

**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:**

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| COMPETITION TRIBUNAL<br>TRIBUNAL DE LA CONCURRENCE |        |
| FILED / PRODUIT                                    |        |
| October 20, 2005                                   |        |
| Not a Rose for / pour<br>REGISTRAR / REGISTRE      |        |
| OTTAWA, ONT  | #0112g |

**UNITED GRAIN GROWERS LIMITED**

Applicant

- and -

**THE COMMISSIONER OF COMPETITION**

Respondent

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**APPLICANT'S MEMORANDUM OF ARGUMENT FOR INTERIM RELIEF**  
**Re: Section 106 Application**

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**PART I – NATURE OF THE MOTION AND SUMMARY OF THE**  
**APPLICANT'S POSITION**

1. The Applicant files this Memorandum of Argument in support of its motion for, among other things, the Tribunal's approval pursuant to paragraph 49 of the Consent Agreement extending the Port Terminal Initial Sale Period from its current expiry date of 12:00 noon (Winnipeg time) on August 15, 2005 to a date after the final disposition of the Applicant's Section 106 Application. (All capitalized terms in this Memorandum that are not otherwise defined have the meaning given to them in the Statement of Grounds and Material Facts filed for the purposes of the Section 106 Application (the "SGMF") or the Notice of Motion for Interim Relief, dated August 11, 2005).

2. The Applicant's position on this motion can be summarized as follows. The Commissioner has a contractual, statutory and common law duty to act fairly, reasonably and in good faith in responding to both the Applicant's requests for extensions of time under the Consent Agreement and the Section 106 Application. By withholding her consent to the extension of the Port Terminal Initial Sale Period pending the final disposition of the Section 106 Application, the Commissioner has acted unfairly, unreasonably and inconsistently with her obligations.
3. In particular, in light of the prejudice to a Trustee sale process in the midst of Tribunal proceedings seeking rescission of the very Consent Agreement pursuant to which the Trustee obtains his status and power, the considerable merit of the Section 106 Application, the extensive good faith efforts of the Applicant to effect a divestiture, and the absence of any prejudice arising from the requested extension, it is unreasonable and unfair for the Commissioner to withhold her consent to the requested extension of the Port Terminal Initial Sale Period, and it is appropriate for the Tribunal to approve such an extension pending the final disposition of the Section 106 Application, pursuant to section 49 of the Consent Agreement.

## **PART II – THE FACTS**

4. The facts relevant to the Section 106 Application are set out in detail in the SGMF. A summary of the facts particularly relevant to this motion is set out below. These facts are derived from the SGMF and the Affidavit of Mr. MacKay, sworn August 11, 2005.

### **A. The Background to the Consent Agreement**

5. On November 1, 2001, UGG acquired Agricore Cooperative Limited ("Agricore") (the "Acquisition"). Since the closing of the Acquisition, UGG and Agricore have been carrying on business as "Agricore United". Accordingly, the Applicant will hereinafter be referred to as Agricore United.
6. On January 2, 2002, the Commissioner filed an application with the Tribunal pursuant to section 92 of the *Competition Act* (the "Act") alleging that the Acquisition would likely prevent or lessen competition substantially in the market for the provision of port

terminal grain handling services in the Port of Vancouver (the "Section 92 Application"), and requested that the Tribunal issue an order requiring that Agricore United divest all or part of a port terminal in the Port of Vancouver.

7. At the same time that the Section 92 Application was filed with the Tribunal, the Commissioner also filed a notice of application requesting the issuance of an interim consent order pursuant to section 104 of the Act (the "Section 104 Application"), which the Tribunal issued on January 14, 2002 (the "Interim Consent Order").
8. The Interim Consent Order required Agricore United to, among other things, maintain the UGG Terminal and the Pacific Complex (as defined in the Consent Agreement) (each a "Port Terminal" and collectively the "Port Terminals"), honour all existing contracts for the handling of grain for Independent Grain Companies (as defined in the Consent Agreement) and offer to handle for Independent Grain Companies a minimum of 125,000 tonnes of grain per month (1.5 million tonnes per year), by way of contracts, through the Port Terminals or, at no additional cost to the Independent Grain Companies, through terminal arrangements entered into with other terminal operators.
9. **[CONFIDENTIAL]**, the Commissioner brought a motion (uncontested by Agricore United) to resolve, among other things, whether the Acquisition would likely result in a substantial lessening of competition, as alleged by the Commissioner (the "SLC Motion").
10. On September 12, 2002, pursuant to the uncontested SLC Motion, the Tribunal found that the Acquisition would likely result in a substantial lessening of competition in the provision of port terminal grain handling services in the Port of Vancouver. The Tribunal also found that the divestiture of either the UGG Terminal or Agricore United's interest in the Pacific Complex would remedy the substantial lessening of competition, as would the divestiture of that portion of the Pacific Complex known as the Pacific 1 Terminal, either alone or with a portion of the Annex component of the Pacific Complex, provided, in the case of a divestiture of only part of the Pacific Complex, that such a divestiture satisfied certain criteria previously agreed to by Agricore United and the Commissioner.

11. The Tribunal left for determination at a later date the one unresolved issue between the parties, being whether the divestiture of the Pacific 1 Terminal, either alone or with a portion of the Annex component of the Pacific Complex, would satisfy such criteria. The hearing on this issue was scheduled to commence on October 21, 2002. However, on October 17, 2002, the Commissioner and Agricore United resolved the outstanding issue and executed and filed the Consent Agreement, thereby terminating the Section 92 Application.

**B. The Consent Agreement**

12. The Consent Agreement includes both interim access and divestiture provisions.

Interim Access Provisions

13. Until such time as a Port Terminal has been divested, Agricore United is required to honour all existing contracts for the handling of grain for Independent Grain Companies in the Port of Vancouver and offer to handle for Independent Grain Companies a minimum of 125,000 tonnes of grain per month (1.5 million tonnes per year), by way of contracts, through the Port Terminals or, at no additional cost to the Independent Grain Companies, through terminal arrangements entered into with other port terminal operators in the Port of Vancouver. This is in addition to Agricore United's obligations to receive grain under subsection 69(1) of the *Canada Grain Act* and the power of the Canadian Grain Commission (the "CGC") to order a terminal operator to receive grain under subsection 69(2) of the *Canada Grain Act* (described in detail in the SGMF).
14. The Consent Agreement also provides that new contracts between Agricore United and Independent Grain Companies are to be based on reasonable commercial terms consistent with past practice. Prices for the handling of Independent Grain Companies' grain under any new contracts are to be based on Agricore United's tariffs as filed with the CGC. Diversion premiums negotiated with Independent Grain Companies are to be kept confidential, but in any event shall be at least \$2 per tonne. Any non-Canadian Wheat Board ("CWB Monopoly") tariff increase or any diversion premium decrease (CWB

Monopoly or non-CWB Monopoly grain) from these initial levels must be commercially reasonable.

15. The access provisions in the Consent Agreement have now been in place for almost three years. Under these access provisions and prevailing market conditions, Independent Grain Companies have not encountered any difficulty in securing access to port terminals in the Port of Vancouver at competitive rates. Agricore United has continued to honour all existing contracts for the handling of grain for Independent Grain Companies. Agricore United has also entered into [CONFIDENTIAL] new handling agreements with Independent Grain Companies since the Consent Agreement was executed. [CONFIDENTIAL].
16. [CONFIDENTIAL].
17. Similarly, since the Consent Agreement was executed, Agricore United has renewed its handling agreements with [CONFIDENTIAL], while Cascadia Terminal, which is owned equally by Agricore United and Cargill Limited, has renewed its handling agreement with [CONFIDENTIAL].
18. In addition, since the Consent Agreement was executed, Agricore United has not received or become aware of any complaints from any Independent Grain Companies with respect to price, tariffs, diversion premiums or any other terms of access included in the Consent Agreement.

*Divestiture Provisions*

19. The Consent Agreement requires that Agricore United offer to divest, at its option, either the UGG Terminal or its interest in the Pacific Complex within the Port Terminal Initial Sale Period. If Agricore United has not divested a Port Terminal within the Port Terminal Initial Sale Period, a Trustee (as defined in the Consent Agreement) will be appointed to seek to implement a divestiture pursuant to the Consent Agreement.
20. The Consent Agreement also provides that Agricore United is permitted to elect whether the Trustee will (if necessary) be entitled to divest the UGG Terminal or Agricore

United's interest in the Pacific Complex. On August 31, 2004, Agricore United elected that the Trustee would (if necessary) be entitled to divest the UGG Terminal.

21. In the absence of any extensions, the Port Terminal Initial Sale Period would have expired on October 31, 2004. The Port Terminal Initial Sale Period was, however, extended to December 30, 2004 [CONFIDENTIAL]. In addition, Agricore United and the Commissioner mutually agreed to a number of additional extensions, pursuant to paragraph 48 of the Consent Agreement, [CONFIDENTIAL]. The Port Terminal Initial Sale Period is now currently scheduled to expire at 12:00 noon (Winnipeg time) on August 15, 2005 and the Commissioner has not agreed to any further extensions.
22. The Trustee would be required to implement a divestiture at the price and on the terms and conditions most favourable to Agricore United then reasonably available, in the opinion of the Trustee, [CONFIDENTIAL].
23. Among other conditions, divestiture of a Port Terminal, whether by Agricore United or the Trustee, must be completed on two terms. First, the divestiture must be by way of disposition of the Port Terminal for use as a going concern. Second, the divestiture must be to one or more arm's length purchasers who will use the Port Terminal for the same purpose it was used prior to November 1, 2001 and who must have the managerial, operational and financial capability to operate the Port Terminal for such purpose.
24. [CONFIDENTIAL].

Purpose of Divestiture

25. The materials filed by the Commissioner in connection with the Section 92 Application, the Section 104 Application, and the SLC Motion clearly indicate that the purpose of any divestiture of a Port Terminal by Agricore United pursuant to the Consent Agreement was to provide Independent Grain Companies with access to port terminal grain handling services in the Port of Vancouver at competitive rates. For example, in paragraph 38 of the Section 92 SGMF, the Commissioner stated that:

[f]or [Independent Grain Companies] to compete effectively with Integrated [Grain Companies] ... it is essential that they have regular and predictable access to a port terminal.... [A]ccess is provided on an individual shipment basis in the form of terminal authorization. A terminal authorization must be obtained before a tender is submitted to the [CWB Monopoly] or, in respect of non-tendered grain, before the railways will provide rail cars for loading at a primary elevator. In order to compete, it is ... important that [Independent Grain Companies] have access to all the revenue streams associated with grain handling, such as ... terminal diversion premiums.

**C. Agricore United's Divestiture Efforts**

26. As outlined in detail in the SGMF, Agricore United has made diligent and good faith efforts to divest a Port Terminal. [CONFIDENTIAL].
27. [CONFIDENTIAL].
28. The fact that Agricore United was offering to divest the UGG Terminal pursuant to the Consent Agreement was widely-known, including throughout the Western Canadian grain handling industry. Newspaper articles discussing the requirement for a divestiture pursuant to the Consent Agreement appeared, for example, in *The Western Producer* and in the *Manitoba Co-operator* and a public version of the Consent Agreement itself was posted on the Tribunal's website. As a result of this publicity, some prospective purchasers of the UGG Terminal (other than those noted above) contacted Agricore United directly.
29. Expressions of interest were received from [CONFIDENTIAL]. Agricore United subsequently attempted to negotiate a divestiture of the UGG Terminal with [CONFIDENTIAL].
30. Agricore United understands that certain prospective purchasers that it identified opted not to submit expressions of interest for the UGG Terminal either because they concluded that they would not be able to attract sufficient volumes of grain to ensure the ongoing viability of the facility.



31. Terminal One represents a consortium of five farmer-owned inland grain terminals operating in Saskatchewan. Each of these companies is an Independent Grain Company and a member of ITAC.
32. [CONFIDENTIAL].
33. [CONFIDENTIAL].
34. [CONFIDENTIAL].
35. [CONFIDENTIAL].
36. [CONFIDENTIAL].
37. [CONFIDENTIAL].
38. [CONFIDENTIAL].
39. [CONFIDENTIAL].
40. [CONFIDENTIAL].

**D. The Section 106 Application**

41. On August 11, 2005, Agricore United brought the Section 106 Application for an order rescinding the Consent Agreement and related relief.
42. As discussed in more detail in the SGMF, the circumstances that led to the making of the Consent Agreement have changed significantly. The amount of uncommitted grain shipped to the Port of Vancouver by Independent Grain Companies in Western Canada ("independent grain") that would be available to a prospective purchaser of the UGG Terminal has diminished dramatically as a result of 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 since the Consent Agreement was executed. It has thus become clear both that a prospective purchaser will not be able to secure enough independent grain to operate the UGG  
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Terminal as a grain terminal on a sustainable basis and that Independent Grain Companies have been able to secure long-term access to the Port of Vancouver pursuant to such handling agreements.

43. The significantly reduced volume of uncommitted independent grain demonstrates both the absence of any continuing basis for a divestiture to provide an alternative port terminal for Independent Grain Companies in the Port of Vancouver and the inability to make an effective divestiture pursuant to the Consent Agreement under current market conditions. It also demonstrates that Independent Grain Companies continue to have access to port terminal grain handling services in the Port of Vancouver at competitive rates. In this regard, every Independent Grain Company that ships grain to the Port of Vancouver has or will have a port terminal access contract covering at least the next crop year and in some cases many years, and most independent grain is being delivered under handling agreements with terms [CONFIDENTIAL]. (A crop year runs from August 1 to July 31 of the following calendar year.)
44. In the circumstances that now exist, Agricore United would not have entered into the Consent Agreement or any consent agreement contemplating the divestiture of a Port Terminal. Moreover, given the significantly reduced volume of uncommitted independent grain shipped through the Port of Vancouver as a result of subsequent events, and the adverse implications that such reduced volume has for the prospects for an effective divestiture, Agricore United submits that the Commissioner also would not, on any reasonable basis, have entered into a consent agreement contemplating the divestiture of a Port Terminal.
45. On August 11, 2005, Agricore United requested, pursuant to paragraph 48 of the Consent Agreement, that the Commissioner agree to an extension of the Port Terminal Initial Sale Period pending the disposition of the Section 106 Application.
46. The Commissioner refused to grant her consent. Accordingly, Agricore United seeks interim relief in the form of the Tribunal's approval of an extension of the Port Terminal Initial Sale Period pending the final determination of the Section 106 Application, pursuant to paragraph 49 of the Consent Agreement.

**PART III – SUBMISSIONS ON REQUEST FOR INTERIM RELIEF**

47. As noted above, the Port Terminal Initial Sale Period is currently scheduled to expire at 12:00 noon (Winnipeg time) on August 15, 2005. Upon the expiry of the Port Terminal Initial Sale period, a Trustee will be appointed to effect a divestiture of the UGG Terminal in accordance with the requirements of the Consent Agreement.

48. The Consent Agreement specifically provides for the extension of any time period specified in the Consent Agreement. In particular, paragraph 48 of the Consent Agreement provides:

The Commissioner and Agricore United may, by way of mutual agreement, extend any of the time periods applicable herein.

49. Further, the Consent Agreement provides the Tribunal with jurisdiction to approve an extension of time unreasonably refused by the Commissioner. Paragraph 49 provides:

If the Commissioner's approval is sought pursuant to this Agreement and such approval is not granted, or if a decision of the Commissioner is unreasonably delayed or withheld, Agricore United may apply to the Competition Tribunal for approval.

50. In addition, the Commissioner has a common law and statutory duty to act reasonably, fairly and in good faith in making any decision or exercising any authority under the Consent Agreement or in response to the Section 106 Application. This duty includes the obligation to not act in a way that eviscerates or defeats the very objectives of the Consent Agreement. In fact, the Tribunal has recently confirmed that the Commissioner is required to remain sensitive to and react to changed market conditions throughout the duration of a consent agreement, including market conditions that eradicate the very reason for entering into the agreement.

*RONA Inc. v. The Commissioner of Competition (2005)*, Comp. Trib. 18; *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 13 B.L.R. (3<sup>rd</sup>) 310 (Alta. C.A.); *Gateway Realty Ltd. v. Arton Holdings Ltd* (1991), 106 N.S.R. (2d) 180 (N.S.S.C.), appeal dismissed (1992), 112 N.S.R. (2d) 180; *Peel Condominium Corp. v. Cam-Valley Homes Ltd.* (2001), 53 O.R. (3d) 2 (C.A.); *Transamerica Life Inc. v. ING Canada Inc* (2003), 68 O.R. (3d) 457 (C.A.); J. D. McCamus, "Abuse of Discretion,

Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance" (2004), 29 Advocates' Quarterly 72.

51. Agricore United submits that, in the circumstances, the Commissioner acted unreasonably, unfairly and contrary to her obligations when she withheld her consent to the request to extend the Port Terminal Initial Sale Period pending the determination of the Section 106 Application.
52. The considerable merits of Agricore United's Section 106 application should be considered when assessing this motion for interim relief. The facts set out in the SGMF clearly satisfy the test for rescinding a consent agreement established recently by the Tribunal in *RONA Inc. v. The Commissioner of Competition*. In this regard, for the reasons discussed above, the circumstances that led to the making of the Consent Agreement have changed significantly since the Consent Agreement was executed in October 2002. Moreover, in the circumstances that now exist, Agricore United would not have entered into the Consent Agreement. Similarly, Agricore United submits that, in the circumstances that now exist, the Commissioner also would not, on any reasonable basis, have entered into the Consent Agreement.
53. The merits of Agricore United's Section 106 Application are reinforced by the fact that the Commissioner has, at least to date, not challenged the proposed SWP/JRI JV, which is effectively a merger of their respective grain handling terminals in the Port of Vancouver. The proposed SWP/JRI JV was announced on April 6, 2005 and apparently at least partially implemented in July 2005 without objection by the Commissioner. Any further restraints on the ability of SWP and JRI to complete the implementation of the proposed SWP/JRI JV pursuant to the SWP/JRI Consent Interim Agreement are currently scheduled to expire on September 3, 2005. Failure by the Commissioner to challenge the proposed SWP/JRI JV would confirm a lack of current grounds to require a divestiture in connection with the Acquisition as the proposed SWP/JRI JV represents further consolidation in the same market.
54. If the Consent Agreement is rescinded, the Trustee will have no status or power to perform any functions under the Consent Agreement, including to sell the UGG  
For #: 1562376.4

Terminal. Given the strength of Agricore United's case for rescission of the Consent Agreement, it is unreasonable for the Commissioner not to agree to extend the Port Terminal Initial Sale Period pending the final determination of the Section 106 Application to avoid the appointment of a trustee whose functions, duties and powers will be eliminated if Agricore United is successful on the Section 106 Application.

55. Moreover, allowing the Trustee to be appointed at a time when his very legitimacy under the Consent Agreement and his power to sell the UGG Terminal is subject to serious challenge, and at best is uncertain, will discourage potential purchasers. [CONFIDENTIAL]. While Agricore United seeks an expedited schedule for the disposition of the Section 106 Application, a final determination by the Tribunal may still not occur until after the Trustee Sale Period has expired, at which time the Trustee would have no authority to make a sale in any event.

56. [CONFIDENTIAL].

57. Even if the Section 106 Application is unsuccessful, approval to extend the Port Terminal Initial Sale Period pending the final determination of the Section 106 Application would merely delay the appointment of the Trustee until that time. No prejudice to any of the Commissioner, Independent Grain Companies or the public interest would flow from such a delay in the appointment of the Trustee. Agricore United would continue to fulfill its obligations under the Consent Agreement. Agricore United's best information is that every Independent Grain Company that ships grain to the Port of Vancouver has or will have a port terminal access contract or handling agreement covering at least the next crop year ending July 31, 2006 and in some cases many years. Moreover, the access provisions included in the Consent Agreement have been in place for almost three years and have addressed any possible concerns that the Commissioner may have regarding access to port terminals in the Port of Vancouver for the reasonably foreseeable future. In addition, subsections 69(1) and (2) of the *Canada Grain Act* require that port terminal operators receive all grain shipped to the Port of Vancouver, without discrimination, subject to certain exceptions and conditions.

58. Further, in the absence of approval to extend the Port Terminal Initial Sale Period pending the final determination of the Section 106 Application, Agricore United would very likely incur significant additional and unnecessary costs following the appointment of the Trustee, costs that will prove unnecessary if the application is successful. For example, Agricore United is required by paragraph 20 of the Consent Agreement to pay all expenses reasonably and properly incurred by the Trustee in the course of a Trustee sale and the Trustee may retain financial, legal and other professional advisors, including investment bankers, pursuant to paragraph 24 of the Consent Agreement.
59. The Commissioner has previously consented to a number of extensions to the Port Terminal Initial Sale Period. The Commissioner's refusal to agree to further extend the Port Terminal Initial Sale Period pending the Section 106 Application is surprising, unjustified and contrary to her obligation to remain sensitive to changing market circumstances throughout the life of a consent agreement.
60. In light of the foregoing, there was no reasonable or fair basis for the Commissioner to have withheld her consent under paragraph 48 of the Consent Agreement and the Tribunal should order the approval of the requested extension of the Port Terminal Initial Sale Period pursuant to paragraph 49 of the Consent Agreement.

**PART IV – RELIEF SOUGHT**

61. The Applicant requests that, in addition to costs, the Tribunal grant the Applicant's motion and issue the substantive relief requested in the Applicant's Notice of Motion, namely:
- (a) approval pursuant to paragraph 49 of the Consent Agreement extending the Port Terminal Initial Sale Period from 12:00 noon (Winnipeg time) on August 15, 2005 to a date following the final determination of the Section 106 Application; and
  - (b) an expedited schedule for the Section 106 Application.

ALL OF WHICH IS RESPECTIVELY SUBMITTED.

**DATED AT TORONTO**, this 12th day of August 2005.

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**SCHEDULE "A" – LIST OF AUTHORITIES**

*RONA Inc. v. The Commissioner of Competition (2005)*, Comp. Trib. 18.

*Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 13 B.L.R. (3<sup>rd</sup>) 310 (Alta. C.A.).

*Gateway Realty Ltd. v. Arton Holdings Ltd* (1991), 106 N.S.R. (2d) 180 (N.S.S.C.), appeal dismissed (1992), 112 N.S.R. (2d) 180.

*Peel Condominium Corp. v. Cam-Valley Homes Ltd.* (2001), 53 O.R. (3d) 2 (C.A.).

*Transamerica Life Inc. v. ING Canada Inc* (2003), 68 O.R. (3d) 457 (C.A.).

J. D. McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance" (2004), 29 *Advocates' Quarterly* 72.