

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application 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.

BETWEEN:

UNITED GRAIN GROWERS COMMISSION

Applicant

- AND -

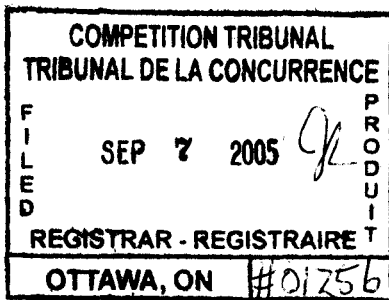
THE COMMISSIONER OF COMPETITION

Respondent

-AND-

CANADIAN WHEAT BOARD

Intervenor



AFFIDAVIT OF WARD WEISENSEL
Re: Applicant's Section 106 Application & Motion for Interim Relief

1. I am the Chief Operating Officer, Operations for the Canadian Wheat Board ("the CWB") and have held that position since February 2004. Prior to that time, I have been employed by the CWB in various capacities since 1991. My positions at the CWB have included Executive Vice President – Marketing, Vice President of Transportation & Country Operations, Assistant Vice President - Grain Transportation Division, Head of Corporate Policy and Marketing Manager for the Asia-Pacific desk. I have a Masters degree in Agricultural Economics from the University of Saskatchewan (1988) and operated a grain farm in Saskatchewan from 1981 to 1989. As such I have knowledge of the matters hereinafter deposed to, except where they are stated to be based on information and belief, in which case I believe them to be true.

Background

2. On May 29, 2002 the Tribunal granted the CWB leave to intervene in the Commissioner's application in respect of the acquisition by United Grain Growers Limited ("UGG") of Agricore Cooperative Ltd. (the "Section 92 Application") that is associated with both the current Section 106 application seeking to set aside the Consent Agreement of October 17, 2002 (the "Section 106 Application") and the current motion for interim relief seeking an extension of time for the divestiture (the "Motion"). Attached as Exhibits 1, 2 and 3 respectively are the Tribunal's reasons for decision in respect of the CWB's prior intervention application, the CWB's Notice of Request and the supporting affidavit of Adrian C. Measner dated February 19, 2002.

3. On August 26, 2005, the CWB sought clarification as to its status in the Section 106 Application. On Friday September 2, 2005 the Tribunal directed that the question on which the CWB was granted leave to intervene in the Section 92 Application was not relevant to the current application. The Tribunal further directed that should the CWB wish to pursue its request for intervenor status in respect of the Section 106 Application and/or of the Motion, it should file its letter of request on or before 5 p.m. on Wednesday September 7, 2005. This application by the CWB for leave to intervene in both the Section 106 Application and the Motion is brought in response to that direction.

The Canadian Wheat Board

4. The CWB is a producer-controlled marketing organization. A 15-member Board of Directors governs the CWB. Producers from across Western Canada elect 10 of the Directors and the Government of Canada appoints the remaining five (including the President and Chief Executive Officer). The Board of Directors is responsible for the overall governance of the corporation and its strategic direction.

5. The CWB is a corporation incorporated pursuant to the provisions of the *Canadian Wheat Board Act*, R.S., c. C-12 (the "*CWB Act*"). The statutory object of the corporation is to market grain grown in Western Canada in an orderly manner in interprovincial and export trade. As determined by its Board of Directors, the CWB's vision is to unite western Canadian grain farmers as the world-recognized, premier grain marketer and its mission is to market and provide quality products and services in order to maximize value to its owners, western Canadian grain farmers.

6. The CWB is not, as the Applicant, UGG, rather colourfully defines in its materials, a "monopoly". Rather the *CWB Act* and the regulations passed under it make the CWB the single-desk seller of wheat, durum and barley grown in Western Canada and intended for export or domestic human consumption ("CWB grains"). While all CWB grains must pass through the CWB, as the CWB's vision and mission confirm, the CWB acts in the interests of Western Canadian wheat and barley farmers to obtain the best return for their products that the marketplace will allow. The CWB is most certainly not driven by the anti-competitive motives that I must presume the Applicant's use of the term "monopoly" is meant to imply.

7. Every crop year approximately 70,000 producers deliver their CWB grains over the course of the crop year to primary elevator companies that act as handling agents for the CWB. In the vast majority of cases the CWB's agents issue an "initial" payment on behalf of the CWB for the grain that each producer delivers. This payment reflects the CWB's initial price for the particular grain in question delivered instore Vancouver or St. Lawrence, less deductions made by the elevator agent for transportation related charges and handling charges (e.g., cleaning, primary elevation, weighing and inspection, etc.). The initial payment represents a substantial portion of the total payment that producers will receive for their grain. The balance is distributed

through "adjustment" and "interim" payments as sales are made with a "final" payment being made generally within five or six months of the end of the crop year. The Canadian crop year runs from August 1st to July 31st. All payments are based on the particular tonnage, class, grade, and protein of the grain that the producer delivers. In a relatively small number of cases producers can select one of the alternate forms of payment that the CWB offers known as "Producer Payment Options" or "PPO's".

8. The CWB markets the grain that it receives to over 70 countries around the world. Annual sales revenues are in the range of \$4 billion to \$6 billion (Canadian). All of the money received from the sale of all CWB grain is pooled into one of four "pool accounts" (wheat, durum, barley, and designated or malt barley). After deducting the CWB's operating costs, all of the sales revenue earned by the CWB is returned to producers. This results in roughly 96% to 98% or more of all sales proceeds being returned to producers. The amount that each pool participant ultimately receives for their CWB grain is the pooled price that the CWB is able to obtain during the year on sales of the particular class, grade and protein of the grain that the producer delivered, net of operating expenses. Any increase in the operating costs of the CWB results in a reduction in the return to producers of CWB grains.

Grain Companies in Canada

9. From my review of the materials filed in both the Section 92 and the Section 106 Applications, grain companies in Canada appear to have been categorized as "integrated" companies which have both port and country facilities and "independent" companies which have only country facilities. As was the case at the time of the Section 92 application, the CWB conducts business with both integrated and independent companies. Both the integrated and independent companies act as CWB handling agents in the country in respect of CWB grain delivered to their respective primary elevator facilities by producers. However, in their capacity as terminal owners, the integrated companies do not act as agents for the CWB. Rather, they supply terminal facility services to the CWB as independent parties. In this regard it should be noted that the CWB owns no elevator facilities whatsoever. Once CWB grain has been delivered in the country to a particular companies' primary elevator facility the cost of transferring that grain to a different country facility is prohibitive. Thus, the CWB requires access to that

particular company for terminal facility services whether those services are provided by the company itself (in the case of an integrated company) or by a terminal with whom the owner of the country facility has entered into a terminal access arrangement (in the case of independent companies).

10. At the Port of Vancouver, at the time of the Section 92 Application, there were four integrated companies: the merged entity Agricore United ("Agricore United"), Saskatchewan Wheat Pool ("SWP"), James Richardson International ("JRI") and Cargill Canada Ltd. ("Cargill"). As of the date of this affidavit the same four integrated companies continue to operate at the Port of Vancouver, however, the ownership interests have changed somewhat as follows:

- Agricore United owns 100% of the United Grain Growers Limited ("UGG") terminal, now owns 100% of Pacific Elevators and has retained its 50% interest in Cascadia Terminal.
- SWP remains the sole owner of its facility but no longer has any interest in Pacific Elevators, having divested of its 30% interest to Agricore United.
- JRI remains the sole owner of its facility.
- Cargill continues to have a 50% interest in Cascadia Terminal.

11. As was the case at the time of the Section 92 Application the independent companies fall roughly into two categories, namely larger entities with multiple primary elevator facilities and smaller entities most of which own only a single grain handling facility in the country. Louis Dreyfus Canada Ltd., N. M. Paterson & Sons Limited and Parrish & Heimbecker Limited ("P & H") remain in the category of larger independent companies. Conagra Grain Canada has sold its four facilities to JRI. The number of smaller entities has remained relatively constant with the most noteworthy developments in that regard being the purchase of Mainline Terminal by P & H and the ownership changes arising as a result of the Tribunal's orders in respect of the divestiture of Agricore United country facilities.

12. As was the case at the time of the Section 92 Application because the independent grain companies do not own port terminal facilities, it remains the situation that these independent grain companies depend on the four integrated grain companies for access to port terminal facilities.

13. As was the case at the time of the Section 92 Application the integrated companies can determine the economic viability of independent companies through their ownership of terminal elevators because the ability of an independent company to compete for the farmers' grain in Western Canada often depends on:

- a) the level of diversion payments paid out to independent grain companies in return for the processing of their origins at port, and
- b) the granting of terminal authorization to unload the independent companies' cars at port.

Accordingly, ownership of the port terminal facilities continues to effect competitiveness throughout the grain industry.

Grain Terminal Facilities at the Port of Vancouver

14. The port terminal grain handling services in the Port of Vancouver are as essential to the CWB's operations today as they were at the time of the Section 92 Application.

15. In each of the crop years 1999-2000 and 2000-2001, an average of 8.9 million tonnes ("MT") of CWB grains passed through these facilities, accounting for approximately 47.5% of CWB grains exported. The Vancouver facilities in which Agricore United now has a complete or partial interest (Pacific Terminals, UGG Terminal and Cascadia Terminal) collectively handled an average of 62.5% of all CWB grain unloads in Vancouver in both of those years.

16. In the crop years 2001-2002 to 2003-2004, the following quantities of CWB grains passed through the terminal facilities in the West Coast ports of Vancouver and Prince Rupert:

Crop Year	Total CWB Exports (millions of tonnes)	Total Vcr. Exports (millions of tonnes)	Vcr. as % of Total CWB	Total P.R. Exports (millions of tonnes)
2001-2002	16.724	6.975	41.7	1.099
2002-2003	9.039	1.975	21.85	1.687
2003-2004	16.544	5.687	34.38	2.792

17. During this time, the Vancouver facilities in which Agricore United now has a complete or partial interest (Pacific Terminals, UGG Terminal and Cascadia Terminal) collectively handled an average of 52.5% of all CWB grain unloads in Vancouver during of those years.

18. The terminal facility at Prince Rupert is owned by a consortium of the owners of the integrated terminal facilities located in Vancouver. The owners of the Prince Rupert facility jointly decide whether and for how long that facility will open each year.

19. The sharp drop in exports during the 2002-03 crop year was as a result of a lockout of Vancouver terminal workers by the owners thereof. To compound matters, that year the Prairies also experienced the worst drought in modern memory. The lower than average numbers in 2003-04 reflect the lingering effects of that drought.

20. As was the case at the time of the Section 92 Application there remains a limited ability to shift tonnage of CWB grain between the Canadian West Coast ports (Vancouver and Prince Rupert) and other Canadian and U.S. ports in an attempt to enhance terminal competition at Vancouver. West Coast ports continue to yield the greatest returns for Western producers of CWB grain and the use of alternative facilities results in reduced returns for those producers.

21. At the time of the Section 92 Application the CWB's 10-year forecast of annual Canadian grain and oilseeds exports showed an overall increase to 27.1MT by 2008-2009. A

portion of that increase in trade was projected to come from markets traditionally served through West Coast ports, including Vancouver. The CWB's latest 10-year forecast of Canadian grain and oilseeds exports continues to predict an overall increase, however, that increase has been revised downward slightly to 25.8MT per year by 2010-2011. The West Coast ports are expected to handle 14.9MT of that total by 2011, up from the 1997-2001 average annual handle of 13.5MT. Accordingly, the Port of Vancouver is expected to remain a key export corridor for the sale of CWB grains.

The Anti-Competitive Effect on the CWB if No Divestiture is Ordered and the Comparability of Today's Fact-situation with the Circumstances that Existed at the Time of the Section 92 Application

22. I have reviewed the affidavit of Murdoch McKay, as well as the Statement of Grounds and Material Facts filed in support of Agricore United's Section 106 Application. As I understand Agricore United's position, it is requesting that the Consent Agreement entered into on October 17, 2002 between itself and the Commissioner of Competition be set aside on the basis that the circumstances that led to the making of the Consent Agreement have changed significantly. In support, Agricore United states that:

- a) There are reduced exports at the Port of Vancouver and therefore there is excess capacity at the port terminals.
- b) The amount of "uncommitted" grain shipped to the Port of Vancouver by Independent Grain Companies in Western Canada that would be available to a prospective purchaser has "diminished dramatically" as a result of both consolidation among grain companies in Western Canada and exclusive long-term handling agreements entered into by Independent Grain Companies and port terminal operators in the Port of Vancouver. As a result, a prospective purchaser will not be able to secure enough independent grain to operate the terminal on a sustainable basis.
- c) Agricore United acknowledges that a prospective purchaser would be able to secure enough grain if that purchaser entered into an agreement with the CWB. However,

Agricore United takes the position that a direct contract between CWB and the prospective purchaser would adversely affect the grain handling industry and therefore it is not a viable solution.

23. As was the case at the time of the Section 92 Application the CWB remains concerned that any further consolidation of the terminal capacity at the Port of Vancouver would further enhance the market power that now exists in that market. This in turn would adversely impact access to facilities, prices, and quality of service both at the Port of Vancouver and upstream at the primary grain elevator level. As noted above, any increase in operating costs will have a direct impact on the CWB and therefore on Western Canadian farmers.

24. The existing market power at the Port of Vancouver continues to manifest itself in the terminals' posted tariffs. These tariffs have risen continuously from before the Section 92 Application to the present day without a commensurate increase in the level or quality of services provided. These tariffs remain a significant cost to the CWB and therefore to Western Canadian farmers. Any increase in terminal tariffs of any kind will ultimately impact the return to producers either directly, when they deliver their grain in the country, or indirectly, through lower pool distributions resulting from increased operating costs for the CWB.

25. For example, every tonne of CWB grain that passes through a terminal in Vancouver is subject to a "FOBbing" charge for loading grain onto a vessel. This is in addition to terminal tariffs for various services and programs that the CWB requests and in addition to terminal tariffs for inward weighing & inspection and cleaning that producers pay when they deliver their CWB grain to the elevators in the country. At the time of the Section 92 Application, FOBbing charges were in the range of \$8 to \$10 per tonne depending on the facility that handled the grain and the product in question. Today the range is \$9.75 to \$11.55 per tonne.

26. It is also noteworthy that despite the drastic reduction in exports and notwithstanding the Applicants suggestion of excess terminal capacity in Vancouver, tariffs in Vancouver have not come down over time and in fact have increased. As noted above, total CWB exports in 2002-03 dropped to just over 9MT and total exports through Vancouver dropped to just under

2MT. These reductions were consistent with the overall reduction in total grain and oilseed exports through Vancouver, which went from 10.11MT in 2001-02 down to 3.91MT in 2002-03 and back up to 9.28MT in 2003-04. However, during that time frame average posted elevation tariffs in Vancouver, to choose just one example, increased from \$7.73 in 2001-02 to \$8.10 in 2002-03 to \$8.48 in 2003-04.

27. As was the case at the time of the Section 92 Application market power in Vancouver also continues to manifest itself by the steadfast refusal of integrated companies not only to enter into but even to negotiate individual terminal agreements with the CWB. To date, the CWB still has individual terminal agreements with only two terminals, Hudson Bay Terminals (Omnitrax) in the Port of Churchill and Mission Terminals in the Port of Thunder Bay. As was described in Mr. Measner's affidavit (Exhibit 3 hereto), in the fall of 2000, the CWB proposed the implementation of individual terminal agreements with the integrated companies in the Port of Vancouver to specify a guaranteed level of terminal space and number of CWB unloads for a negotiated rate. The CWB's willingness to enter into such terminal capacity agreements has been repeated on a number of occasions since and the owners of these facilities have clearly acknowledged the CWB's desire to enter such agreements. However, nothing has changed in this regard since the Section 92 Application.

28. With respect to the change in circumstance that the Applicant alleges has taken place, the CWB is of the view that none of the changes have been material to the issue at hand. From the CWB's perspective, there is nothing that has transpired since October 17, 2002 that has improved the competitive situation in Vancouver. On the contrary it has, if anything worsened.

Unique Perspective of the Canadian Wheat Board

29. As noted above the CWB is the direct representative of Western Canadian producers of wheat and barley and is a major user of terminal facilities at the Port of Vancouver. In my view the CWB's role and extensive involvement in the industry make it particularly well-placed to comment on the changes that have taken place in Vancouver and elsewhere and on their materiality. Moreover, the CWB takes great issue with the suggestion that a terminal capacity

agreement between the CWB and a prospective purchaser would in any way adversely affect the Western Canadian grain handling industry. Only the CWB can comment fully on that issue.

30. Accordingly, the CWB continues to have a unique perspective on the potential competitive effects of the acquisition and the extent to which divestiture would provide an adequate remedy and on the effects that rescinding the Consent Agreement and/or extending the deadline to complete the divestiture as contemplated in that Agreement would have on the CWB and on the Western Canadian grain industry.

Extent of Intervention

31. The CWB would be satisfied with the same restrictions on its intervention as were imposed in the Tribunal's order of May 29, 2002, namely:

- a) That the Canadian Wheat Board be allowed to participate in the proceedings and be permitted:
 - i. to review any discovery transcripts and access any discovery documents of the parties to the application but not direct participation in the discovery process, subject to confidentiality orders;
 - ii. to call *viva voce* evidence on the following conditions and containing the following information: (1) the names of the witnesses sought to be called; (2) the nature of the evidence to be provided and an explanation as to what issue within the scope of the intervention such evidence would be relevant; (3) a demonstration that such evidence is not repetitive, that the facts to be proven have not been adequately dealt with in the evidence so far; and (4) a statement that the Commissioner had been asked to adduce such evidence and had refused;
 - iii. to cross-examine witnesses at the hearing of the application to the extent that it is not repetitive of the cross-examination of the parties to the application;
 - iv. to submit legal arguments at the hearing of the application that are non-repetitive in nature and at any pre-hearing motions or pre-hearing conferences; and
 - v. to introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the *Competition Tribunal Rules*, SOR/94-290, and case management.


b) And that UGG not be permitted to seek documentary and oral discovery of the CWB.

32. The CWB will, of course, respect any confidentiality orders that may be in place.

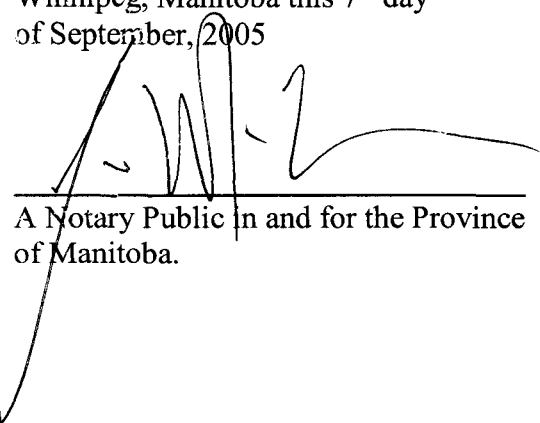
Purpose of Affidavit

33. I make this affidavit in support of the request of the Canadian Wheat Board for leave to intervene in both the Section 106 Application and the Motion and not for any improper purpose.

Affirmed
SWORN BEFORE ME at the City of)
Winnipeg, Manitoba this 7th day)
of September, 2005)



Ward Weisensel



A Notary Public in and for the Province
of Manitoba.



Reference: *The Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp. Trib. 20
File no.: CT2002001
Registry document no.: 0031

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

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

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

BETWEEN :

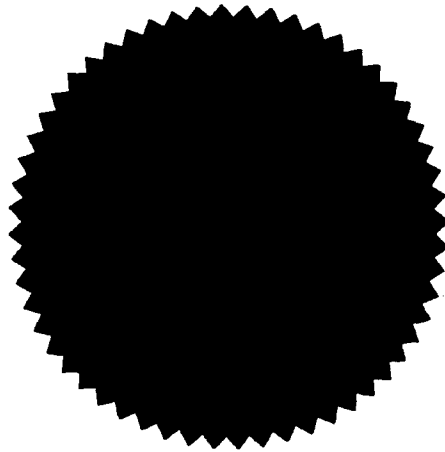
The Commissioner of Competition
(applicant)

and

United Grain Growers Limited
(respondent)

and

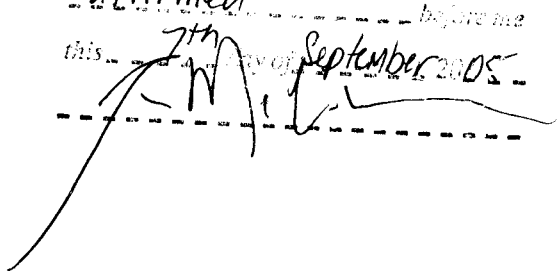
The Canadian Wheat Board
(applicant for leave to intervene)



Date of hearing: 20020514 to 20020515
Member: McKeown J. (Chairman)
Date of order: 20020529
Order signed by: McKeown J.

REASONS AND ORDER GRANTING REQUEST FOR LEAVE TO INTERVENE

*This is exhibit 1 referred
to in the Affidavit of Ward Weisense /
affirmed before me
this 7th day of September 2005*



[1] On January 2, 2002, following the acquisition by United Grain Growers Limited (“UGG”) of Agricore Cooperative Ltd. (“Agricore”), the Commissioner of Competition (the “Commissioner”) filed an application pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”) for: (a) an order or orders against the respondent pursuant to section 92 of the Act requiring the respondent to divest, at the respondent’s option: (i) all of its interests in the Pacific Elevators Limited (“Pacific”) grain terminal at the Port of Vancouver (as more fully described in paragraph 21 of the Statement of Grounds and Material Facts dated December 19, 2001) (the “Statement of Grounds and Material Facts”), Western Pool Terminals Limited (“WPTL”) and the Loan Agreement between Pacific, WPTL and Alberta Wheat Pool dated January 11, 1996; or (ii) UGG’s grain terminal at the Port of Vancouver (as more fully described in paragraph 21 of the Statement of Grounds and Material Facts); and (b) such further orders as may be appropriate.

[2] While the Commissioner’s position is that there are two options: either the divestiture of the UGG facility or the divestiture of the respondent’s 70 percent interest in the Pacific terminal as a whole, the respondent submits that there should be a third option; namely, the divestiture of the so-called Pacific 1 terminal.

[3] The existence of a substantial lessening of competition (“SLC”) in the market for port terminal grain handling services in the Port of Vancouver has been agreed to by the parties for the purpose of this proceeding and is not at issue in this application. The sole substantive issue in this proceeding is what divestiture will effectively address this SLC; specifically whether the divestiture of the Pacific 1 terminal would satisfy the four conditions set out in paragraph 77 of the Statement of Grounds and Material Facts. Both parties agree that a divestiture that satisfies these four conditions would be sufficient to remedy the SLC.

[4] A request for leave to intervene in the proceedings was filed by the Canadian Wheat Board (the “CWB”) on February 19, 2002. This request was decided orally at a hearing on May 15, 2002. The CWB was granted leave to intervene on the substantive issue. The following are the reasons for the order.

[5] The CWB is a farmer controlled marketing organization which is incorporated pursuant to the provisions of the *Canadian Wheat Board Act*, R.S.C. 1985 c. C-24. The statutory object of the corporation is to market grain grown in Western Canada in interprovincial and export trade. Its mission is to market quality products and services in order to maximize returns to Western Canadian grain producers. All of the money received by the CWB for the sale of CWB grains is combined into one of four accounts (wheat, durum, barley and designated (i.e. malt) barley) and, after deducting the CWB’s operating costs, the sales revenue earned is returned to producers. Any increase in the operating costs of the CWB results in a reduction in the return to producers.

[6] The CWB is concerned that enhanced market power not adequately remedied will adversely impact access to facilities, price levels and quality of service both at the Port of Vancouver and primary grain elevator levels, thus, resulting in competitive consequences affecting the CWB and the producers that it represents. More specifically, the CWB submits that the alternative partial divestiture proposed by the

respondent in the Commissioner's application will not adequately remedy the substantial lessening or prevention of competition arising from the acquisition. Therefore, the CWB alleges that it is directly affected by the matters at issue in the application, which is to determine whether the divestiture of the Pacific 1 Terminal or other alternate remedies satisfy the four conditions set out in paragraph 77 of the Statement of Grounds and Material Facts.

[7] The CWB also alleges that it has a unique perspective on the potential competitive effects of the acquisition and the extent to which the partial divestiture proposed by UGG would provide an adequate remedy because it is the direct representative of Western Canadian producers of wheat and barley and is a major user of terminal facilities at the Port of Vancouver.

[8] The Commissioner supports the intervention of the CWB as counsel submits that the request satisfies the test for granting intervenor status set out in subsection 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c.19 (2nd Supp.), and in the jurisprudence of the Tribunal.

[9] Counsel for the respondent submits that the test for granting intervenor status has not been satisfied by the CWB and that the request for leave to intervene should be denied. Counsel submits that the CWB has not demonstrated that it has unique knowledge of the matters in issue that would provide the Tribunal with a perspective different from the Commissioner's namely because of the narrowness of the issue between the parties as formulated in the pleadings. Counsel argues that CWB only asserts that because it is a customer it has a "unique perspective to 'bring to bear' on the potential competitive effects of this acquisition". Further, counsel submits that the CWB intends to intervene in this case simply to express its view in favour of the Commissioner's position which is not a proper basis on which leave to intervene should be granted.

[10] Counsel for the respondent also submits that the CWB should not be given leave to intervene as this would result in a prejudice to the respondent who may be required to divulge highly confidential information concerning its cost structure, margins, operations and future business plans. Counsel submits that the respondent has gone to great lengths to streamline this proceeding and to limit the scope of the issues by negotiating an arrangement with the Commissioner and that this result might be defeated by the participation of the CWB.

[11] As stated in *Director of Investigation and Research v. Tele-Direct* (Reasons and Order Granting Requests for Leave to Intervene) 61 C.P.R. (3d) 528, [1995] C.C.T.D. No. 4 (QL), the test for granting intervenor status is set out in subsection 9(3) of the *Competition Tribunal Act*:

Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person.

[12] Further, as previously stated in *The Commissioner of Competition v. Canadian Waste Services Holdings* (26 June 2000), CT2000002/20, Reasons and Order Granting Request for Leave to Intervene at paragraph 3, [2000] C.C.T.D. No. 10 (QL) (Comp. Trib.) referred to in *Commissioner of Competition v. Air Canada* [2001], C.C.T.D. No. 5 (QL) (Comp. Trib.) at paragraph 11, the Tribunal must be satisfied that all of the following elements are met in order to grant the status of intervenor:

- (a) The matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate (see *Director of Investigation and Research v. Air Canada* (1992), 46 C.P.R. (3d) 184 at 187, [1992], C.C.T.D. No. 24 (QL)).
- (b) The person seeking leave to intervene must be directly affected. The word "affects" has been interpreted in *Air Canada, ibid.*, to mean "directly affects".
- (c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (see *Tele-Direct*, cited above in § [2]).
- (d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (see *Washington v. Director of Investigation and Research*, [1998] C.C.T.D. No. 4 (QL) (Comp. Trib.)).

[13] I am of the view that the CWB has demonstrated that its request for leave to intervene satisfies the test stated above. In particular, CWB's extensive involvement in the grain industry with producers clearly places it in a unique position to assist the Tribunal in its consideration of the effectiveness of the remedies that are proposed.

[14] Confidentiality concerns raised by counsel for the respondent cannot by themselves constitute grounds for denying intervenor status. However, CWB will have to respect any confidentiality obligations arising by virtue of any confidentiality orders.

[15] I am of the view that the CWB shall only be entitled to address the issues which I identify below, that will assist the Tribunal in making a decision on the Commissioner's application. Further, I took note of the fact that the CWB is prepared to agree to the conditions proposed by the Commissioner regarding the calling of witnesses which are stated at paragraph 31 of the Response of the Applicant to the Request for Leave to Intervene by the Canadian Wheat Board. I am of the view that those conditions will provide adequate and proper disclosure to the parties of the evidence intended to be called, if at all, by the CWB, and ensure that it is not repetitive or disruptive to the proceedings.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[16] The Canadian Wheat Board is granted leave to intervene on the sole substantive issue of this proceeding:

(a) whether the divestiture of the Pacific 1 Terminal or other alternate remedies would satisfy the four conditions set out in paragraph 77 of the Statement of Grounds and Material Facts and will effectively remedy the substantial prevention or lessening of competition in the market for port terminal grain handling services in the Port of Vancouver.

[17] The Canadian Wheat Board shall be allowed to participate in the proceedings and is permitted:

(a) to review any discovery transcripts and access any discovery documents of the parties to the application but not direct participation in the discovery process, subject to confidentiality orders;

(b) to call *viva voce* evidence on the following conditions and containing the following information: (1) the names of the witnesses sought to be called; (2) the nature of the evidence to be provided and an explanation as to what issue within the scope of the intervention such evidence would be relevant; (3) a demonstration that such evidence is not repetitive, that the to be facts proven have not been adequately dealt with in the evidence so far; and (4) a statement that the Commissioner had been asked to adduce such evidence and had refused;

(c) to cross-examine witnesses at the hearing of the application to the extent that it is not repetitive of the cross-examination of the parties to the application;

(d) to submit legal arguments at the hearing of the application that are non-repetitive in nature and at any pre-hearing motions or pre-hearing conferences; and

(e) to introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the *Competition Tribunal Rules*, SOR/94-290, and case management.

[18] UGG shall not be permitted to seek documentary and oral discovery of the CWB.

DATED at Ottawa, this 29th day of May, 2002.

SIGNED on behalf of the Tribunal by the presiding judicial member

(s)W.P. McKeown

APPEARANCES:

For the applicant:

John Syme
Arsalaan Hyder

For the respondents:

Kent E. Thomson
Sandra A. Forbes

For the applicant for leave to intervene:

The Canadian Wheat Board

Randall T. Hughes
Susan E. Paul
Jeff Lindsay

CT-2002-001

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the acquisition by the Commissioner of Competition under section 92 of the *Competition Act*;

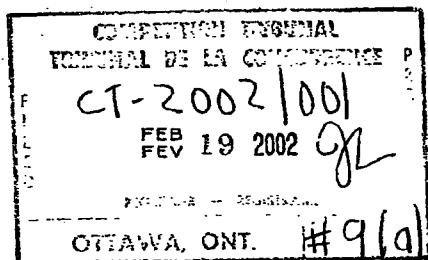
AND IN THE MATTER OF the acquisition by United Grain Growers Limited of Agricore Cooperative Ltd., a company engaged in the grain handling business.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- AND -



UNITED GRAIN GROWERS LIMITED

Respondent

**REQUEST FOR LEAVE TO INTERVENE
ON BEHALF OF THE CANADIAN WHEAT BOARD**

The Canadian Wheat Board ("the CWB") requests leave of the Competition Tribunal pursuant to Section 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19, as amended, to intervene in these proceedings. In support of this request, the CWB intends to rely up on the Affidavit of Adrian C. Measner sworn February 19, 2002.

1. Name and Address of the Proposed Intervenor:

The Canadian Wheat Board
423 Main Street
P.O. Box 816
Station Main
Winnipeg, Manitoba
R3C 2P5

This is exhibit 2 referred
to in the Affidavit of Ward Weisense
affirmed
this 7th day of September 2005

DT-2002-001

THE COMPETITION TRIBUNAL

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

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The Canadian Wheat Board
423 Main Street
P.O. Box 816
Station Main
Winnipeg, Manitoba
R3C 2P5

Attention: James E. McLandress, General Counsel

Telephone: (204) 984-2413
Fax: (204) 983-5609

Address for Service:

Fraser Milner Casgrain LLP
P.O. Box 100
1 First Canadian Place
Toronto, Ontario
M5M 1E8
Attention: Randal T. Hughes

Phone: (416) 863-4446
Fax: (416) 863-4592
E-mail: randy.hughes@fmc-law.com

2. The matters in issue that affect CWB and the competitive consequences arising from such matters:

(a) The CWB is a farmer controlled marketing organization. It is a corporation incorporated pursuant to the provisions of the *Canadian Wheat Board Act*, R.S., c. C-12 (the "*CWB Act*"). The statutory object of the corporation is to market grain grown in Western Canada in an orderly manner in interprovincial and export trade. Its mission is to market quality products and services in order to maximize returns to Western Canadian grain producers. The *CWB Act* and the regulations passed under it give the CWB exclusive jurisdiction over the purchase and sale of wheat, durum and barley grown in Western Canada and intended for export or domestic human consumption ("CWB grains").

(b) All of the money received by the CWB for the sale of CWB grains is pooled into one of four accounts (wheat, durum, barley and designated (i.e. malt) barley) and, after deducting the CWB's operating costs, all of the sales revenue earned by the CWB is returned to producers. Any increase in the operating costs of the CWB results in a reduction in the return to producers for CWB grains that the CWB markets on their behalf.

(c) The CWB does not own any grain handling facilities in Canada, including any at the Port of Vancouver, and it therefore relies on grain handling services and the facilities provided by both integrated and non-integrated companies, including United Grain Growers Limited ("UGG") and Agricore Cooperative Ltd. ("Agricore").

(d) The port terminal grain handling services in the Port of Vancouver are essential to the CWB's operations. In the Crop Years 1999-2000 and 2000-2001, an average of 8.9 million tonnes of CWB grains passed through these facilities, accounting for approximately 47.5% per

cent of CWB grains exported. The Vancouver facilities in which the merged entity Agricore United will have a complete or partial interest (Pacific Terminals, UGG Terminal and Cascadia Terminal) collectively handled an average of 62.5% of all CWB grain unloads in Vancouver in both of those years.

(e) The Commissioner and the Respondent have agreed for the purposes of this Application that the acquisition by UGG of Agricore is likely to prevent or lessen competition substantially in the market for port terminal grain handling services in the Port of Vancouver.

(f) The CWB is concerned that any further consolidation of the terminal capacity at the Port of Vancouver will further enhance the considerable market power which now exists in that market, adversely impacting access to facilities, prices, levels and quality of service both at the Port of Vancouver and upstream at the primary grain elevator level.

(g) The CWB is concerned that the alternative partial divestiture proposed by UGG in this Application will not adequately remedy the substantial lessening or prevention of competition arising from the acquisition.

(h) The CWB has a unique perspective on the potential competitive effects of the acquisition and the extent to which the partial divestiture proposed by UGG would provide an adequate remedy because it is the direct representative of Western Canadian producers of wheat and barley and is a major user of terminal facilities at the Port of Vancouver.

3. The party whose position CWB intends to support:

Based on the materials filed to date with the Competition Tribunal, the CWB intends to generally support the position of the Applicant.

4. The Official Language to be used:

English

5. At this time, CWB proposes to participate in the proceedings on the following basis:

(a) the review of any discovery transcripts and access to any discovery documents of the parties to the Application (but not direct participation in the discovery process);

(b) the calling of *viva voce* evidence and the cross-examination of witnesses at the hearing of the Application (to the extent not repetitive of the examination and cross-examination of the parties to the Application); and

(c) the submission of legal argument at the hearing of the Application and at any pre-hearing motions and at prehearing conferences.

DATED at Toronto, Ontario this 19th day of February, 2002

Fraser Milner Casgrain LLP
P.O. Box 100
1 First Canadian Place
Toronto, Ontario
M5M 1E8

Attention: Randal T. Hughes
Susan E. Paul
Telephone: (416) 863-4446
Fax: (416) 863-4592

Barry Zalmanowitz
Telephone: (780) 423-7344
Fax: (780) 423-7276

**Solicitors for the Canadian Wheat
Board**

CT-2002-001

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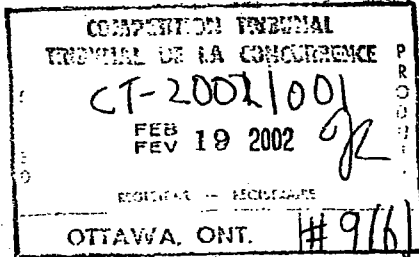
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BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- AND -



UNITED GRAIN GROWERS LIMITED

Respondent

**AFFIDAVIT OF
ADRIAN C. MEASNER**

1. I am the Executive Vice-President of Marketing for the Canadian Wheat Board ("the CWB") and as such have knowledge of the matters hereinafter deposed to, except where stated to be on information and belief, in which case I believe them to be true.

This is exhibit 3 referred to in the Affidavit of Ward Weisense affirmed before me this 7th day of September 2005

Received Time Feb.19. 1:33PM

DT-2002-001

THE COMPETITION TRIBUNAL

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The Canadian Wheat Board

2. The CWB is a producer-controlled marketing organization. A 15-member Board of Directors governs the CWB. Producers from across Western Canada elect ten of the Directors and the Government of Canada appoints the remaining five (including the President and Chief Executive Officer). The Board of Directors is responsible for the overall governance of the corporation and its strategic direction.
3. The CWB is a corporation incorporated pursuant to the provisions of the *Canadian Wheat Board Act*, R.S., c. C-12 (the "*CWB Act*"). The statutory object of the corporation is to market grain grown in Western Canada in an orderly manner in interprovincial and export trade. Its mission is to market quality products and services in order to maximize returns to Western Canadian grain producers.
4. The *CWB Act* and the regulations passed under it give the CWB exclusive jurisdiction over the purchase and sale of wheat, durum and barley grown in Western Canada and intended for export or domestic human consumption ("CWB grains").
5. Producers deliver their CWB grains over the course of the crop year to primary elevator companies that act as handling agents for the CWB. The CWB's agents issue an "initial" payment on behalf of the CWB for the grain that each producer delivers. This payment reflects the CWB's initial price for the particular grain in question delivered instore Vancouver or St. Lawrence, less deductions made by the elevator agent for transportation related charges and handling charges (e.g., cleaning, primary elevation, weighing and inspection, etc.). The initial payment represents a substantial portion of the total payment that producers will receive for their grain. The balance is distributed through "adjustment" and "interim" payments as sales are made with a "final" payment being made generally within five or six months of the end of the crop year. The Canadian crop year runs from August 1st to July 31st. All payments are based on the particular tonnage, class, grade, and protein of the grain that the producer delivers.

6. All of the money received from the sale of all CWB grain is pooled into one of four "pool accounts" (wheat, durum, barley, and designated or malt barley). After deducting the CWB's operating costs, all of the sales revenue earned by the CWB is returned to producers. This results in roughly 96 to 98 per cent or more of all sales proceeds being returned to producers. The amount that each producer ultimately receives for its CWB grain is the pooled price that the CWB is able to obtain during the year on sales of the particular class, grade and protein of the grain that the producer delivered, net of operating expenses. Any increase in the operating costs of the CWB results in a reduction in the return to producers of CWB grains.

Grain Companies in Canada

7. Grain companies in Canada may be categorized as "integrated" companies which have both port and country facilities and "non-integrated" companies which have only country facilities. At the Port of Vancouver there are four integrated companies: Agricore United, Saskatchewan Wheat Pool ("SWP"), James Richardson International ("JRI") and Cargill Canada Ltd. ("Cargill"). It is my understanding that the ownership interests of these companies in terminal facilities located in Vancouver are as follows: Agricore United has the United Grain Growers Limited ("UGG") terminal and a partial interest both Cascadia Terminal (50%) and Pacific Elevators (70%). SWP has its own facility and a partial interest in Pacific Terminals (30%). JRI has its own facility and Cargill has a 50% interest in Cascadia Terminal. There are a few reasonably large non-integrated companies such as Louis Dreyfus Canada Ltd., N. M. Paterson & Sons Limited, Parrish & Heimbecker Limited and Conagra Grain Canada. Finally, there are a number of small non-integrated companies, most of which own a single grain handling facility in the country. Many of these single point elevator companies are represented by the Inland Terminals Association of Canada. Non-integrated grain companies depend on the four integrated grain companies for access to port terminal facilities.

8. The CWB conducts business with both integrated and non-integrated grain companies.

9. Integrated companies can determine the economic viability of non-integrated companies through their ownership of terminal elevators. The ability of a non-integrated company to compete for the farmers' grain in Western Canada often depends on: (a) the level of diversion payments paid out to non-integrated grain companies in return for the processing of their originations at port, and (b) the granting of terminal authorization to unload non-integrated companies' cars at port. Ownership of the port terminal facilities can therefore affect competitiveness throughout the grain industry.

Grain Terminal Facilities at the Port of Vancouver

10. The port terminal grain handling services in the Port of Vancouver are essential to the CWB's operations. In each of the crop years 1999-2000 and 2000-2001, an average of 8.9 million tonnes of CWB grains passed through these facilities, accounting for approximately 47.5% per cent of CWB grains exported. The Vancouver facilities in which the merged entity Agricore United will have a complete or partial interest (Pacific Terminals, UGG Terminal and Cascadia Terminal) collectively handled an average of 62.5% of all CWB grain unloads in Vancouver in both of those years.

11. There is limited ability to shift tonnage of CWB grain between the Port of Vancouver and other Canadian or U.S. ports in an attempt to enhance terminal competition at Vancouver. West Coast ports yield the greatest returns for Western producers of CWB grain and the use of alternative facilities results in reduced returns for those producers.

12. The CWB's 10-year forecast of Canadian grain and oilseeds exports shows an overall increase to almost 27 MT by 2008-2009 and a portion of this increase in trade is projected to come from markets which have traditionally been served through West Coast ports, including Vancouver. Accordingly, the Port of Vancouver is expected to remain an important export corridor for the sale of CWB grains.

The Anti-Competitive Effect on the Canadian Wheat Board of a Partial Divestiture of the Pacific Complex

13. As I understand it, the Commissioner and the Respondent have agreed for the purposes of this Application that the acquisition by UGG of Agricore Cooperative Ltd. is likely to prevent or lessen competition substantially in the market for port terminal grain handling services in the Port of Vancouver. The CWB is concerned that any further consolidation of the terminal capacity at the Port of Vancouver will further enhance the market power which now exists in that market, adversely impacting access to facilities, prices, and quality of service both at the Port of Vancouver, and upstream at the country or primary grain elevator level.

14. I believe that existing market power at the Port of Vancouver already manifests itself in the terminals' posted tariffs, which have been rising continuously for the past several years. These tariffs are a significant cost to the CWB and its producers. For example, FOB charges alone are in the range of \$8 to \$10 per tonne and every tonne of CWB grain that passes through a terminal in Vancouver is subject to an FOB charge. This is in addition to terminal tariffs for various services and programs that the CWB requests and in addition to terminal tariffs for weighing and inspection and cleaning that producers pay when they deliver their CWB grain to the elevators in the country. Any increase in terminal tariffs of any kind will ultimately impact the return to producers either directly, when they deliver their grain in the country, or indirectly, through lower pool distributions resulting from increased operating costs for the CWB.

15. Market power at the Port of Vancouver also manifests itself in the unwillingness of the integrated companies to enter individual terminal agreements with the CWB. To date, the CWB has individual terminal agreements with only two terminals, Hudson Bay Terminals (Omnitrac) in the Port of Churchill and Mission Terminals in the Port of Thunder Bay. Significantly, both facilities are owned by independent operators that do not own country facilities. In the fall of 2000, the CWB proposed the implementation of individual terminal agreements with the integrated companies in the Port of Vancouver to specify a guaranteed level of terminal space and number of CWB unloads for a negotiated rate. The CWB's willingness to enter into such agreements has been repeated on a number of occasions since and the owners of

these facilities have clearly acknowledged the CWB's desire to enter such agreements. To date, however, the terminals have resisted entering into negotiations individually and the CWB has had to deal with the terminals as a group in order to reach an arrangement assuring the CWB access to port terminal grain facilities at Vancouver.

16. The CWB is particularly concerned that the alternative partial divestiture proposed by UGG in this Application will not adequately remedy the substantial lessening or prevention of competition arising from the acquisition and that it could have a substantial effect on competition including increases in prices for utilizing terminal facilities, reduced access to terminal facilities for non-integrated grain companies, and the lessening of competition in the country if the diversion payments currently offered by terminals to non-integrated facilities are reduced or eliminated. Ultimately these would have an adverse impact on the farmers whom the CWB represents.

17. The CWB believes that Pacific 1 Terminal may not be able to compete on an economically viable basis as a stand-alone facility. We are concerned that there are a number of potentially serious shortcomings to Pacific 1 Terminal as a stand-alone facility. Based on the information currently available, our primary concerns are that Pacific 1 Terminal's rail car spotting and unloading capabilities are inadequate and that it has insufficient storage space. Ensuring proper unload and storage capacity is a critical issue for the viability of any terminal facility.

18. For these reasons, the CWB believes that the divestiture of Pacific 1 Terminal alone is not an adequate remedy and that a divestiture as proposed by the Commissioner is required.

Unique Perspective of the Canadian Wheat Board

19. The CWB has a unique perspective on the potential competitive effects of the acquisition and the extent to which the partial divestiture proposed by UGG would provide an

adequate remedy because it is the direct representative of Western Canadian producers of wheat and barley and is a major user of terminal facilities at the Port of Vancouver.

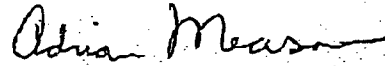
Extent of Intervention

20. It is not the current intention of the CWB to adduce evidence at the hearing of this Application. However, the CWB wishes to preserve its right to do so, and to cross-examine witnesses at the hearing should circumstances arise which affect its interests.

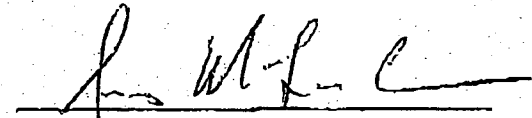
Purpose of Affidavit

21. I make this affidavit in support of the request of the Canadian Wheat Board for leave to intervene and not for any improper purpose.

SWORN BEFORE ME at the City of)
Winnipeg, Manitoba this 19th day)
of February, 2002)



Adrian C. Measner



A Notary Public in and for the Province of Manitoba.

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