ltd.

(u) "Port terminal" means an elevator located in a port, the principal uses of which are the receiving of grain on or after the official inspection and official weighing of the grain and the cleaning, storing and treating of the grain before it is moved forward.

(v) "PRG" means Prince Rupert Grain Ltd.

(w) "Primary grain elevator" means an elevator the principle use of which is the receiving of grain directly from producers for storage or forwarding or both.

(x) " JV" means the proposed joint venture between SWP and JRI for the joint operation and marketing of their Vancouver port terminal elevators.

(y) "SWP" means Saskatchewan Wheat Pool Inc.

(z) "UGG" means the United Grain Growers Limited.

III. THE PARTIES

7. The Applicant is the Commissioner, appointed under section 7 of the Act and charged with the administration of the *Competition Act* ("the Act").

8. The Respondent, SWP, a publicly traded agri-business cooperative, has its head office in Regina, Saskatchewan. It provides a wide range of goods and services to farmers and to other grain handling companies in western Canada and also markets agricultural commodities domestically and internationally. SWP operates businesses in three distinct but related areas: (1) grain handling and marketing at both the port terminal and primary grain elevator levels, (2) agri-business (crop inputs) supplies and services and (3) agri-food processing. SWP operates 45 primary grain elevators in the Prairies and owns port terminals at Vancouver and Thunder Bay and an interest in a port terminal at Prince Rupert, British Columbia.

9. The Respondent, JRI, has its head office in Winnipeg, Manitoba, and is a subsidiary of James Richardson & Sons Limited, a privately owned corporation. Through various subsidiaries and affiliates, JRI operates businesses in: (1) grain handling and marketing at both the port terminal and primary grain elevator levels, (2) agri-business (crop inputs) supplies and services and (3) agri-food processing. JRI operates 66 primary grain

elevators in the Prairies and owns and operates port terminal facilities at Vancouver, Thunder Bay, Port Stanley and Hamilton and an interest in a port terminal at Prince Rupert, British Columbia.

10. Both SWP and JRI provide port terminal grain handling services at Vancouver and Thunder Bay. JRI's facilities in Hamilton and Port Stanley service their local areas.

IV. THE PROPOSED JOINT VENTURE

11. SWP and JRI, together with their affiliates, 6362681 Canada Ltd. and 6362699 Canada Ltd. ("the Parties"), have entered into a series of agreements[1] (collectively, the "JV Agreements"), dated April 6, 2005, creating a joint venture for the joint operation of their Vancouver port terminal facilities as well as the marketing of port terminal grain handling services to Non-Integrated Graincos.

12. SWP and JRI will each continue to own their respective facilities at Vancouver. However, the JV Agreements provide that a new business corporation, owned equally by SWP and JRI, would be established to act as a joint venture operator and agent for the parties. The JV operator would manage the operation of the Parties' Vancouver port terminals together, as if they were one terminal. The JV operator would also market the grain handling services offered at these terminals to Non-Integrated Graincos.

[1] A Shareholders' Agreement between SW P, JRI and 6362681 Canada Limited.; a Shareholders' Agreement between SW P, JRI and 6362699 Canada Limited.; and a Co-Production and Facility Management Agreement between SWP, JRI and 6362699 Canada Limited.

13. The Parties would continue to own and independently control all their remaining business assets including their respective:

    (a) whole or partial interests in primary grain elevator facilities;

    (b) whole or partial interests in port terminal facilities (including Prince Rupert and Thunder Bay); and

    (c) whole or partial agri-business interests (crop input supplies and services, etc.).

14. The Parties entered into a Consent Interim Agreement ("Hold Separate") with the Commissioner, which was registered with the Competition Tribunal on July 5, 2005, requiring the Parties to implement a Hold Separate relating to the marketing component of the proposed JV, pending the completion of the merger review by the Commissioner. The Hold Separate has been extended and is due to expire on November 10, 2005.

V. INDUSTRY OVERVIEW

15. The grain industry in Western Canada has a number of elements and various participants. They include:

    (a) Farmers, who produce grain; the vast majority of their grain for export is delivered to primary elevators located within a limited geographic area surrounding their farm;

(b) The CWB is by law the sole marketer of wheat and barley for export and domestic human consumption. These grains are referred to as “CWB grains”. Wheat and barley sold for non-human consumption in Canada (e.g. livestock feed or ethanol production) are traded outside the jurisdiction of the CWB;

(c) Grain companies purchase grain at primary grain elevators from farmers. When purchasing CWB grain they act as agents for the CWB. The majority of all non-CWB grains (i.e., canola, lentils, peas, etc.) are purchased at primary grain elevators from farmers by grain handling companies on their own account at market prices. At primary elevators, the grain is elevated, graded, and segregated and may be cleaned, dried, blended and stored. Grain companies with ownership interests in both primary grain elevators and port terminals in Vancouver and Prince Rupert are hereinafter called “Integrated Graincos”. Grain companies who do not own a port terminal in Vancouver or Prince Rupert are hereinafter called “Non-Integrated Graincos”. SWP and JRI are thus Integrated Graincos;

(d) The railways (i.e., Canadian National Railway and the Canadian Pacific Railway) transport CWB and non-CWB grain from primary grain elevators to, among other places, port terminals located in Vancouver, Prince Rupert (only connected to CN), and Thunder Bay. Rail transportation charges account for about half the costs of handling and transporting grain destined for off-shore markets. The logistics (including incentives and disincentives) relating to the allocation and delivery by rail are complex and have an important impact on the competitive dynamic of the grain handling industry;

(e) Port terminals receive grain from the Prairies and earn fees for storage, elevation and, if necessary, blending and cleaning; and

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

16. Integrated and Non-Integrated Graincos compete in purchasing farmers' CWB and non-CWB grains via their primary grain elevators. They do this through various activities, including pricing (discounts on service charges), grade promotions and by bundling trucking services with crop inputs. Non-Integrated Graincos require competitive access to west coast port terminals owned by Integrated Graincos in order to get their grain to market.

17. As Integrated Graincos earn revenue for elevating, storing, blending and cleaning wheat at their port terminals, they may seek to increase the volume of grain handled at their port terminals by offering financial inducements commonly referred to as "diversion

premiums", a per tonne payment to Non-Integrated Graincos, paid in return for the Non-Integrated Graincos shipping their grain to the Integrated Graincos' port terminal.

18. These diversion premiums are confidential and set out in grain handling contracts, the majority of which are between [CONFIDENTIAL] years in duration. They generally range from approximately $ [CONFIDENTIAL] to $ [CONFIDENTIAL] per tonne. The Non-Integrated Graincos receive diversion premium payments on both CWB and non CWB grains. The grain handling contracts also provide Non-Integrated Graincos contractual rights of access to port terminal.

19. For Non-Integrated Graincos to compete effectively with Integrated Graincos, it is essential that they have regular and predictable access to port terminal services.

Regulatory Environment

20. Aspects of the grain handling industry are regulated by the Canadian Grain Commission ("CGC") and the CWB pursuant to the *Canada Grain Act* and the *Canadian Wheat Board Act*, respectively.

Canadian Grain Commission

21. The CGC is responsible for establishing grain standards for grain sold domestically and for export. CGC inspectors monitor grain quality and assign official grades in respect of the grain delivered to port grain terminals. In order to respond to different customer

demands for specific quality characteristics of grain (primarily wheat) the CGC has, pursuant to section 16 of the *Canada Grain Act*, established in recent years an increasing number of grain "segregations", currently many hundreds, each of which is generally handled and stored separately. Segregations are made on the basis of factors such as the type of grain, the grade of grain and its protein content.

22. Pursuant to section 50 of the *Canada Grain Act,* tariffs for each service offered at any port terminal must be filed annually with the CGC and are publicly posted. Amended tariffs can also be filed during the year. However, the CGC is not required to approve the tariffs before they come into force and there is no complaint mechanism under the *Canada Grain Act* which permits shippers to challenge tariffs filed with the CGC. The CGC does not have any regulatory oversight relating to the payment of diversion premiums.

23. Pursuant to subsection 69(1) of the *Canada Grain Act*, licensed terminal elevators, including port terminals at the Port of Vancouver, are required to "receive into the elevator all grain so lawfully offered for which there is, in the elevator, available storage accommodation of the type required by the person by whom the grain is offered." Subsection 69(2) of that Act empowers the CGC to require the operator of a licensed terminal elevator to receive grain offered for storage or transfer at the elevator. However, in practice storage accommodation availability or refusal of terminal authorization is sometimes an issue and is not monitored by the CGC.

Canadian Wheat Board

24. The CWB is a farmer controlled marketing organization, incorporated pursuant to the provisions of the *Canadian Wheat Board Act*. It has exclusive jurisdiction over the purchase and sale of wheat and barley grown in western Canada and intended for export or domestic human consumption. All the sales revenue earned by the CWB, after deducting operating costs, is returned to the approximately 85,000 producers of CWB grains.

25. The CWB does not own any grain handling facilities in Canada, and it therefore relies on grain handling services and the facilities provided by both integrated and non-integrated companies. Port terminal grain handling services in the Port of Vancouver are essential to its operations.

Terminal Authorization

26. In order to obtain access to rail cars, the primary grain elevator operator must first obtain a port grain terminal authorization from a port grain terminal. Terminal authorizations to transport product to port may be denied if the port grain terminal is unable to accommodate further "unloads" of grain. The ability of port grain terminals to receive more grain relative to demand is subject to a number of variables such as seasonality, crop yield and vessel arrivals. The railway delivers rail cars to the terminal specified in the terminal authorization. However, in unforseen circumstances when the authorized

terminal cannot accept the grain, alternate arrangements may need to be made to have the grain delivered to another terminal.

VI. MARKET DEFINITIONS

Product Market

27. The relevant product market is port terminal grain handling services.

28. Port terminal grain handling services are a distinct product market without practical substitutes for the shipment of grain to international customers. The primary function of a Port grain terminal is the handling of grain for offshore exports. This can include elevation, cleaning, segregation, drying, storage, grading, blending and loading onto a vessel. Port grain terminals differ significantly from other port loading facilities in their physical characteristics, means of production, uses and pricing.

29. Grain is sometimes exported using shipping containers. There are a number of limitations on the use of containers including blending and grading issues, the availability of containers and container yard capacity. Transportation by containers represents only a small percentage of total grain exports.

30. Grain can also be transported by rail and then loaded directly from the rail car onto a waiting ship. This is usually referred to as a “direct hit” shipment. This requires extremely precise logistics including “just in time delivery” and vessel availability. This

method of shipping grain is only used for extremely small volumes and is not an acceptable substitute to port grain terminals because of the precise logistics required.

31. Vancouver Wharves operates a bulk handling terminal at the Port of Vancouver that handles grain and a variety of other commodities. With respect to grain products, it primarily handles specialty crops. However, Vancouver Wharves currently has no grain cleaning equipment. Vancouver Wharves only has 25,000 tonnes of licensed grain storage capacity, or approximately 2.7% of the licenced grain storage capacity at the Port of Vancouver compared to SWP's capacity of 237,240 tonnes and JRI's capacity of 108,000.

Geographic Market

32. Grain from western Canada that is to be exported outside of North America is shipped by rail to ports at Vancouver, British Columbia; Prince Rupert, British Columbia; Thunder Bay, Ontario; and Churchill, Manitoba. Canadian west coast ports are particularly well positioned for moving grain from the Prairies to Asia. In recent years, approximately 95% of all the bulk grain from western Canada destined for Asia has passed through the ports of Vancouver and Prince Rupert.

33. The draw areas for port terminals are determined primarily by relative freight and handling costs as between different routes/ports and the location of export demand. The dividing line between east and west for moving grain has tended to shift eastward in

recent years in response to the increase in demand from Asian countries. In certain circumstances, the CWB and grain companies ship grain to Vancouver from as far away as Manitoba.

34. Since the mid-1980s, Canada's traditional grain markets have shifted from Europe to Asia, which has resulted in a larger portion of export grain shipments going through the two Canadian west coast ports (Vancouver and Prince Rupert), as opposed to Thunder Bay and Churchill. In the 1984-85 crop year, the two Canadian west coast ports together accounted for less than 45 % of all the grain going through these four ports. In the 2003-04 crop year, Canadian west coast ports handled approximately 84 % of all the grain volume being exported through those same four ports.

35. Effective May 1, 2005, CN reduced its single car published rates for grain originating in western Canada and destined to Prince Rupert, making these rates equal to the published rates to Vancouver for all export grain movements in covered hopper cars. Since the Port of Prince Rupert is now rail cost competitive with the Port of Vancouver in relation to CN movements of grain, these two ports are now arguably within the same relevant geographic market.

VII. COMPETITIVE ANALYSIS

Canadian West Coast Port Terminals

36. On the West Coast, there are five port terminals in Vancouver and one at Prince Rupert. In Vancouver, the terminals are as follows:

(a) SWP terminal, with a licensed storage capacity of 237,240 tonnes, is wholly owned and operated by SWP;

(b) JRI terminal, with licensed storage capacity of 108,000 tonnes, is wholly owned and operated by JRI;

(c) Cascadia terminal, with 282,830 tonnes of licensed storage capacity. Cargill Limited ("Cargill") and Agricore United ("AU") each own 50% of Cascadia;

(d) Pacific Elevators Limited terminal ("Pacific") with 199,150 tonnes of licensed storage capacity. AU is the sole shareholder of Pacific, which owns and operates this terminal. SWP sold its 30% interest in Pacific in October 2002; and

(e) UGG terminal, with licensed storage capacity of 102,070 tonnes, is presently wholly owned and operated by AU[2].

Appendix "A" to this Statement identifies the locations of the foregoing port grain terminals in relation to the Greater Vancouver Region.

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[2] The Consent Agreement requiring a divestiture of this terminal is currently being challenged by AU through an application filed with the Competition Tribunal on August 12, 2005, pursuant to section 106 of the *Competition Act*.

The Prince Rupert Grain Ltd. ("PRG") terminal, with licensed storage capacity of 209,510 tonnes, is operated under a co-tenancy agreement wherein as of August 1, 2004, AU had a 45.3 % interest, SWP had a 24.0 % interest, Cargill had a 15.8 % interest and JRI had a 14.9 % interest. The PRG terminal handles almost exclusively CWB grain. In recent years, it has only been open a portion of the year. It is currently planning to be open year round. It should be noted that all the owners of PRG have an equity interest in Vancouver terminals and earn greater revenues on grain moving through their Vancouver facilities where they are not required to share revenues with a number of other facility owners.

MARKET SHARES

37. The current capacity and receipts for the 5 Vancouver grain terminals is as follows:

Port Terminal Grain Handling Services at Vancouver (2003-2004 crop year)

Terminals	**Ownership Interest**	**Receipts at Terminals**		**Storage Capacity**	
		Tonnes	**Share**	**Tonnes**	**Share**
Cascadia	50% - AU 50% - Cargill	3347147	37%	282830	30.4%
UGG	100% AU	1039878	11%	102070	11%
Pacific	100% AU	510779	6%	199150	21.4%
SWP	**100% - SWP**	**2548888**	**28%**	**237240**	**25.5%**
JRI	**100% - JRI**	**1597344**	**18%**	**108000**	**11.6%**
Total		9044036	100%	929290	100%
Combined SWP/JRI		**4146232**	**46%**	**345240**	**37.1%**

38. SWP and JRI combined control 37% of the licensed storage capacity of grain terminals at the Port of Vancouver. In 2003-2004, SWP and JRI received 46% of the grain handled by the Vancouver port grain terminals.

39. In addition to the 929,290 tonnes of capacity provided by the Vancouver Port grain terminals, the PRG terminal has 209,510 tonnes of licensed storage capacity. However, PRG is not an independent competitor as it is owned jointly by all the current owners of the Vancouver port grain terminals. It should also be noted that the combined SWP and JRI ownership interest of PRG is 38.9%, a level almost equivalent to their combined share of the overall capacity of Vancouver port grain terminals.

40. The pre-JV Herfindahl-Hirschman Index ("HHI") for port terminal grain handling services in Vancouver is approximately 4024. The proposed JV would increase the HHI by over 1000 points to approximately 5032.[3]

Barriers to Entry

41. The barriers to entry to constructing a new port terminal in Vancouver are very high.

42. Capital costs for construction of a new port terminal elevator facility are high and would involve significant sunk costs. The numerous wheat segregations established by the CGC in response to demands for specific protein content and other quality measures, impose a

[3] These numbers are based on receipts (volume handled), with AU being the current owner of the UGG terminal and also having control of the Cascadia terminal.

need for considerable storage capacity which is costly to construct.

43. There is little or no land available upon which a new port terminal could be built in the port of Vancouver. Although Roberts Bank (located south of Vancouver) was, at one time, considered as a possible location for a grain handling terminal, its poor soil conditions would have significantly increased the cost of construction. Concern has also been raised over the potential for grain contamination from the nearby coal terminal.

44. As a result of the lack of suitable land in the port of Vancouver and the need for rail link access and ocean vessel berth access, the potential for entry of a new port terminal is very unlikely in the foreseeable future.

45. Entry of a new competitor in the market for port terminal grain handling services in Vancouver would likely, in the short term, only be possible through the acquisition of an existing terminal. Pursuant to a Consent Agreement between the Commissioner and UGG filed with the Competition Tribunal on October 17, 2002, AU was required to divest either the Pacific or the UGG port terminal to an arm's length purchaser. AU subsequently elected to divest the UGG port terminal. However, on August 12, 2005, AU filed an application to the Competition Tribunal seeking to rescind this obligation. If successful, this would relieve AU of the obligation to divest the terminal to a third party. The Commissioner is opposing this application. Until the Competition Tribunal disposes of the matter, it is not possible to know whether there is likely to be a sale of the UGG port terminal.

Removal of a Vigorous and Effective Competitor

46. In the context of a highly concentrated market JRI and SWP have been alternative providers of grain handling services for Non-Integrated Graincos at the Port of Vancouver. In recent years, certain large Non-Integrated Graincos have transferred their shipment volumes between the two.

47. Through the elimination of this competition, the proposed JV will result in less choice for Non-Integrated Graincos in shipping their grain. This would allow SWP-JRI to exercise market power, with the ability and incentive to introduce higher handling fees and lower diversion premiums.

Effective Remaining Competition

48. If SWP and JRI are permitted to implement the proposed JV, the only remaining effective competitor will be AU which owns the Pacific port terminal, the UGG port terminal, and a 50% interest in the Cascadia port terminal. The other 50% interest in Cascadia is owned by Cargill. The joint terminal ownership renders Cargill a less than effective competitor with respect to soliciting grain volume from Non-Integrated Graincos. **[CONFIDENTIAL]**

49. Therefore the proposed JV would increase concentration in an already concentrated market and, in the current market likely create, in effect, a duopoly in the supply of port terminal grain handling services at Vancouver and Prince Rupert. Even if AU is required by the Tribunal to divest the UGG port terminal, it would be necessary to assess at that time the

degree to which the purchaser would discipline the market power otherwise accumulated by the proposed JV.

50. PRG is not an effective competitor to the Vancouver port terminals for a number of reasons.

51. Because PRG is owned jointly by all of the Vancouver port terminal operators, there is considerably less incentive for it to compete vigorously against Vancouver port terminals. **[CONFIDENTIAL]**

52. Prince Rupert is only connected to the CN rail network, with CP originating grain shipments accounting for about half of all grain volume going to Vancouver. For grain originating on the CP rail network, it would be necessary to interchange the traffic between the two railways in order to ship to Prince Rupert. There have been no interchange movements of grain to Prince Rupert in recent years except during the lock-out in Vancouver in the fall of 2002, at which time CP cars were shipped to Prince Rupert.[4]

53. Furthermore, CP's current published rates to Prince Rupert are approximately 15% higher than its rates to Vancouver. Similarly, CP has published rates for the movement of grain from western Canada to Prince Rupert that are approximately 12 % higher than CN's published rates for the same originations. Clearly, Prince Rupert is not an alternative to

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[4] Like PRG, the SWP and JRI terminals are only connected directly to the CN line. However, in this case, due to provisions of the *Canada Transportation Act,* it is economically feasible to deliver grain originating on a CP line to the North Shore port terminals via the Vancouver CN line.

Vancouver for all CP originating shipments of grain.

54. PRG is not configured to clean canola, the major non-CWB grain. During the last 20 years, PRG has handled an insignificant volume of non-CWB grain. The only exception was in the 2002-03 crop year when non-CWB grain accounted for 19% of all the grain volume handled by PRG. This was an unusual year, since there was a lock-out that took place in Vancouver during the Fall of 2002.

55. For all these reasons, the PRG port terminal is not an effective remaining competitor.

<u>Foreign Competition</u>

56. US port terminals in the Pacific North-West are not a close substitute for port grain terminal services at Canadian west coast ports. Rail rates are approximately $12 per tonne, or 37%, higher from western Canada to Portland or Seattle as compared to Vancouver.

<u>Competitive effects</u>

57. As noted above, the market for port terminal grain handling services is already highly concentrated. The proposed JV would effectively create an even more highly concentrated market and, possibly, a duopoly. The proposed JV is likely to reduce even further the level of effective competition in the relevant market, specifically, it will give rise to both unilateral and coordinated effects.

<u>Unilateral Effects</u>

58. A unilateral exercise of market power occurs where the merged entity can profitably sustain a material price increase without discipline from competitive responses by rivals. Factors indicating that unilateral exercise of market power is likely, in the case of the prroposed JV, include:

- The proposed JV would remove a service provider to whom buyers would otherwise turn in response to a price increase. As noted in paragraph 47 and 48 above, SWP and JRI have been alternative providers of grain handling services for Non-Integrated Graincos.

- The only significant remaining competitor is AU, which has a large market share. Because of its large market share AU has a reduced incentive to compete in response to a post-merger price increase.

59. As a result, it is likely that the proposed JV will increase the incentive to raise tariffs, reduce or eliminate diversion premiums, and reduce the incentive to provide timely terminal authorization and access to port terminal grain handling services.

<u>Coordinated Effects</u>

60. A merger results in coordinated effects when a group of firms is able to profitably coordinate its behaviour because of each firm's accommodating responses to the conduct of others. Market conditions are likely to allow coordinated behaviour in the west coast port terminal grain handling services market, which would be exacerbated if the proposed

JV is allowed.

61. The proposed JV changes the competitive dynamic by reducing the number of players in the market. As a result, firms in the market may find it easier and less costly to:

- raise tariff rates towards levels that would occur in a monopoly market;
- eliminate diversion premiums as a monopoly provider would; and
- reduce the timeliness of access in order to dampen competition from Non-Integrated Graincos in primary grain elevator markets.

Anti-competitive Effects

<u>SLC in Port Terminal Grain Handling Services</u>

62. The proposed JV between SWP and JRI at the Port of Vancouver is likely to prevent or lessen, competition substantially in the market for Canadian west coast port terminal grain handling services.

63. If SWP and JRI are permitted to proceed with their proposed JV, they will likely be able to exercise market power in the provision of grain handling services at the Port of Vancouver. The proposed JV would likely enable them to unilaterally increase prices charged to buyers of Vancouver port terminal grain handling services and/or lower diversion premiums paid to Non-Integrated Graincos. It is also likely to result in a

substantial lessening of competition by allowing the only two remaining firms with complete control of port grain terminal facilities in Vancouver to assume a position in which they can increase prices and/or reduce diversion premiums.

Impact on Primary Grain Elevator Markets

64. Farmers currently benefit from the fact that both Integrated and Non-Integrated Graincos compete in many primary grain elevator markets. If Non-Integrated Graincos experience greater difficulties in obtaining ready access to port terminal grain handling services or diversion premiums are reduced or eliminated, their per unit operating costs will be increased. This would reduce the incentive and ability for them to compete in primary grain elevator markets. That is, more concentration in the port terminal grain handling services market will likely lead to increased concentration in primary grain elevator markets.

65. An increase in concentration in primary grain elevator markets would likely result in a reduction in various competitive activities that benefit farmers, including pricing (discounts on service charges), grade promotions and the bundling of trucking services with crop inputs. It would also likely put upward pressure on tariffs in primary grain elevator markets, thereby increasing costs to the CWB and consequently reduce payments to grain farmers.

VIII. RELIEF SOUGHT

The Commissioner requests the following relief:

a) an Order or Orders against the Respondents pursuant to section 92 of the *Competition Act* dissolving the proposed JV, to the extent that it has taken effect;

b) an Order or Orders against the Respondents pursuant to section 92 of the *Competition Act* dissolving the proposed JV;

c) such further and other orders as may be appropriate.

IX. PROCEDURAL

The Commissioner requests that the hearing of this application be held in Ottawa, Ontario.

For purposes of this application, service of all documents on the Commissioner can be served on:

Mr. Jonathan Chaplan
Mr. André Brantz
Ms. Valérie Chénard
Department of Justice
Competition Law Division
50 Victoria Street
Place du Portage
Phase I, 22nd Floor
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KIA 0C9
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Counsel for the Commissioner of Competition

DATED at Gatineau, Quebec this 10th day of November, 2005.

PUBLIC

Sheridan Scott Q, .C.
Commissioner of Competition
Place du Portage, Phase 1
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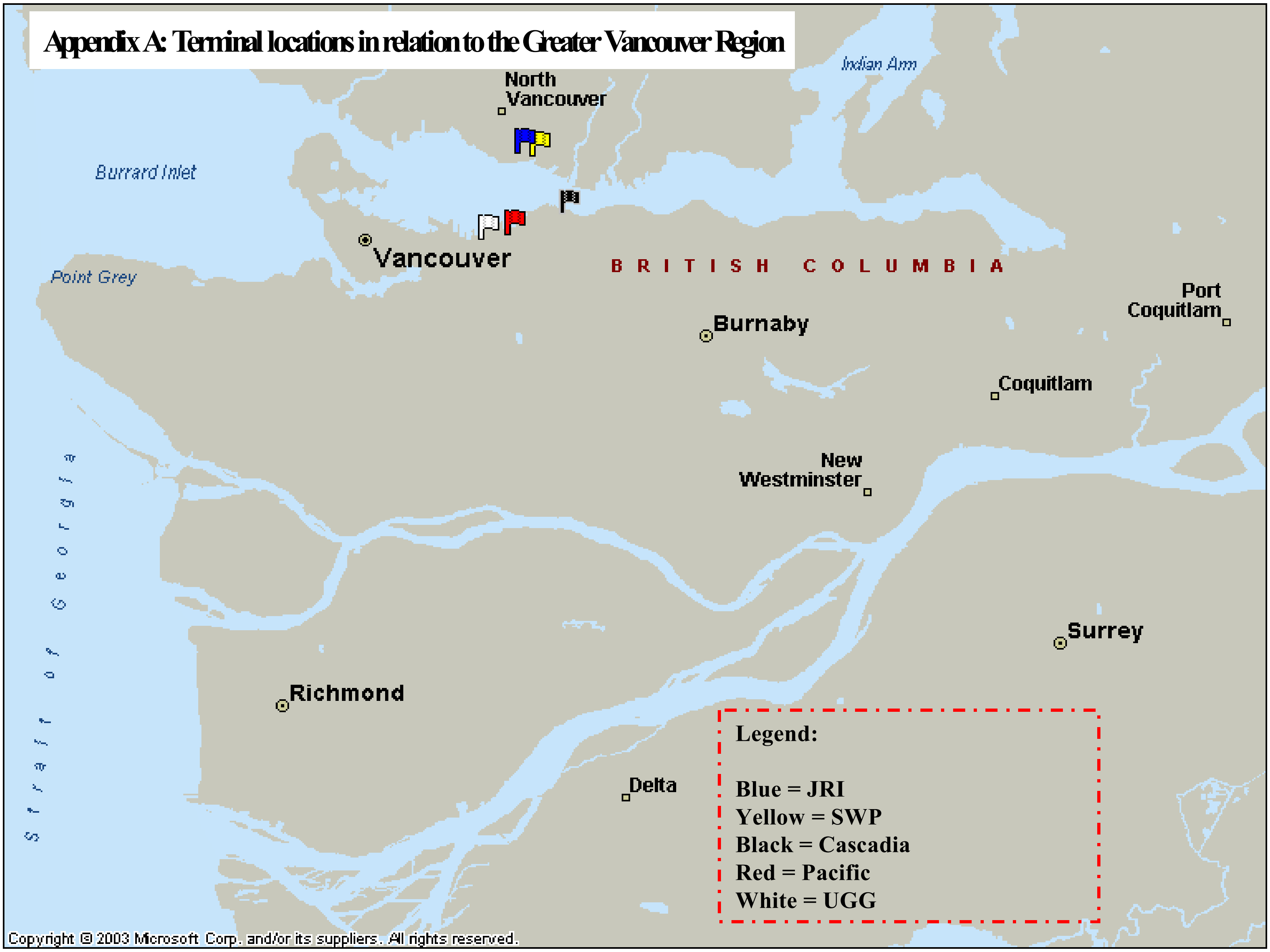
Appendix A: Terminal locations in relation to the Greater Vancouver Region



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Appendix A: Terminal locations in relation to the Greater Vancouver Region
North Vancouver
Indian Arm
Burrard Inlet
Vancouver
Point Grey
BRITISH COLUMBIA
Port Coquitlam
Burnaby
Strait of Georgia
Richmond
Delta
Legend:
Blue = JRI
Yellow = SWP
Black = Cascadia
Red = Pacific
White = UGG
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