

**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:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  FILED / PRODUIT CT-2002-001 October 24, 2005  Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 0132f

**UNITED GRAIN GROWERS LIMITED**

Applicant

- and -

**THE COMMISSIONER OF COMPETITION**

Respondent

---

**REPLY AFFIDAVIT OF STANLEY MURDOCH MACKAY**

---

I, STANLEY MURDOCH MACKAY, of the City of Winnipeg, in the Province of Manitoba, MAKE OATH AND SAY AS FOLLOWS:

- I am the Vice President, Operations at Agricore United, and have held that position since June 2005. Prior to that time, I served as Vice President, Terminal Services at Agricore United, a position that I held since September 1985. As such, I have personal knowledge of the matters referred to in this affidavit, except where such matters are based on information and belief, in which case I verily believe them to be true.

2. I swear this affidavit in reply to various allegations made in the Commissioner's Responding Memorandum of Argument (the "Memorandum") and a redacted version of the Confidential Affidavit of David Ouellet (the "Ouellet Affidavit"), each of which was filed by the Commissioner with the Competition Tribunal (the "Tribunal") in response to Agricore United's Motion for Interim Relief.

3. Capitalized terms not otherwise defined in this affidavit have the meanings ascribed to them in the Statement of Grounds and Material Facts filed in connection with Agricore United's proceeding under section 106 of the *Competition Act* (the "SGMF").

#### **INTRODUCTION**

4. In response to the Motion for Interim Relief, the Commissioner makes three broad allegations. She alleges that:

- (a) in light of the lengthy period of time given to Agricore United to divest a Port Terminal and its failure to do so, Agricore United has not made diligent efforts to complete a sale;
- (b) Agricore United intentionally drew out the Port Terminal Initial Sale Period, which frustrated the purpose of the Consent Agreement; and
- (c) Agricore United misled the Commissioner as to the true status of its efforts to divest a Port Terminal pursuant to the Consent Agreement.

5. A careful review of the facts surrounding Agricore United's efforts to divest a Port Terminal pursuant to the Consent Agreement demonstrates that the Commissioner's allegations have no merit. On the contrary, that review establishes that:

- (a) despite very poor and difficult market conditions for the sale of a Port Terminal, Agricore United has made diligent and good faith efforts to divest a Port Terminal since the Consent Agreement was executed in October 2002, including pursuing multiple offers (or potential offers) simultaneously;
- (b) extensions of the Port Terminal Initial Sale Period were always requested for valid and legitimate reasons, frequently as a result of circumstances entirely beyond Agricore United's control and always with the expectation that a divestiture of the UGG Terminal was possible; and
- (c) by virtue of the long-term port terminal handling agreements secured by Independent Grain Companies, the access provisions contained in the Consent Agreement and the statutory protections provided by the *Canada Grain Act*, no prejudice to farmers, Independent Grain Companies or the public interest would flow from the requested extension of the Port Terminal Initial Sale Period. For the same reasons, the requested extension would not frustrate the objective of the Consent Agreement, namely ensuring that Independent Grain Companies will have access to port terminal grain handling services in the Port of Vancouver at competitive rates, including diversion premiums.

**LENGTH OF THE PORT TERMINAL INITIAL SALE PERIOD**

6. At paragraph 12 of her Memorandum, the Commissioner states that:

"... [b]y August 10, 2005, when counsel for the Commissioner indicated that the Commissioner was not prepared to agree to yet another extension, there had been at least 10 extensions, totalling 10½ months, added to what was already a lengthy [Port Terminal Initial Sale Period] of over two years. By August 15, 2005, approximately 34 months of opportunity to sell the Port Terminal had passed." [emphasis added]

7. The Commissioner fails to explain why it was that the parties agreed to a Port Terminal Initial Sale Period of over two years or to place Agricore United's efforts to divest in the difficult market conditions which have existed since October 2002. Without this necessary context, the Commissioner's reference to "approximately 34 months of opportunity to sell the Port Terminal" is misleading.

8. At the time the Consent Agreement was executed in October 2002, Agricore United and the Commissioner both recognized that, in light of the drought during the summer of 2002 that severely reduced grain shipments to the Port of Vancouver during the remainder of the 2001/2002 crop year and which was expected to severely reduce grain shipments to the Port of Vancouver during the 2002/2003 crop year, and the ongoing lockout by port terminal operators in the Port of Vancouver (which started in August 2002 and continued until December 2002), it would be very difficult for Agricore United to attract potential purchasers, let alone sell a Port Terminal within the next crop year (i.e., the 2002/2003 crop year). Agricore United and the Commissioner also both expected that Agricore United would have a much better chance of selling a Port Terminal during the following crop year (i.e., the 2003/2004 crop year), assuming that there was a more typical harvest and a more regular flow of grain through the Port of Vancouver. (In fact, as circumstances developed, and as discussed below, the Western Canadian grain industry was hit with continued hot, dry weather during the summer of 2003, which adversely impacted total grain production, and with an early frost and unusually wet conditions during the late summer and fall of 2004, which adversely impacted the quality of the grain harvested.)

9. As a result of these circumstances, Agricore United and the Commissioner agreed to a two-year divestiture period, with the expectation that market conditions would significantly

improve over that time and on the understanding that Agricore United would not be obliged to press for the sale of a Port Terminal during the first year of the Port Terminal Initial Sale Period. The premise underlying the two-year sale period was that a purchaser of a Port Terminal would require sufficient grain originations in order to operate the Port Terminal on a viable and competitive basis.

10. Notwithstanding the parties' expectations in October 2002, conditions did not improve over the following two years. Instead, the drought experienced on the Prairies during the summer of 2002 continued during the summer of 2003. While the volume of grain harvested by Prairie farmers during 2003 was higher than the volume of grain harvested during 2002, the total grain available for export did not increase dramatically due to the low carry-over of grain inventory in Western Canada from the previous year and the desire to bring the carry-over back to normal levels for the next crop year, with the result that the volume of grain shipped through the Port of Vancouver during 2003/2004 remained well below historical levels. Similarly, the volume of grain shipped through the Port of Vancouver during the 2004/2005 crop year was also well below historical levels as a result of an early frost and wet weather conditions experienced on some parts of the Prairies in the late summer and fall of 2004, which affected the quality of the grain harvested. In fact, according to the Canadian Grain Commission, the port terminals in the Port of Vancouver handled an average of approximately 11.847 million tonnes of grain per year during the 1991/1992 to 2001/2002 crop years. Throughput fell to approximately 2.958 million tonnes in 2002/2003 (the year of the lockout referred to above), 9.240 million tonnes in 2003/2004 and 9.617 million tonnes in 2004/2005. As a result of this reduced throughput, the port terminals in the Port of Vancouver had significant excess capacity during the two-year

divestiture period. It was in the context of these very difficult market conditions that Agricore United pursued its efforts to divest a Port Terminal.

**EFFORTS TO DIVEST A PORT TERMINAL AND RELATED EXTENSIONS**

11. After the Consent Agreement was executed in October 2002, Agricore United had discussions with representatives of [CONFIDENTIAL] to determine whether any of these companies would be interested in purchasing one of the Port Terminals pursuant to the Consent Agreement. Each of these companies subsequently indicated that it was not interested in purchasing a Port Terminal at that time.

12. In March 2003, Agricore United began contacting merchant bankers, soliciting proposals with respect to the sale of a Port Terminal. These contacts ultimately led Agricore United to retain Scotia Capital Inc. ("Scotia Capital") on October 1, 2003. Agricore United did not retain Scotia Capital prior to this date because, as recognized by both Agricore United and the Commissioner, it would be very difficult to attract potential purchasers, let alone sell a Port Terminal, during the 2002/2003 crop year. A copy of the retainer letter between Agricore United and Scotia Capital is at Tab 1 of the Document Brief attached hereto as Exhibit "A".

13. By letter dated April 8, 2003, [CONFIDENTIAL], advised Brian Hayward, the CEO of Agricore United, that [CONFIDENTIAL] was interested in acquiring either the UGG Terminal or the Pacific Complex. [CONFIDENTIAL] also requested that Agricore United advise [CONFIDENTIAL] of the details associated with the divestiture process, including the anticipated sale and closing dates. [CONFIDENTIAL] letter to Mr. Hayward dated April 8, 2003 is discussed at paragraph 15 of the Ouellet Affidavit. A copy of [CONFIDENTIAL] letter to Mr. Hayward dated April 8, 2003 is at Tab 2 of the Document Brief attached hereto as Exhibit "A".

14. Chris Martin, Vice President, Corporate Affairs and General Counsel at Agricore United, acknowledged [CONFIDENTIAL] expression of interest in a letter to [CONFIDENTIAL] dated April 15, 2003. Mr. Martin also stated that Agricore United would keep [CONFIDENTIAL] "interest in mind as [it proceeded] in dealing with this matter". An unexecuted copy of Mr. Martin's letter to [CONFIDENTIAL] dated April 15, 2003 is at Tab 3 of the Document Brief attached hereto as Exhibit "A".

15. By letter dated August 5, 2003, [CONFIDENTIAL], advised Jim Wilson, the former Chairman of Agricore United, that [CONFIDENTIAL] would be very interested in discussing the possibility of purchasing a Port Terminal pursuant to the Consent Agreement. [CONFIDENTIAL] letter to Mr. Wilson dated August 5, 2003 is discussed at paragraph 17 of the Ouellet Affidavit. A copy of [CONFIDENTIAL] letter to Mr. Wilson dated August 5, 2003 is at Tab 4 of the Document Brief attached hereto as Exhibit "A".

16. Mr. Martin acknowledged [CONFIDENTIAL] expression of interest in a letter to [CONFIDENTIAL] dated August 14, 2003. Mr. Martin also indicated that "[t]his matter remains under review and we will advise in due course". An unexecuted copy of Mr. Martin's letter to [CONFIDENTIAL] dated August 14, 2003 is at Tab 5 of the Document Brief attached hereto as Exhibit "A".

17. Although the names of [CONFIDENTIAL] are blacked out in paragraphs 15 and 17 of the redacted version of the Ouellet Affidavit, it is clear to me, based on that Affidavit as well as my own personal knowledge and experience in the industry, that Mr. Ouellet was referring to [CONFIDENTIAL] in paragraph 15 of his Affidavit and [CONFIDENTIAL] in paragraph 17 of his Affidavit.

18. At paragraph 15 of his Affidavit, Mr. Ouellet states that "a copy of an April 8, 2003 letter to [Agricore United's] Chief Executive Officer in which they express an interest in acquiring either the UGG or PEL terminal and asked for details about the sale process as well as a tour of the facilities" was attached to the letter received by the representative of the Commissioner. The only letter that Mr. Hayward received on April 8, 2003 expressing an interest in acquiring a Port Terminal came from [CONFIDENTIAL].

19. Similarly, in paragraph 17 of his Affidavit, Mr. Ouellet refers to a letter to Mr. Wilson, the former Chairman of Agricore United, dated August 5, 2003, in which the writer expressed an interest in purchasing a Port Terminal. The only letter that Mr. Wilson received on August 5, 2003 expressing an interest in acquiring a Port Terminal came from [CONFIDENTIAL].

20. In his Affidavit, Mr. Ouellet implies that Agricore United was unresponsive to the expressions of interest from [CONFIDENTIAL]. For example, at paragraph 15 of his Affidavit, Mr. Ouellet states that, "[o]n April 22, 2003, [CONFIDENTIAL] wrote to a representative of the Commissioner advising that [it] had expressed an interest in the terminal acquisition in Vancouver, but had not yet heard back from [Agricore United]". Similarly, at paragraph 17 of his Affidavit, Mr. Ouellet states that, according to [CONFIDENTIAL] letter to Mr. Wilson dated August 5, 2003, [CONFIDENTIAL] "representative [had] spoken to Mr. Christopher Martin of [Agricore United] on three occasions earlier in the year and as of June [2003] was being advised that [Agricore United] was still not in a position to provide divestiture details".

21. The suggestion that Agricore United was unresponsive to potential bidders is incorrect. In this regard, as noted above, Mr. Martin did acknowledge [CONFIDENTIAL] expression of interest in a letter to [CONFIDENTIAL] dated April 15, 2003. Also, Mr. Martin's response must be viewed in the proper context. At that point in time Agricore United had not yet



completed the complex processes of selecting an appropriate merchant banker to assist in the sale or of determining which Port Terminal it should divest. In any event, any alleged unresponsiveness is of no moment. As discussed in more detail below, both [CONFIDENTIAL] participated fully in the divestiture process and subsequently made offers to purchase the UGG Terminal. Moreover, as discussed in more detail in paragraph 9 above, it was understood that Agricore United would not be obliged to press for the sale of a Port Terminal during the first year of the Port Terminal Initial Sale Period.

22. After retaining Scotia Capital on October 1, 2003, Agricore United made a decision to focus its efforts on divesting the UGG Terminal. Thereafter, Agricore United and Scotia Capital prepared a Confidential Information Memorandum, which was provided to a number of prospective purchasers in late October 2003. A list of these prospective purchasers is set out at paragraph 53 of the SGMF, a copy of which is attached as Exhibit "A" to my Affidavit sworn August 11, 2005. A copy of the Confidential Information Memorandum is at Tab 10 of Exhibit "B" to my Affidavit sworn August 11, 2005.

23. Expressions of interest to purchase the UGG Terminal were subsequently provided to Scotia Capital by each of [CONFIDENTIAL]. Copies of the expressions of interest submitted by each of [CONFIDENTIAL] are at Tabs 6 to 9, respectively, of the Document Brief attached hereto as Exhibit "A".

24. Agricore United decided not to pursue negotiations with either [CONFIDENTIAL]. In this regard, in a letter to Christopher Margison, Agricore United's counsel, dated April 30, 2004 (which Mr. Ouellet does not refer to), counsel for the Commissioner stated that [CONFIDENTIAL] "is offering what appears to be a very low price for the facility", and questioned whether [CONFIDENTIAL] would satisfy the requirements of the Consent

Agreement. Specifically, counsel for the Commissioner was concerned about the fact that [CONFIDENTIAL] was not an established grain handling company and that it clearly intended to rely on Agricore United's existing management expertise to operate the UGG Terminal. A copy of the letter dated April 30, 2004 is at Tab 10 of the Document Brief attached hereto as Exhibit "A".

25. Agricore United entered into discussions with each of [CONFIDENTIAL]. Following these discussions, [CONFIDENTIAL] submitted a revised expression of interest to Scotia Capital on May 14, 2004. Pursuant to this expression of interest, [CONFIDENTIAL] offered to acquire the UGG Terminal for [CONFIDENTIAL] million. While not as low as the purchase prices that had been offered by each of [CONFIDENTIAL], the purchase prices offered by each of [CONFIDENTIAL] were significantly less than the market value of the UGG Terminal, which an independent appraiser has indicated is approximately [CONFIDENTIAL] million, and significantly less than the cost of building a new terminal, which the Commissioner had indicated (in paragraph 62 of the Statement of Grounds and Material Facts filed in connection with the Section 92 Application) would be \$100 million to \$300 million, depending on its size. The Prince Rupert terminal, for example, was completed in 1986 at a cost of about [CONFIDENTIAL] million. Copies of the revised expressions of interest submitted by [CONFIDENTIAL] are at Tabs 11 and 12, respectively, of the Document Brief attached hereto as Exhibit "A".

26. Following receipt and review of these revised expressions of interest, Agricore United opted to deal with [CONFIDENTIAL]. Over the course of the next four months, Agricore United and [CONFIDENTIAL] spent a significant amount of time, effort and money attempting to negotiate an agreement with respect to the proposed sale of the UGG Terminal. Agricore

United also engaged in periodic discussions with [CONFIDENTIAL] over this same time period.

27. [CONFIDENTIAL] provided a revised expression of interest to purchase the UGG Terminal to Scotia Capital on October 27, 2004. A copy of [CONFIDENTIAL] revised expression of interest is at Tab 13 of the Document Brief attached hereto as Exhibit "A". This expression of interest was a significant improvement over [CONFIDENTIAL] first proposal. Pursuant to this expression of interest, [CONFIDENTIAL] offered to acquire the UGG Terminal for [CONFIDENTIAL] million, and [CONFIDENTIAL]. Agricore United signed back this expression of interest on October 27, 2004. Agricore United informed [CONFIDENTIAL] that it wanted to move forward with the proposed transaction as quickly as possible.

28. Agricore United's counsel provided counsel for the Commissioner with a copy of the executed expression of interest on October 27, 2004. In his letter to counsel for the Commissioner, Mr. Margison confirmed his understanding that, in light of the executed expression of interest, [CONFIDENTIAL]. He also indicated that [CONFIDENTIAL] expression of interest contemplated that the proposed transaction would close on or before [CONFIDENTIAL] and confirmed his understanding that the Commissioner had agreed, pursuant to paragraph 48 of the Consent Agreement, to extend the Port Terminal Initial Sale Period [CONFIDENTIAL] to January 14, 2005. Together, these two extensions represent the first extension referred to in the Ouellet Affidavit. A copy of the letter to counsel for the Commissioner dated October 27, 2004 is at Tab 14 of the Document Brief attached hereto as Exhibit "A".

29. At paragraph 14 of her Memorandum, the Commissioner points to this extension as one example of Agricore United claiming to be close to completing a deal just as the Port Terminal Initial Sale Period was about to end. Specifically, the Commissioner states that:

"On October 27, 2004, four days before the deadline of the [Port Terminal Initial Sale Period], Agricore United provided the Commissioner with a copy of a letter of intent between Agricore United and [CONFIDENTIAL] ... regarding the sale of the Agricore United terminal. The indication was that a deal would close on January 14, [2005]."

30. The Commissioner fails to disclose that Agricore United did not receive the expression of interest until October 27, 2004 and, as such, was not in a position to request an extension until that date. The Commissioner also fails to disclose that it was [CONFIDENTIAL] which proposed to close the proposed transaction on or before January 14, 2005.

31. Further negotiations took place between Agricore United and [CONFIDENTIAL] following the execution of the expression of interest. During a meeting in November 2004, Paterson Grain demanded that Agricore United [CONFIDENTIAL]. Agricore United would not agree to [CONFIDENTIAL]. In light of [CONFIDENTIAL] actions at this meeting and other earlier dealings with [CONFIDENTIAL], I and other representatives of Agricore United believed that [CONFIDENTIAL] was not genuinely interested in acquiring the UGG Terminal at that time. Discussions between Agricore United and [CONFIDENTIAL] with respect to a proposed sale of the UGG Terminal terminated approximately two weeks later.

32. Agricore United immediately resumed active discussions with [CONFIDENTIAL]. These discussions ultimately led Agricore United and [CONFIDENTIAL] to negotiate and settle on the terms of an asset purchase agreement with respect to the sale of the UGG Terminal. This is confirmed in a letter from [CONFIDENTIAL], to me dated January 7, 2005.

[CONFIDENTIAL]. I counter-signed [CONFIDENTIAL] letter on January 12, 2005, thereby confirming that Agricore United and [CONFIDENTIAL] had settled on the terms of an asset purchase agreement with respect to the UGG Terminal and that [CONFIDENTIAL]. A copy of [CONFIDENTIAL] letter dated January 7, 2005 is at Tab 15 of the Document Brief attached hereto as Exhibit "A".

33. Mr. Margison, Agricore United's counsel, e-mailed a copy of [CONFIDENTIAL] letter as signed by me to counsel for the Commissioner on January 12, 2005. Following receipt of this e-mail, the Commissioner agreed to further extend the Port Terminal Initial Sale Period to January 28, 2005. This extension represents the second extension referred to in the Ouellet Affidavit.

34. At paragraph 15 of her Memorandum, the Commissioner points to this extension as another example of Agricore United claiming to be close to completing a deal just as the Port Terminal Initial Sale Period was about to end. Specifically, the Commissioner states that, "[o]n January 12, 2005, two days before the end of the new [Port Terminal Initial Sale Period] termination date, Agricore United provided the Commissioner with an asset purchase agreement dated January 7, 2005, signed by both Agricore United and [CONFIDENTIAL]".

35. Contrary to this statement, an agreement was not provided to the Commissioner on January 12, 2005. Instead, Mr. Margison provided counsel for the Commissioner with a copy of [CONFIDENTIAL] letter referred to above. Significantly, that letter discloses that [CONFIDENTIAL]. This second extension was therefore requested and given to accommodate [CONFIDENTIAL] proposed timetable.

36. At paragraph 16 of her Memorandum, the Commissioner states that "[a]lthough a sale had not been effected between Agricore United and [CONFIDENTIAL] by January 31, [2005],

the Commissioner instructed the Trustee to 'hold off' as there was still a possibility of a sale". This very short, three-day extension, from January 28, 2005 to January 31, 2005, represents the third extension referred to in the Ouellet Affidavit.

37. On January 28, 2005, Mr. Martin provided the trustee selected pursuant to the Consent Agreement with an update of the proposed sale of the UGG Terminal to [CONFIDENTIAL]. In this status report, Mr. Martin indicated that he was "[s]till waiting on [CONFIDENTIAL]" and that "[he did] not expect this to go off the rails, [as] all indications in the last weeks have been good". A copy of Mr. Martin's status report dated January 28, 2005 is at Tab 16 of the Document Brief attached hereto as Exhibit "A".

38. As with the second extension referred to above, this third extension was requested and given to accommodate [CONFIDENTIAL] proposed timetable.

39. On January 31, 2005, Mr. Martin sent a letter to [CONFIDENTIAL], acknowledging that he had received [CONFIDENTIAL] voicemail message earlier that day. Mr. Martin also confirmed his understanding that [CONFIDENTIAL]. Mr. Martin also stated that he looked forward to hearing from [CONFIDENTIAL] on February 7, 2005. A copy of Mr. Martin's letter to [CONFIDENTIAL] is at Tab 17 of the Document Brief attached hereto as Exhibit "A".

40. On February 9, 2005, Mr. Margison sent counsel for the Commissioner an e-mail that he had received from Mr. Martin on February 8, 2005. Mr. Martin's e-mail indicated that Agricore United had spoken with [CONFIDENTIAL] on February 4, 2005, that [CONFIDENTIAL] had advised that it was [CONFIDENTIAL], and that [CONFIDENTIAL] remained optimistic that a deal would soon be reached. A copy of this e-mail is at Tab 18 of the Document Brief attached hereto as Exhibit "A".

41. On February 11, 2005, Mr. Martin received a letter from [CONFIDENTIAL], in which [CONFIDENTIAL] advised, in relevant part, that: [CONFIDENTIAL].

42. In the same letter, [CONFIDENTIAL] also advised that [CONFIDENTIAL]. A copy of [CONFIDENTIAL] letter to Mr. Martin dated February 11, 2005 is at Tab 19 of the Document Brief attached hereto as Exhibit "A".

43. On February 21, 2005, Agricore United provided a status report to counsel for the Commissioner. Attached to this status report was an e-mail from Mr. Martin to Mr. Margison and me dated February 21, 2005. Mr. Martin advised: [CONFIDENTIAL]. A copy of the status report provided to counsel for the Commissioner on February 21, 2005 is at Tab 20 of the Document Brief attached hereto as Exhibit "A".

44. On February 28, 2005, Mr. Margison provided a further status report to counsel for the Commissioner. In this status report, Agricore United's counsel stated as follows: [CONFIDENTIAL].

Based on the information provided by [CONFIDENTIAL], Mr. Margison also told counsel for the Commissioner that "Agricore United understands that such a divestiture could be completed by March 18, 2005". A copy of the status report provided to counsel for the Commissioner on February 28, 2005 is at Tab 21 of the Document Brief attached hereto as Exhibit "A".

45. An e-mail from Mr. Martin to Mr. Margison dated February 28, 2005 was attached to the further status report referred to above. In this e-mail, Mr. Martin stated, among other things, that he "was somewhat frustrated with the length of time this is taking but [realizes] that this is the way the group [CONFIDENTIAL] operates". (This was one of a number of occasions on which Agricore United and its counsel advised the Commissioner of Agricore United's

frustrations with the time that [CONFIDENTIAL] were taking to respond or obtain requisite approvals.)

46. The Commissioner subsequently agreed on or about February 28, 2005 to extend the Port Terminal Initial Sale Period to March 18, 2005. This extension represents the fourth extension referred to in the Ouellet Affidavit.

47. At paragraph 17 of her Memorandum, the Commissioner points to this fourth extension as a further example of Agricore United claiming to be close to completing a deal just as the Port Terminal Initial Sale Period was about to end. Specifically, the Commissioner states that, "[o]n February 28, 2005, Agricore United contacted the Commissioner to indicate that the deal with [CONFIDENTIAL] was close to being finalized and that Agricore United expected that such a divestiture could be completed by March 18, 2005". The Commissioner, however, fails to disclose that Agricore United's statements were, as the Commissioner very well knows, based on representations that Agricore United had received from [CONFIDENTIAL]. Clearly, as with the other extensions referred to above, this extension was entirely legitimate. It was requested and given to accommodate a prospective purchaser's timetable.

48. As stated in paragraph 47 of the Ouellet Affidavit, John Bodrug, counsel for Agricore United, spoke with Gaston Jorré on March 15, 2005 and advised that, because [CONFIDENTIAL] was not yet prepared to close, the proposed transaction with [CONFIDENTIAL] would not be completed by March 18, 2005, despite the previous assurances that Agricore United had received from [CONFIDENTIAL]. Mr. Bodrug also advised Mr. Jorré that [CONFIDENTIAL] had recently approached Agricore United to express their interest in purchasing the UGG Terminal and that [CONFIDENTIAL]. As Agricore United viewed a sale to [CONFIDENTIAL] as preferable and more consistent with the



purposes of the Consent Agreement, and in light of the fact that [CONFIDENTIAL], Agricore United decided to begin negotiations with [CONFIDENTIAL].

49. On March 16, 2005, [CONFIDENTIAL] provided Agricore United with an expression of interest to purchase the UGG Terminal. A copy of the expression of interest provided by [CONFIDENTIAL] at Tab 22 of the Document Brief is attached hereto as Exhibit "A".

50. On March 17, 2005, Agricore United and its counsel met with various representatives of the Commissioner to discuss the expression of interest received from [CONFIDENTIAL] and to request a further extension of the Port Terminal Initial Sale Period in order to pursue a sale to [CONFIDENTIAL]. Representatives of [CONFIDENTIAL] participated in part during this meeting by way of conference call, at which time they indicated that [CONFIDENTIAL] proposed acquisition of the UGG Terminal would be [CONFIDENTIAL]. During the meeting it was noted by the representatives of [CONFIDENTIAL] that there were [CONFIDENTIAL].

51. On March 18, 2005, Gaston Jorré e-mailed Mr. Bodrug indicating that the Port Terminal Initial Sale Period had been extended for three days, from March 18, 2005 to March 21, 2005. A copy of Mr. Jorré's e-mail to Mr. Bodrug dated March 18, 2005 is at Tab 23 of the Document Brief attached hereto as Exhibit "A". Later, on March 21, 2005, counsel for the Commissioner wrote to Mr. Margison to confirm that the Commissioner had agreed to extend the Port Terminal Initial Sale Period to March 31, 2005 for the purpose of allowing Agricore United to reach an agreement for the sale of the UGG Terminal to [CONFIDENTIAL]. A copy of counsel to the Commissioner's letter to Mr. Margison dated March 21, 2005 is at Tab 24 of the Document Brief attached hereto as Exhibit "A". Together, these two extensions represent the fifth extension referred to in the Ouellet Affidavit.

52. On March 22, 2004, Mr. Margison sent counsel for the Commissioner an e-mail indicating that [CONFIDENTIAL] had opted not to acquire an equity interest in the UGG Terminal, but was proposing to commit its grain to [CONFIDENTIAL]. A copy of the e-mail from Mr. Margison to counsel for the Commissioner dated March 22, 2004 is included at Tab 25 of the Document Brief attached hereto as Exhibit "A". In addition, Mr. Margison sent counsel for the Commissioner a letter dated March 24, 2005 setting out certain information concerning [CONFIDENTIAL]. A copy of the letter from Agricore United's counsel to counsel for the Commissioner dated March 24, 2004 is included at Tab 26 of the Document Brief attached hereto as Exhibit "A".

53. Following the fifth extension, Agricore United devoted a significant amount of time, effort and money to negotiating an asset purchase agreement with [CONFIDENTIAL]. Similarly, I am advised by [CONFIDENTIAL], and verily believe, that [CONFIDENTIAL] also devoted a significant amount of time, effort and money to negotiating an asset purchase agreement with Agricore United. Based on information provided by [CONFIDENTIAL], I understand and verily believe that [CONFIDENTIAL] has spent several hundred thousand dollars in pursuing its proposed purchase of the UGG Terminal, and that amount represents a very significant expenditure for [CONFIDENTIAL].

54. The negotiation of an asset purchase agreement between Agricore United and [CONFIDENTIAL] ultimately took much longer than Agricore United originally anticipated, [CONFIDENTIAL].

55. The Commissioner subsequently agreed to extend the Port Terminal Initial Sale Period to April 5, 2005 and then to April 27, 2005 for the purpose of allowing Agricore United to reach an

agreement for the sale of the UGG Terminal to [CONFIDENTIAL]. These extensions represent the sixth and seventh extensions referred to in the Ouellet Affidavit. [CONFIDENTIAL].

56. Agricore United received periodic updates from [CONFIDENTIAL] as to its ability and willingness to close a proposed transaction to acquire the UGG Terminal. On April 18, 2005, Mr. Martin received an e-mail from [CONFIDENTIAL] in which [CONFIDENTIAL] reiterated [CONFIDENTIAL] interest in acquiring the UGG Terminal pursuant to the Consent Agreement. A copy of [CONFIDENTIAL] e-mail to Mr. Martin is at Tab 27 of the Document Brief attached hereto as Exhibit "A".

57. [CONFIDENTIAL].

58. On April 25, 2005, Mr. Bodrug contacted counsel for the Commissioner and advised, among other things, that Agricore United's board of directors had passed a resolution authorizing Agricore United to conclude an agreement with [CONFIDENTIAL]; that Agricore United and [CONFIDENTIAL] had reached an agreement in principle; and that the proposed transaction was expected to close on or before August 1, 2005, [CONFIDENTIAL]. The Commissioner thereafter agreed to extend the Port Terminal Initial Sale Period to May 2, 2005. This date was, however, subsequently extended to May 6, 2005. Together, these two extensions represent the eighth extension referred to in the Ouellet Affidavit.

59. Agricore United and [CONFIDENTIAL] continued to work diligently to finalize the terms of the asset purchase agreement. On May 6, 2005, Mr. Margison wrote to counsel for the Commissioner advising that Agricore United and [CONFIDENTIAL] had entered into an agreement to sell the UGG Terminal to Terminal One Vancouver Ltd. ("Terminal One"), [CONFIDENTIAL]. A copy of the press release issued by Agricore United and Terminal One was attached. The press release indicated, among other things, that the proposed transaction

would close on or before August 1, 2005. Accordingly, the Commissioner agreed to extend the Port Terminal Initial Sale Period to August 1, 2005. This extension represents the ninth extension referred to in the Ouellet Affidavit. A copy of the letter to counsel for the Commissioner dated May 6, 2005 is at Tab 28 of the Document Brief attached hereto as Exhibit "A".

60. As discussed above and more fully in the SGMF, from the outset, the proposed transaction with Terminal One was subject to a number of conditions for the benefit of Terminal One, [CONFIDENTIAL].

61. [CONFIDENTIAL].

62. Just over a week later, on July 15, 2005, representatives of Agricore United and its counsel again met with various representatives of the Commissioner. During this meeting, Agricore United and its counsel advised the Commissioner's representatives of, among other things, the problems that Terminal One was continuing to have in securing the required volume of grain and requested a further extension of the Port Terminal Initial Sale Period to provide Terminal One with additional time to secure the required volume of grain. A copy of the presentation made by Agricore United during this meeting is at Tab 30 of the Document Brief attached hereto as Exhibit "A".

63. On July 18, 2005, counsel for the Commissioner wrote to Mr. Bodrug and Mr. Margison in response to requests received from both Agricore United and Terminal One to confirm that the Commissioner had agreed to extend the Port Terminal Initial Sale Period to 12 noon (Winnipeg time) on August 15, 2005. The stated purpose of this extension was to allow Terminal One additional time to secure the required volume of grain. This extension represents the tenth extension referred to in the Ouellet Affidavit. Clearly, this extension was requested and given

primarily, if not solely, for the benefit of Terminal One. A copy of the letter to Mr. Bodrug and Mr. Margison dated July 18, 2005 is at Tab 31 of the Document Brief attached hereto as Exhibit "A".

64. On July 18, 2005, Terminal One advised Agricore United that, [CONFIDENTIAL], it was unable to secure the required volume of grain and, therefore, could not complete the proposed transaction as agreed. Terminal One also advised Agricore United that it was interested in continuing discussions with Agricore United with a view to [CONFIDENTIAL].

65. [CONFIDENTIAL].

66. On July 27, 2005, representatives of Agricore United, including myself, met with representatives from Terminal One in Saskatoon, Saskatchewan. [CONFIDENTIAL].

67. On July 29, 2005, Agricore United and Terminal One issued a joint press release indicating, among other things, that "[t]he transaction is not expected to close by the original August 1, 2005 closing date. However, Agricore United and Terminal One continue to work diligently to conclude a transaction as early as practicable". Mr. Bodrug sent a copy of the joint press release to counsel for the Commissioner on July 29, 2005. A copy of the joint press release is at Tab 32 of the Document Brief attached hereto as Exhibit "A".

68. [CONFIDENTIAL].

69. [CONFIDENTIAL].

70. In a letter dated August 10, 2005, the Commissioner's counsel advised that the Commissioner would not agree to any further extension of the Port Terminal Initial Sale Period beyond 12:00 noon (Winnipeg time) on August 15, 2005. A copy of counsel for the

Commissioner's letter dated August 10, 2005 is at Tab 33 of the Document Brief attached hereto as Exhibit "A".

71. On August 12, 2005, Agricore United filed an application under section 106 of the *Competition Act* for an order rescinding the Consent Agreement. Agricore United also filed a Notice of Motion seeking, among other things, the Tribunal's approval, pursuant to paragraph 49 of the Consent Agreement, to extend the Port Terminal Initial Sale Period from 12:00 noon (Winnipeg time) on August 15, 2005 to a date after the final disposition of the Section 106 Application. Agricore United indicated that the motion would be brought on or before August 15, 2005.

72. I am advised by counsel and do verily believe that a conference call was scheduled with Justice Lemieux for 11:00 am on August 12, 2005 for the purpose of discussing the timing of Agricore United's motion for interim relief. However, prior to this conference call taking place, Agricore United and the Commissioner agreed to adjourn Agricore United's motion for interim relief on certain terms. These terms are set out in counsel to the Commissioner's letter to Ms Forbes, Agricore United's counsel, dated August 12, 2005 and found at Tab 34 of the Document Brief attached hereto as Exhibit "A".

73. In a letter dated September 12, 2005 and in response to the Commissioner's request for an update, Mr. Margison provided counsel for the Commissioner with an update of Agricore United's efforts to divest the UGG Terminal. [CONFIDENTIAL].

74. [CONFIDENTIAL].

**NO PREJUDICE FROM THE REQUESTED EXTENSION**

75. At paragraphs 60, 61 and 68 of her Memorandum, the Commissioner contends that any further extension of the Port Terminal Initial Sale Period would frustrate the objectives of the Consent Agreement and negatively impact farmers, Independent Grain Companies and the public interest.

76. Contrary to the Commissioner's assertion, a further extension would neither frustrate the objectives of the Consent Agreement nor negatively impact farmers, Independent Grain Companies or the public interest. In this regard, as discussed in more detail in my Affidavit sworn August 11, 2005 and the SGMF attached thereto as Exhibit "A", to my knowledge 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, to the best of my knowledge, have addressed any possible concerns that the Commissioner may have had 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.

77. In light of the foregoing, it is inconceivable to me how the further extension requested by Agricore United would frustrate the objective of the Consent Agreement, namely ensuring that Independent Grain Companies will have access to port terminal grain handling services in the Port of Vancouver at competitive rates, including diversion premiums.

**THE SECTION 106 APPLICATION**

78. At paragraph 51 of her Memorandum, the Commissioner submits that, because the Notice of Application to rescind the Consent Agreement pursuant to section 106 of the *Competition Act* was not filed until after she had communicated her decision that she would not grant a further extension of the Port Terminal Initial Sale Period, "the merits of Agricore United's [section] 106 application played no part (and could have played no part) in the Commissioner's decision not to agree to an extension". This is inaccurate.

79. As discussed in detail below, well before it filed its Notice of Application with the Tribunal, Agricore United and its counsel had informed the Commissioner and her representatives of the significant changes that had occurred in the Western Canadian grain handling industry and, in light of those changes, Agricore United had taken the position that the Consent Agreement should be varied to remove the requirement that it divest a Port Terminal. Further, approximately one month before the Notice of Application was filed with the Tribunal, Agricore United and its counsel advised the Commissioner's representatives that Agricore United would consider applying to the Tribunal under section 106 of the *Competition Act* in the event that the Commissioner did not agree to further extend the Port Terminal Initial Sale Period.

80. As Mr. Ouellet acknowledges at paragraph 24 of his Affidavit, Mr. Martin, Mr. Margison and George Addy, counsel to Agricore United, met with Gaston Jorré, Chuck Stevenson, Dave Ouellet and Graham Law on June 8, 2004. I am advised by Mr. Martin and verily believe that, during that meeting, Agricore United and its counsel provided an update on Agricore United's efforts to divest the UGG Terminal and discussed, among other things: (i) the significant changes that had occurred in the Western Canadian grain handling industry since the Consent Agreement was executed in October 2002 (which changes are summarized in the SGMF); and (ii) why,



having regard to these changes, the Consent Agreement should be varied to remove the requirement that Agricore United divest a Port Terminal.

81. As noted in paragraph 24(d) of the Ouellet Affidavit, during the June 8, 2004 meeting Agricore United also reminded the Commissioner that [CONFIDENTIAL] had offered to purchase the UGG Terminal for [CONFIDENTIAL] million, [CONFIDENTIAL]. I am advised by Mr. Martin and verily believe that he also discussed with the Commissioner's representatives the adverse effects that such an agreement would have on all grain handling companies in Western Canada, including both Independent Grain Companies and Integrated Grain Companies.

82. The adverse effects that a CWB Monopoly/[CONFIDENTIAL] handling agreement would have on all grain companies in Western Canada were also discussed by representatives of Agricore United (including myself) and representatives of the Commissioner on a number of other occasions, including at the meeting on March 17, 2005 referred to above. A discussion about the adverse effects arose in the context of Agricore United explaining why [CONFIDENTIAL] would be the ideal purchaser of the UGG Terminal. Significantly, during that meeting, Chuck Stevenson, then a Senior Commerce Officer in the Mergers Branch at the Competition Bureau, indicated to Agricore United and its counsel that the effects that a CWB Monopoly handling agreement would have on the Western Canadian grain handling industry was not a new issue for the Bureau and that the Commissioner would not necessarily approve a purchaser that intended to enter into a handling agreement with the CWB Monopoly.

83. On June 16, 2004, Mr. Jorré informed Mr. Addy that it was highly unlikely that Agricore United's request for a variation to the Consent Agreement would be supported by the

Commissioner. Mr. Jorré also rejected Agricore United's request to discuss this matter further with the Commissioner on the basis that a change in position was unlikely.

84. On July 8, 2004, Mr. Addy wrote to Mr. Jorré expressing his disappointment with the position taken by the Commissioner in connection with Agricore United's request to vary the Consent Agreement. Mr. Addy also summarized once again certain of the changes that had occurred in the Western Canadian grain handling industry since the Consent Agreement was executed in October 2002. A copy of the letter from Mr. Addy to Gaston Jorré is found at Tab 36 of the Document Brief attached hereto as Exhibit "A".

85. The significant changes that had occurred in the Western Canadian grain handling industry were again discussed during a conference call with the Commissioner, Gaston Jorré, Chuck Stevenson and Graham Law on July 13, 2004. As indicated at paragraph 28 of the Ouellet Affidavit, counsel for the Commissioner wrote to Agricore United's counsel on July 26, 2004 stating that "[the Commissioner] remained of the view that there had been no change in circumstances such that the structural remedies set out in the Consent Agreement would no longer be necessary and saw no reasons to amend the Consent Agreement".

86. More recently, the significant changes that have occurred in the Western Canadian grain handling industry since October 2002 were summarized in a letter from Mr. Bodrug to counsel for the Commissioner dated June 15, 2005, and were discussed during presentations made to (and left with) various representatives of the Commissioner on July 7, 2005 and July 15, 2005. In addition, in the presentation dated July 15, 2005, Agricore United advised that, "[i]n the event that the Commissioner does not consent to the requested extension ... Agricore United will consider ... [a]pplying to the Tribunal pursuant to section 106 of the *Competition Act* for an order rescinding the Consent Agreement". A copy of the letter to counsel for the Commissioner

dated June 15, 2005 is included at Tab 37 of the Document Brief attached hereto as Exhibit "A". Copies of these presentations are included at Tabs 29 and 30 of the Document Brief attached hereto as Exhibit "A".

**SWP/JRI JOINT VENTURE**

87. As discussed in paragraph 49 of the SGMF, the Commissioner, SWP and JRI filed a consent agreement with the Tribunal on July 5, 2005 (the "SWP/JRI Consent Interim Agreement") requiring that SWP and JRI take all steps necessary to ensure that they operate independently in respect of the marketing of grain handling services to certain Independent Grain Companies during the 60-day term of the SWP/JRI Consent Interim Agreement, which expired on September 3, 2005. The SWP/JRI Consent Interim Order did not otherwise restrict SWP and JRI from implementing the SWP/JRI JV. A copy of the SWP/JRI Consent Interim Agreement is included at Tab 38 of the Document Brief attached hereto as Exhibit "A".

88. On September 14, 2005, the Commissioner, SWP and JRI filed an amending agreement with the Tribunal, in effect extending the SWP/JRI Consent Interim Agreement to September 16, 2005 or, in the event that the Commissioner advised SWP and JRI that it intends to file an application pursuant to section 92 of the *Competition Act* in respect of the SWP/JRI JV, to September 26, 2005. A copy of the amending agreement is included at Tab 39 of the Document Brief attached hereto as Exhibit "A".

89. To my knowledge and belief the Commissioner has not filed an application pursuant to section 92 of the *Competition Act* in respect of the SWP/JRI JV.

SWORN BEFORE ME at the City of  
Winnipeg, in the Province of Ontario, this 19<sup>th</sup>  
day of September, 2005

---

---

STANLEY MURDOCH MACKAY

---

Commissioner for taking Affidavits, etc.

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** 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 LIMITED**

Applicant

- and -

**THE COMMISSIONER OF COMPETITION**

Respondent

---

**REPLY AFFIDAVIT OF STANLEY MURDOCH  
MACKAY**

---

**Davies Ward Phillips & Vineberg LLP**  
Suite 4400  
1 First Canadian Place  
Toronto, Ontario M5X 1B1

**Kent Thomson**  
Tel: (416) 863-5566  
Fax: (416) 863-0871

**Sandra Forbes**  
Tel: (416) 863-5574  
Fax: (416) 863-0871

**Davit Akman**  
Tel: (416) 367-6903  
Fax: (416) 863-0871

Counsel for the Applicant

**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 LIMITED**

Applicant

- and -

**THE COMMISSIONER OF COMPETITION**

Respondent

---

**EXHIBIT "A" TO THE AFFIDAVIT OF STANLEY MURDOCH MACKAY SWORN  
SEPTEMBER 19, 2005**

---

**Kent Thomson  
Sandra Forbes  
Davit D. Akman  
Davies Ward Phillips & Vineberg LLP  
Suite 4400  
1 First Canadian Place  
Toronto, Ontario M5X 1B1  
Telephone: (416) 863-0900  
Facsimile: (416) 863-0871**

**Counsel to United Grain Growers Limited**

**TAB 1**

**[CONFIDENTIAL]**



**TAB 2**

**[CONFIDENTIAL]**

**TAB 3**

April 15, 2003



Dear Sir:

**Re: Vancouver Terminal**

Thank you very much for your inquiry of April 8, 2003. We shall keep your interest in mind as we proceed in dealing with this matter.

Yours truly,

Chris Martin  
General Counsel

/et

**TAB 4**

**[CONFIDENTIAL]**

# TAB 5

August 14, 2003

[REDACTED]

[REDACTED]

Dear Sir:

Mr. Wilson has forwarded your letter of August 5, 2003 to my attention.

This matter remains under review and we will advise in due course.

Yours truly,

Chris Martin  
*Vice President – Corporate Affairs & General Counsel*

CM/jp

bcc: Murdoch MacKay

COPIES



**TAB 6**

**[CONFIDENTIAL]**

**TAB 7**

**[CONFIDENTIAL]**

**TAB 8**

**[CONFIDENTIAL]**

# TAB 9

**[CONFIDENTIAL]**



**TAB 10**



Ministère de la Justice  
Canada

Department of Justice  
Canada

Droit de la concurrence  
Place du Portage, Tour I  
22<sup>e</sup> étage  
50, rue Victoria  
Gatineau (Québec)  
K1A 0C9

Competition Law Division  
Place du Portage, Phase I  
22<sup>nd</sup> floor  
50 Victoria Street  
Gatineau, Quebec  
K1A 0C9

Téléphone/Telephone: (819) 997-2078

Télécopieur/Facsimile: (819) 953-9267

Courriel/Email: law.graham@cb-bc.gc.ca

April 30<sup>th</sup>, 2004

By Facsimile

Without Prejudice

Christopher Margison  
Davies Ward Phillips & Vineburg LLP  
1 First Canadian Place, 44<sup>th</sup> Floor  
Toronto, Ontario  
M5X 1B1

Re: Agricore United

Dear Mr. Margison:

This is a follow-up to our recent discussion and your voicemail to me.

[REDACTED]

Sale of UGG Grain Terminal - Port of Vancouver

I confirm we are waiting for further advice from you respecting the following:

1. Comments from your client regarding the offer from [REDACTED]. During the telephone discussion Mr. Stevenson and I had with you we expressed the Bureau's concerns respecting [REDACTED] and specifically [REDACTED] it is offering what appears to be a very low price for the facility. [REDACTED]

2. Input, if any, from your client with respect to the type of trustee that it expects can facilitate sale of the UGG facility should appointment of a trustee become necessary under the terms of the Consent Order [REDACTED] it is the Bureau's intention to initiate the trustee selection process at within the next two weeks.

We look forward to hearing from you at your earliest convenience.

Yours truly,



Graham Law  
Counsel  
Department of Justice

Cc: Chuck Stevenson  
Dave Ouellet

**TAB 11**

**[CONFIDENTIAL]**

**TAB 12**

**[CONFIDENTIAL]**

**TAB 13**



**[CONFIDENTIAL]**

**TAB 14**



DAVIES WARD PHILLIPS & VINEBERG LLP

44th Floor Tel 416 863 0900  
1 First Canadian Place Fax 416 863 0871  
Toronto Canada M5X 1B1 www.dwpv.com

October 27, 2004

Christopher D. Margison  
Dir 416 863 5544  
cmargison@dwpv.com

File No. 197998

**BY E-MAIL**

**CONFIDENTIAL**

Mr. Duane Schippers  
Senior Counsel, Competition Law Division  
Department of Justice, Industry Canada  
Place du Portage, Phase 1  
50 Victoria Street, 22nd Floor  
Gatineau, Quebec K1A 0C9

Dear Mr. Schippers:

**Agricore United (CT-2002-001)**

Further to our telephone conversation earlier today, please find attached a copy of the letter of intent between Agricore United and [REDACTED] (the "LOI").

The attached LOI, which has been signed by both parties and sets out the principal terms and conditions relating to [REDACTED] proposed acquisition of the UGG Terminal (the "Proposed Acquisition"), clearly constitutes [REDACTED]

[REDACTED] to the Consent Agreement filed with the Competition Tribunal on October 17, 2002 (the "Consent Agreement").

As I discussed in detail with Mr. Ouellet, paragraph 2 of the LOI contemplates that the Proposed Acquisition will close on or before January 14, 2005. This date falls slightly beyond the expiry of the extended Port Terminal Initial Sale Period. In this regard, we confirm our understanding that the Commissioner of Competition (the "Commissioner") has agreed, pursuant to paragraph 48 of the Consent Agreement, to extend the Port Terminal Initial Sale Period to January 14, 2005 in order to allow the parties additional time to complete the Proposed Acquisition.



Please do not hesitate to contact me if you have any questions with respect to the foregoing.

Yours very truly,

*Chris Margison*

Christopher D. Margison

CDM/pf  
Attachment

cc Chris Martin  
*Agricore United*

**[CONFIDENTIAL]**

**TAB 15**

**[CONFIDENTIAL]**

**TAB 16**



**[CONFIDENTIAL]**

**TAB 17**

**[CONFIDENTIAL]**

**TAB 18**

[CONFIDENTIAL]

---

Christopher D. Margison

[cmargison@dwpv.com](mailto:cmargison@dwpv.com)

416.863.5544

Davies Ward Phillips & Vineberg LLP

[www.dwpv.com](http://www.dwpv.com)

This email (including any attachments) is for the sole use of the intended recipient and may contain confidential information which may be protected by legal privilege. If you are not the intended recipient, please immediately notify us by reply email or by telephone (collect), delete this email and destroy any copies. Thank you.

---

-----Original Message-----

**From:** Graham M Law [mailto:[GrahamMLaw@nyc.rr.com](mailto:GrahamMLaw@nyc.rr.com)]

**Sent:** February 9, 2005 4:16 PM

**To:** Margison, Christopher

**Cc:** Dave McAllister; Chuck Stevenson

**Subject:** Re: Agricore United

Christopher, is there any further word? I continue to be concerned about the lack of communication from your client. In addition, I am advised that the Commissioner herself has expressed an indication that she is running out of patience with the amount of time this is taking. Your client's letter to [REDACTED] of January 31, 2005 indicated that some response was expected February 7th.

Please contact me to discuss this further once you have received instructions from your client, at the very least with respect to when a binding agreement will be in place and what the proposed closing date will be.

Sincerely,

Graham M. Law  
Barrister & Solicitor  
525 East 80th Street, # 4-A  
New York, NY  
10021 U.S.A.

22/08/2005

(212) 879-0514

---

This e-mail and any attachments are being transmitted in confidence. This e-mail and any attachments may be solicitor-client privileged; such privilege is expressly claimed. If you have received this e-mail in error please call (212) 879-0514 and delete the original e-mail and attachments.

**[CONFIDENTIAL]**

**[CONFIDENTIAL]**

**TAB 19**



**[CONFIDENTIAL]**

**TAB 20**

[CONFIDENTIAL]

-----Original Message-----

**From:** Graham M Law [mailto:GrahamMLaw@nyc.rr.com]

**Sent:** February 17, 2005 10:37 AM

**To:** Margison, Christopher

**Cc:** Dave McAllister; Chuck Stevenson

**Subject:** Re: Agricore United

Dear Christopher,

Please advise of progress, if any, as it has been over one week since we last received any indication that the parties were still negotiating.

To be clear, we require the following:

1. Information detailing what precisely are the outstanding issues between the parties. Advice that they are "continuing to talk" is unhelpful and vague, notwithstanding your client's apparent satisfaction with the way this matter is moving. We were assured many weeks ago that a firm commitment was imminent, yet the parties have not yet reached consensus on a binding agreement.
2. An estimate of firm dates, not vague time frames, for (a) a binding agreement and (b) closing of the transaction.

18/09/2005

It appears to be less and less in the public interest for this matter to continue to drag on endlessly. I trust your client will give this its immediate attention.

Sincerely,

Graham M. Law  
Barrister & Solicitor  
525 East 80th Street, # 4-A  
New York, NY  
10021 U.S.A.  
(212) 879-0514

---

This e-mail and any attachments are being transmitted in confidence. This e-mail and any attachments may be solicitor-client privileged; such privilege is expressly claimed. If you have received this e-mail in error please call (212) 879-0514 and delete the original e-mail and attachments.

**[CONFIDENTIAL]**

[CONFIDENTIAL]

-----Original Message-----

**From:** Graham M Law [mailto:GrahamMLaw@nyc.rr.com]  
**Sent:** February 9, 2005 4:16 PM  
**To:** Margison, Christopher  
**Cc:** Dave McAllister; Chuck Stevenson  
**Subject:** Re: Agricore United

Christopher, is there any further word? I continue to be concerned about the lack of communication from your client. In addition, I am advised that the Commissioner herself has expressed an indication that she is running out of patience with the amount of time this is taking. Your client's letter to [REDACTED] of January 31, 2005 indicated that some response was expected February 7th.

Please contact me to discuss this further once you have received instructions from your client, at the very least with respect to when a binding agreement will be in place and what the proposed closing date will be.

Sincerely,

Graham M. Law  
Barrister & Solicitor  
525 East 80th Street, # 4-A  
New York, NY  
10021 U.S.A.  
(212) 879-0514

---

This e-mail and any attachments are being transmitted in confidence. This e-mail and any attachments may be solicitor-client privileged; such privilege is expressly claimed. If you have received this e-mail in error please call (212) 879-0514 and delete the original e-mail and attachments.

18/09/2005

**[CONFIDENTIAL]**

**TAB 21**

**Margison, Christopher**

---

**From:** Margison, Christopher  
**Sent:** February 28, 2005 7:03 PM  
**To:** Chuck Stevenson  
**Cc:** 'Graham M Law'; Dave McAllister  
**Subject:** Agricore United - Confidential

**Confidential**

Mr. Stevenson:

Further to our telephone conversation earlier this afternoon, please find attached a copy of a status report that I received from Chris Martin earlier today. In summary, as indicated in the attached status report, [REDACTED] has informed Chris Martin that [REDACTED]

As we discussed, the purchase and sale agreement is substantially complete. The agreement includes as a schedule a form of lease with the VPA. [REDACTED] has reviewed this form of lease and has confirmed that it is prepared to enter into a lease on those terms. [REDACTED]

The only outstanding issues with respect to the proposed transaction relate to [REDACTED]

Agricore United and the Commissioner have a common interest, namely the divestiture of the UGG Terminal pursuant to the Consent Agreement. In this regard, Agricore United understands that such a divestiture could be completed by March 18, 2005. In order to further discuss how best to achieve this common interest, we would like to set up a conference call on March 2, 2005 to discuss the issues that you raised during our earlier call, including market contacts and the March 11, 2005 deadline that you referred to. We are available at 11:30 am (Toronto time). Please let me know if that time works for you.

In the meantime, please do not hesitate to contact me if you have any questions with respect to the foregoing.

Regards,  
Chris

---

Christopher D. Margison  
[cmargison@dwpv.com](mailto:cmargison@dwpv.com)

22/08/2005



416.863.5544

Davies Ward Phillips & Vineberg LLP

[www.dwpv.com](http://www.dwpv.com)

This email (including any attachments) is for the sole use of the intended recipient and may contain confidential information which may be protected by legal privilege. If you are not the intended recipient, please immediately notify us by reply email or by telephone (collect), delete this email and destroy any copies. Thank you.

---

22/08/2005

**[CONFIDENTIAL]**

**TAB 22**

**[CONFIDENTIAL]**

**TAB 23**

**Margison, Christopher**

---

**From:** Bodrug, John  
**Sent:** March 18, 2005 5:18 PM  
**To:** 'cmartin@agricoreunited.com'; 'mmackay@agricoreunited.com'  
**Cc:** Addy, George; Margison, Christopher; Forbes, Sandra  
**Subject:** FW: Agricore United  
**Importance:** High

FYI

-----Original Message-----

**From:** "Jorré, Gaston: #CB - BC" [mailto:Jorre.Gaston@cb-bc.gc.ca]  
**Sent:** March 18, 2005 5:12 PM  
**To:** Bodrug, John  
**Cc:** Stevenson, Chuck: #CB - BC  
**Subject:** RE: Agricore United  
**Importance:** High

John,

We will provide a response on Monday.

As a result we will extend by three days, until the end of Monday, the deadline that we had given your client (the deadline whereby your client had to complete a deal by the end of today).

Gaston

-----Original Message-----

**From:** Bodrug, John [mailto:JBodrug@dwpv.com]  
**Sent:** Friday, March 18, 2005 2:05 PM  
**To:** Jorré, Gaston: #CB - BC  
**Subject:** Agricore United

Gaston,

Do you have any sense of when you might be getting back to us pursuant to our meeting yesterday?

Best regards,  
John

---

This e-mail (including any attachments) is for the sole use of the intended recipient and may contain confidential information which may be protected by legal privilege. If you are not the intended recipient, please immediately notify us by reply e-mail or by telephone (collect), delete this e-mail and destroy any copies. Thank you.

---

John D. Bodrug  
[jbodrug@dwpv.com](mailto:jbodrug@dwpv.com)  
Direct: 416-863-5576  
Davies Ward Phillips & Vineberg LLP  
44th Floor, 1 First Canadian Place  
Toronto, Ontario, Canada, M5X 1B1

19/09/2005

<http://www.dwpv.com>  
Tel: 416-863-0900  
Fax: 416-863-0871



**TAB 24**



**GRAHAM M. LAW  
BARRISTER & SOLICITOR  
525 EAST 80<sup>TH</sup> STREET, #4-A  
NEW YORK, NY, U.S.A. 10021**

**(212) 879-0514**  
[Graham@Lawfirm.com](mailto:Graham@Lawfirm.com)

My file no. GML04-001  
Your file no. 197998

**PRIVILEGED & CONFIDENTIAL**

***Via email***

**March 21, 2005**

**Christopher D. Margison  
Davies Ward Phillips & Vineberg LLP  
1 First Canadian Place, 44<sup>th</sup> Floor  
Toronto ON M5X 1B1**

**Dear Mr. Margison,**

**Agricore United (CT-2002-001)**

Further to your email earlier today, this is to confirm the Commissioner of Competition is agreeable to a further extension of the Port Terminal Initial Sale Period under the Consent Agreement respecting this matter. The Commissioner will agree to extend the Initial Sale Period until close of business on Thursday, March 31, 2005, for the purpose of permitting Agricore United to reach an agreement for sale of the UGG Terminal (as defined in the Consent Agreement) with

This agreement is founded upon representations made by your client and by representatives of [REDACTED] during the telephone conference held March 17,

2005. We were advised by Agricore United that [REDACTED] has not yet obtained satisfactory financing for its proposed purchase of the UGG Terminal, and final approval of its board of directors has accordingly not been obtained.

This agreement is also conditional upon your client providing to the Bureau as soon as practicable the following information regarding the members of [REDACTED]

The purpose of the above information is to permit the Competition Bureau to assess whether the proposed ownership under [REDACTED] may potentially conflict with the spirit of the divestiture provisions of the Consent Order, [REDACTED]

[REDACTED] As was discussed on Thursday, the Consent Order is intended to restore competition in grain handling services at the Port of Vancouver and to preserve the ability of non-integrated grain handlers to access export terminals at competitive rates.

In all other respects the terms and conditions of the Consent Agreement remain applicable. This includes but is not limited to any prospective purchaser, including [REDACTED] [REDACTED] being subject to the Competition Bureau's review, due diligence and approval.

Yours truly,



Graham M. Law

c. G. Jorré, C. Stevenson

**TAB 25**

**Margison, Christopher**

---

**From:** Margison, Christopher  
**Sent:** March 22, 2005 9:08 AM  
**To:** 'Graham M Law'  
**Cc:** Gaston Jorré; Chuck Stevenson; Bodrug, John  
**Subject:** Agricore United - Port Terminals - Confidential

**Confidential**

Graham:

I am sending for your information a copy of a status report that we received from Chris Martin yesterday afternoon. Please note that while the status report indicates that

We are currently in the process of pulling together the information requested in your letter of March 21, 2005 and will provide it to you as soon as practicable.

Please do not hesitate to contact me if you have any questions with respect to any aspect of the foregoing.

Regards,  
Chris

---

Christopher D. Margison  
[cmargison@dwpv.com](mailto:cmargison@dwpv.com)  
416.863.5544  
Davies Ward Phillips & Vineberg LLP  
[www.dwpv.com](http://www.dwpv.com)

This email (including any attachments) is for the sole use of the intended recipient and may contain confidential information which may be protected by legal privilege. If you are not the intended recipient, please immediately notify us by reply email or by telephone (collect), delete this email and destroy any copies. Thank you.

---

19/09/2005

**[CONFIDENTIAL]**

**TAB 26**

**[CONFIDENTIAL]**

**TAB 27**



**Murdoch Mackay**

---

**From:** [REDACTED]  
**Sent:** Monday, April 18, 2005 7:46 AM  
**To:** Chris Martin  
**Subject:** AUV

Chris:

I simply want to reiterate our continued interest in the completion of the transaction to purchase the Vancouver terminal. As mentioned to you last week [REDACTED] There are minor steps remaining for us to be in a position to close the Purchase Agreement. These steps would take a matter of days to complete such that we would be in a position to close in early May. We have put a lot of time and effort into this deal and hope that we could consummate it in the near future.

Please let me know if you require any further information.

Sincerely,

[REDACTED]

**TAB 28**



DAVIES WARD PHILLIPS & VINEBERG LLP

44th Floor  
1 First Canadian Place  
Toronto Canada M5X 1B1

Tel 416 863 0900  
Fax 416 863 0871  
www.dwpv.com

May 6, 2005

Christopher D. Margison  
Dir 416 863 5588  
cmargison@dwpv.com

File No. 205664

**BY FAX AND BY E-MAIL**

**CONFIDENTIAL**

Mr. Graham Law  
Barrister and Solicitor  
525 East 80<sup>th</sup> Street, #4-A  
New York, New York 10021

Dear Graham:

**Agricore United – Port Terminals**

Further to my e-mail earlier today, this letter is being provided on behalf of United Grain Growers Limited ("UGG") pursuant to the Consent Agreement registered with the Competition Tribunal on October 17, 2002 (the "Consent Agreement"). Specifically, as required by paragraph 28 of the Consent Agreement, this letter provides notice to the Commissioner of Competition (the "Commissioner") that Agricore United has entered into a binding agreement to sell the UGG Terminal to Terminal One Vancouver Ltd. ("Terminal One"). As indicated in the press release attached to my e-mail, Terminal One represents a consortium of five farmer-owned inland grain terminals operating in Saskatchewan, including Great Sandhills Terminal Marketing Centre Ltd. ("GST"), North East Terminal Ltd., North West Terminal Ltd., Prairie West Terminal Ltd. ("PWT") and South West Terminal Ltd.

A sale of the UGG Terminal to Terminal One would satisfy the terms of paragraphs 5 and 27 of the Consent Agreement. In this regard, Terminal One would acquire all of the assets that it needs in order to operate the UGG Terminal as a port terminal grain handling facility in the ordinary course of business and as a going concern. Moreover, neither Agricore United nor any of its subsidiaries holds any ownership interest in Terminal One. Terminal One is, therefore, an arm's length purchaser. In addition, each of the members of Terminal One is an established participant in the Western Canadian grain handling industry. Specifically, as noted above, each of the members of Terminal One operates an inland grain terminal in Saskatchewan. Moreover, as discussed during our meeting at the

Tor #: 1523820.1

Competition Bureau (the "Bureau") on March 17, 2005, in which Garth Gish of PWT and Jim Major of GST participated by telephone, Terminal One clearly has the managerial, operational and financial capability to operate the UGG Terminal as a port terminal grain handling facility. Finally, it is our understanding that Terminal One intends to continue to use the UGG Terminal in substantially the same manner as it is currently being used today.

Agricore United also confirms that Terminal One has agreed to respond to the Bureau as soon as possible for a request for additional information regarding the proposed transaction.

Given the above, Agricore United requests that the Commissioner approve Terminal One as an acceptable purchaser pursuant to paragraph 26 of the Consent Agreement.

Please do not hesitate to contact me if you have any questions with respect to any aspect of the foregoing.

Yours very truly,



Christopher D. Margison

CDM/pf



Email a friend

Click here to receive future news via email from this Company/Organization

NEWS RELEASE TRANSMITTED BY [CCNMatthews](#)



FOR: AGRICORE UNITED

TSX SYMBOL: AU.LV

AND TERMINAL ONE VANCOUVER LTD

AND GREAT SANDHILLS TERMINAL MARKETING CENTRE LTD.

AND NORTH EAST TERMINAL LTD.

AND NORTH WEST TERMINAL LTD.

AND PRAIRIE WEST TERMINAL LTD.

AND SOUTH WEST TERMINAL LTD.

MAY 6, 2005 - 11:52 ET

## **Agricore United Announces Terminal Sale To Terminal One Vancouver Ltd.**

SASKATOON, SASKATCHEWAN--(CCNMatthews - May 6, 2005) - Agricore United (TSX:AU.LV) announced today that it has signed an agreement for the sale of the former United Grain Growers Limited terminal elevator in Vancouver, British Columbia ("the Vancouver Terminal") to Terminal One Vancouver Ltd. ("Terminal One"). The sale of the Vancouver Terminal was undertaken pursuant to a consent agreement with the Commissioner of Competition following the merger of United Grain Growers Limited and Agricore Cooperative Ltd. Terms of the deal were not disclosed but the transaction is expected to close on or before August 1, 2005, subject to certain closing conditions and regulatory approval.

Agricore United will consolidate its Vancouver grain handling operations through two other terminals in which it has an interest and as a result, the sale is not expected to materially impact on the Company's results from continuing operations. The proceeds of the sale may be used for general corporate purposes, including the non-scheduled repayment of debt or capital reinvestment.

Agricore United is one of Canada's leading agri-businesses. The prairie-based company is diversified into sales of crop inputs and services, grain merchandising, livestock production services and financial markets. Agricore United's shares are publicly traded on the

Toronto Stock Exchange under the symbol "AU.LV".

"We're pleased that we've been able to come to a successful arrangement with Terminal One which allows them to complete their grain pipeline," says Murdoch MacKay, Vice-President, Terminal Services for Agricore United. "Agricore United has had a strong relationship with independent inland terminals over the years and, given the leadership demonstrated by them through this process, we're confident in their future success."

Terminal One represents a consortium of five farmer-owned inland grain terminals operating in Saskatchewan: Great Sandhills Terminal Marketing Centre Ltd., North East Terminal Ltd., North West Terminal Ltd., Prairie West Terminal Ltd. and South West Terminal Ltd. The combined throughput capacity of the consortium is in excess of one million tonnes. New partners are being considered that could increase grain handling throughput at Terminal One to 1.5 million to 2 million tonnes.

"This is a great day for our five participating companies as well as independent inland terminal operators across western Canada. We now have full access to the key port of Vancouver which previously was only available to us through handling agreements with other terminal elevator operators," says Garth Gish, representing Prairie West Terminal Ltd. and spokesman for Terminal One. "It is a dream come true for our respective organizations and we are extremely excited about the future possibilities it presents us."

The inaugural board of directors of Terminal One is comprised of one representative from each of the participating inland terminals:

/T/

Prairie West Terminal Ltd.	Plenty, Saskatchewan	Garth Gish-Spokesperson
Great Sandhills Terminal Marketing Centre Ltd.	Leader, Saskatchewan	Jim Major
North East Terminal Ltd	Wadena, Saskatchewan	Alec Dyok
North West Terminal Ltd.	Unity, Saskatchewan	Jason Skinner
South West Terminal Ltd.	Antelope, Saskatchewan	Mark Schell

/T/

Terminal One Vancouver Ltd. will hold a news conference at 11 am MDT, May 6, 2005 in the Sheraton Cavalier East Room, 612 Spadina Crescent East, Saskatoon, Saskatchewan to further outline its plans for the facility.

-30-

**FOR FURTHER INFORMATION PLEASE CONTACT:**  
Terminal One Vancouver Ltd.

**Garth Gish**  
**(306) 460-8874**  
[ggish@p-w-l.ca](mailto:ggish@p-w-l.ca)  
or  
**Agricore United**  
**Murdoch MacKay**  
**Vice-President, Terminal Services**  
**(204) 944-5648**  
[mmackay@agricoreunited.com](mailto:mmackay@agricoreunited.com)

[Other Recent News](#)

[Hot Company Links](#)

[Stock Quote](#)

[Stock Chart](#)

**TAB 29**



**Agricore United/Terminal One  
Meeting with the  
Competition Bureau**

---

**July 7, 2005**

**Confidential**

# Introduction

---

[CONFIDENTIAL]

Confidential

# Part I – Update on Proposed Sale

---

[CONFIDENTIAL]

Confidential

# Part II – Steps Being Taken to Secure Grain

---

[CONFIDENTIAL]

Confidential

# Part II – Steps Being Taken to Secure Grain

---

[CONFIDENTIAL]

Confidential

**Part II – Steps Being  
Taken to Secure Grain (cont'd)**

---

[CONFIDENTIAL]

Confidential

# **Part III – Issues Relating to Securing Grain**

---

[CONFIDENTIAL]

Confidential

# **Part III – Issues Relating to Securing Grain (cont'd)**

---

[CONFIDENTIAL]

Confidential



## **Part IV – Other Issues**

---

[CONFIDENTIAL]

Confidential

## **Part IV – Other Issues (cont'd)**

---

[CONFIDENTIAL]

Confidential

## **Part IV – Other Issues (cont'd)**

---

[CONFIDENTIAL]

Confidential

# Part V – Questions

---

[CONFIDENTIAL]

Confidential

**TAB 30**

# **Agricore United Meeting with the Competition Bureau**

---

**July 15, 2005**

**Confidential**

# Introduction

---

- Part I – Summary.
- Part II – Background.
- Part III – Potential Solutions.
- Part IV – Independent Grain.
- Part V – Consequences of CWB Handling Agreement.
- Part VI – Next Steps.

# Part I – Summary

---

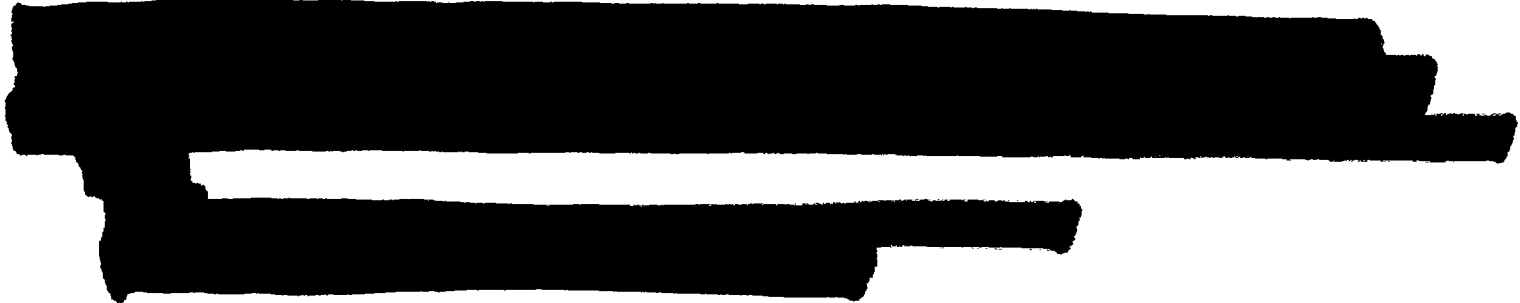
- Extension
  - No prejudice to any independent grain companies.
  - Enhances prospects for effective divestiture.
  - Enables Bureau to address all current industry issues in a consistent and cohesive fashion and achieve an optimal outcome.
  
- If no agreement for extension
  - Tribunal will likely grant reasonable extension.
  - Request confirmation that CWB deal not acceptable to Bureau.
  - Access order is best available remedy to address any concerns.
  - Section 106/*RONA* – grounds for rescission of Consent Agreement.
    - Relevant circumstances have changed.
    - Neither the Commissioner nor Agricore United would have entered into Consent Agreement for divestiture if critical grain volume was locked up.



## Part II – Background


---

- Consent Agreement was filed with the Tribunal on October 17, 2002.
  - Purpose was to ensure that independent grain companies would have access to port terminal grain handling services in the Port of Vancouver at competitive rates, including diversion premiums.
- Agricore United to divest the UGG Terminal within the Port Terminal Initial Sale Period.
  - Agricore United has made good faith efforts to divest the UGG Terminal.
    - Retained Scotia Capital.



## Part II – Background (cont'd)

---

- Port Terminal Initial Sale Period would have expired on October 31, 2004 in the absence of any extensions.
  - 
  - Agricore United and the Commissioner mutually agreed to a number of additional extensions in light of the continuing drought and difficult market conditions and reasonable prospects for a possible divestiture – there were valid and legitimate reasons for each of these extensions.
  - Currently set to expire on August 1, 2005 in the absence of closing the Terminal One transaction or an agreed extension.

## Part III – Potential Solutions

---

1. Provide Agricore United and Terminal One with additional time to complete their proposed transaction (e.g., 60 days).
  - Both Agricore United and Terminal One are committed to completing the proposed transaction, if possible.
    - Terminal One is the optimal solution to address the purpose of the Consent Agreement, namely ensuring that independent grain companies have access to port terminal grain handling services in the Port of Vancouver at competitive rates, including diversion premiums.
    - [REDACTED]
  - No prejudice results from an extension.
    - Every independent grain company has port terminal access contracts covering at least the next crop year.
    - Producer cars guaranteed access by statute in any event.
    - Access is not an issue for at least the next crop year.

## Part III – Potential Solutions (cont'd)

---

### Solution 1 (cont'd)

- In fact, extra time will benefit all parties:
  - **Agricore United:** Increases ability to achieve a fair sale.
  - [REDACTED]
  - **Bureau:**
    - [REDACTED]
    - Gives the proposed transaction every chance of succeeding before the appointment of a trustee (i.e., a successful sale to Terminal One accords with the purpose of the Consent Agreement).
- No need to apply to the Tribunal to extend the time period.

**[CONFIDENTIAL]**

## Part III – Potential Solutions (cont'd)

---

2. In the event that the Commissioner does not consent to the requested extension, the Commissioner should agree to amend the Consent Agreement pursuant to section 106 of the *Competition Act* to either:



- Remove the divestiture requirement and maintain access provisions.
  - Since the Consent Agreement was registered on October 17, 2002, through acquisition and long-term handling agreements signed with SWP and JRI, the available independent grain has shrunk and independent grain companies have secured acceptable long-term access.
  - Neither the Commissioner nor Agricore United would have entered into the Consent Agreement if this critical grain volume had been tied-up under exclusive, long-term handling agreements.
  - Conditions for rescission as confirmed in *RONA* are clearly established.
  - Access provisions would address any concerns that the Commissioner may have.
    - Offer to take all independent grain.
    - Minimum diversion premiums.
    - Fast track arbitration – pre-select arbitrator (e.g., the CGC (per statutory mandate) or a respected individual with experience in and knowledge of the grain handling industry).

## Part III – Potential Solutions (cont'd)

---

3. In the event that the Commissioner does not consent to the requested extension or an amendment to the Consent Agreement, Agricore United will consider:
- Applying to the Tribunal for an extension of the Port Terminal Initial Sale Period.
  - Applying to the Tribunal pursuant to section 106 of the *Competition Act* for an order rescinding the Consent Agreement and related relief – Agricore United would be willing to agree to access provisions.
    - The changes in circumstances which support such a variation or rescission of the Consent Agreement include:
      - Exclusive long-term handling agreements [REDACTED]
      - [REDACTED]
      - [REDACTED]
      - [REDACTED]
      - Low volume of independent grain.
      - Continued excess capacity.
      - JRI's acquisition of ConAgra's primary elevators.
      - P&H's acquisition of Mainline Terminal.
      - [REDACTED]
    - In *RONA*, the Tribunal confirmed that the Commissioner has a duty to actively monitor changing market circumstances throughout the life of a consent agreement, continuously assess the ongoing need for the agreed remedy, and revise the agreement if the remedy is no longer warranted. *RONA* has made it clear that substance must govern over process.

## Part IV – Independent Grain

---

### Total Non-Integrated Grain – Based on 2003/2004 Crop Year Volume

- Total non-integrated grain flowing through the Port of Vancouver – approximately [REDACTED] tonnes.

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

### Available Non-Integrated Grain – Based on 2003/2004 Crop Year Volume

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- Total available non-integrated grain – no more than [REDACTED] tonnes.
  - Purchaser cannot expect all available independent grain to move to the divested terminal.



**[CONFIDENTIAL]**

## **Part V – Consequences of CWB Handling Agreement**

---

- Given that a significant portion of independent grain already has access to port terminals in the Port of Vancouver, [REDACTED], the only realistic possibility for the UGG Terminal to be used for grain handling would be an acquisition by a purchaser who enters into a handling agreement with the CWB.
- While such an agreement may be beneficial for the purchaser and the CWB, it would adversely affect other grain handling companies, including independent grain companies, and would not address the objectives of the Consent Agreement.
  - Revenue loss for independent grain companies.
  - Revenue loss for integrated grain companies.
- Allowing the purchaser to enter into a CWB handling agreement would not address the objectives of the Consent Agreement.
  - No new terminal available for the handling of independent grain.

## **Part V – Consequences of CWB Handling Agreement (cont'd)**

---

- The Commissioner previously determined, and stated in filings with the Tribunal, that the payment of diversion premiums by port terminal operators is important for the ability of the independent grain companies to compete for grain originations in the country.
  - "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".
- Similarly, the CWB indicated that "[t]he ability of [an independent grain] company to compete for the farmers' grain in Western Canada depends on ... the level of diversion payments paid out to [independent] grain companies in return for the processing of their originations at port".
- The CWB also indicated that it was concerned that there would be a "lessening of competition in the country if the diversion payments currently offered by terminals to non-integrated facilities are reduced or eliminated".

## **Part V – Consequences of CWB Handling Agreement (cont'd)**

---

- Allowing a purchaser to acquire the UGG Terminal and then enter into a handling agreement with the CWB would result in no diversion premiums being paid to the independent grain companies by the integrated grain companies for any grain going through the UGG Terminal. This would, according to both the Commissioner and the CWB, raise serious issues regarding the ongoing competitiveness of independent grain companies.
- The Commissioner should not artificially distort markets by requiring a divestiture that would harm the parties and/or other market participants where the divestiture would not be effective and an alternative remedy would be sufficient to prevent any substantial lessening of competition.
- Confirm that divestiture into a CWB handling agreement not acceptable to Bureau.

## **Part VI – Next Steps**

---

- Conference call or meeting with the Bureau to receive the Bureau's position on proposed solutions. This must occur immediately as Agricore United will have to file its applications within a few days, in the event of no agreement.
- Agricore United is prepared to draft any documents required to be filed with the Tribunal, including a revised Consent Agreement.

**TAB 31**



Ministère de la Justice  
Canada

Department of Justice  
Canada

**Droit de la concurrence**  
Place du Portage, Tour I  
22<sup>e</sup> étage  
50, rue Victoria  
Gatineau (Québec)  
K1A 0C9

**Competition Law Division**  
Place du Portage, Phase I  
22<sup>nd</sup> floor  
50 Victoria Street  
Gatineau, Quebec  
K1A 0C9

Téléphone/Telephone: (819) 953-3895

Télécopieur/Facsimile: (819) 953-9267

Courriel/Email:

July 18, 2005

Notre référence / Our file:

**By e-mail**

John Bodrug & Christopher Margison  
Davies Ward Phillips & Vineberg LLP  
1 First Canadian Place, 44<sup>th</sup> Floor  
Toronto ON M5X 1B1  
CANADA

**Without Prejudice**

Dear Sirs,

**Re: Agricore United (CT-2002-001) - Consent Agreement dated October 17, 2002  
and Issued by the Competition Tribunal (the "Consent Agreement")**

Further to our meeting of July 15, this letter is in response to requests received from both Agricore United and Terminal One Vancouver Ltd, for a further extension of the final deadline for completion of an agreement to sell the UGG Terminal.

Based on representations by both Agricore United and Terminal One Vancouver Ltd. (T1), and following discussions with the Commissioner and Bureau management, the Commissioner is agreeable to extending the final deadline for completion of an agreement to sell the UGG Terminal to **12 noon (Winnipeg time) on Monday, August 15, 2005**. In addition, the Competition Bureau requests that by the deadline it be provided with copies of either (a) the signed relevant boards of directors resolutions for the Producer Group members and Agricore, or (b) the fully executed Purchase and Sale Agreement (please fax to John Syme at 819-953-9267).

We wish to be clear that the purpose of this further extension is to allow T1 to secure grain commitments to the terminal.

Yours truly,

Jonathan Chaplan  
Counsel, Competition Law Division

cc. Graham Law, Garth Gish, Angela Yadav

**TAB 32**





## Terminal One Vancouver Ltd.

### **AGRICORE UNITED ANNOUNCES EXTENSION OF TERMINAL SALE TO TERMINAL ONE VANCOUVER LTD.**

**July 29, 2005 (Winnipeg)** – On May 6, 2005, Agricore United and Terminal One Vancouver Ltd. ("Terminal One") announced that they had signed an agreement for the sale of the former United Grain Growers Limited terminal elevator in Vancouver, British Columbia to Terminal One. The transaction is not expected to close by the original August 1, 2005 closing date. However, Agricore United and Terminal One continue to work diligently to conclude a transaction as early as practicable.

Agricore United is one of Canada's leading agri-businesses. The prairie-based company is diversified into sales of crop inputs and services, grain merchandising, livestock production services and financial markets. Agricore United's shares are publicly traded on the Toronto Stock Exchange under the symbol "AU.LV".

Terminal One represents a consortium of five farmer-owned inland grain terminals operating in Saskatchewan: Great Sandhills Terminal Marketing Centre Ltd., North East Terminal Ltd., North West Terminal Ltd., Prairie West Terminal Ltd. and South West Terminal Ltd.

- 30 -

For more information, contact:

**Garth Gish**  
**Terminal One Vancouver Ltd.**  
**(306) 460-8874**  
ggish@p-w-t.ca

**Murdoch MacKay**  
**Vice-President, Terminal Services**  
**Agricore United**  
**(204) 944-5648**  
mmackay@agricoreunited.com

# TAB 33

**GRAHAM M. LAW  
BARRISTER & SOLICITOR  
525 EAST 80<sup>TH</sup> STREET, #4-A  
NEW YORK, NY, U.S.A. 10021**

(212) 879-0514  
GrahamMLaw@nyc.rr.com

My file no. GML04-001  
Your file no. 197998

**PRIVILEGED & CONFIDENTIAL  
WITHOUT PREJUDICE**

***Via email***

August 10, 2005

Christopher Margison  
Davies Ward Phillips & Vineberg LLP  
1 First Canadian Place, 44<sup>th</sup> Floor  
Toronto ON M5X 1B1  
CANADA

Dear Mr. Margison,

**Agricore United (CT-2002-001) - Consent Agreement dated October 17, 2002  
and issued by the Competition Tribunal (the "Consent Agreement")**

Further to your letter of August 9, 2005 requesting another extension of time to implement the divestiture of the UGG Terminal to Terminal One Vancouver Limited, this is to advise that having fully considered the matter, the Commissioner is not prepared to grant any further extension beyond August 15, 2005.

Yours truly,

***[Original signed and kept on file]***

Graham M. Law

c. D. Milne, J. Syme



**TAB 34**

**Droit de la concurrence**  
Place du Portage, Tour I  
22<sup>e</sup> étage  
50, rue Victoria  
Gatineau (Québec)  
K1A 0C9

**Competition Law Division**  
Place du Portage, Phase I  
22<sup>nd</sup> floor  
50 Victoria Street  
Gatineau, Quebec  
K1A 0C9

Téléphone/Telephone: (819) 953-3901  
Télécopieur/Facsimile: (819) 953-9267  
Courriel/Email: syme.john@cb-bc.gc.ca

Ms. Sandra Forbes  
Davies Ward Phillips & Vineberg LLP  
Suite 4400  
1 First Canadian Place  
Toronto, Ontario M5X 1B1

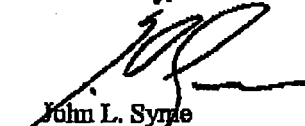
August 12th, 2005

Dear Sandra:

**United Grain Growers Limited and The Commissioner of Competition (CT-2002-001)**

We are writing to confirm that, without prejudice to the Applicant's Motion for Interim Relief in the referenced matter, dated August 11, 2005 (the "Motion"), and any position either Agricore United or the Commissioner of Competition (the "Commissioner") wishes to take on the Motion or on Agricore United's s. 106 Application, dated August 11, 2005, the Commissioner agrees to extend the date referred to in Jonathan Chaplan's July 18, 2005 letter to John Bodrug and Christopher Margison (being, 12 noon (Winnipeg time) on Monday August 15, 2005) to such date as the Tribunal finally disposes of the Motion.

Yours truly,

  
John L. Syme  
Senior Counsel

**TAB 35**

**[CONFIDENTIAL]**

**TAB 36**



# DAVIES WARD PHILLIPS & VINEBERG LLP

44TH FLOOR 1 FIRST CANADIAN PLACE TORONTO CANADA M5X 1B1  
TELEPHONE: 416.863.0900 FAX: 416.863.0871

GEORGE N. ADDY  
Direct Line 416.863.5588  
gaddy@dwpv.com

File No. 197998

July 8, 2004

**BY FAX AND E-MAIL**

**CONFIDENTIAL**

Mr. Gaston Jorré  
Industry Canada, Competition Bureau  
Deputy Commissioner of Competition Mergers  
50 Victoria Street  
Gatineau, Quebec  
K1A 0C9

Dear Mr. Jorré:

## Agricore United – Port Terminals

Further to our meeting of June 8, 2004 and my letter to Graham Law of June 29, 2004, I am writing to express our disappointment with respect to the position taken by the Competition Bureau (the "Bureau") in connection with Agricore United's request to vary the Consent Agreement registered with the Competition Tribunal (the "Tribunal") on October 17, 2002 (the "Consent Agreement") to remove the requirement that Agricore United divest a Port Terminal. As you are aware, the Consent Agreement includes both behavioural and structural remedies. The behavioural remedies have been in place since January 14, 2002 (the date of the Interim Consent Order) and the structural (divestiture) remedy is about to take effect shortly. There appears to have been no negative effects on the market since the behavioural remedies were first put in place. In fact, based on the experience to date, it is clear that the behavioural provisions included in the Consent Agreement are working to address any concerns, including the Commissioner of Competition's (the "Commissioner") key concern over access to terminal capacity in the Port of Vancouver for Non-Integrated grain companies.

Agricore United had requested that the Commissioner re-consider the necessity of a divestiture given the events over the last 29 months, not the least of which is knowing how the market has worked with the behavioural remedy in place and without a divestiture.

Tor #: 1398303.3

CONFIDENTIAL

- 2 -

It is exceptionally rare for the Bureau to have such actual data available to it when considering the need for relief in a merger case. Indeed, given the Commissioner's mandate of seeking only what is necessary to eliminate any substantial lessening of competition, the benefit of such real "market testing" of a remedy cannot be overstated. As explained at our meeting, it is our view that divestiture is no longer necessary to meet any reasonable concerns and that the Consent Agreement should be varied accordingly. The position conveyed to us by the Bureau during our meeting on June 8, 2004 was that, as a matter of policy, structural remedies were preferred and behavioural remedies were rarely, if ever, appropriate. At the meeting and subsequently, it was conveyed that it was highly unlikely that our request for a variation would be supported by the Bureau and that extensive field work would be required to verify our assertions. Our request to meet with the Commissioner and discuss this matter further was also declined on the basis that a change of position was unlikely. Given the lack of receptiveness on the part of the Bureau and the likelihood that the divestiture requirement would stand, Agricore United decided not to pursue the matter as it was felt that field work would disrupt existing discussions with a prospective bidder.

It therefore came as a great surprise when we learned of the resolution in the CN/BC Rail merger. This resolution, which was announced on July 2, 2004, less than one month after our meeting with the Bureau, is significant. In addition, given the fact that the merger had been under review by the Bureau for several months and given the complexity of the CN/BC Rail Consent Agreement itself, it is safe to assume that the behavioural resolution was still under active consideration by your Branch at the time of our meeting. In what the Bureau itself describes as a very complex transaction and with no market history from which to assess the likelihood of success, the Commissioner has agreed not to challenge a significant merger relating to the transportation infrastructure of not only the Western Canadian grain handling industry, but also many other important products. The Commissioner is relying on only the behavioural relief outlined in the Consent Agreement filed with the Competition Tribunal on July 2, 2004. No divestiture remedy has been required. In our view, this behavioural relief is far more complex than the behavioural relief being advanced by Agricore United and will require on-going extensive participation on the part of the Bureau to monitor compliance. We also note that many of the provisions relate to the handling and pricing of grain shipments – the very product of concern in our file.

We therefore re-iterate our request for a meeting with the Commissioner to discuss the matter in the hopes of demonstrating why a divestiture is no longer required and understanding why, from the Commissioner's perspective, behavioural remedies are acceptable for CN/BC Rail but unacceptable for Agricore United.

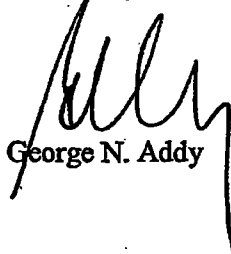
DAVIES WARD PHILLIPS & VINEBERG LLP

CONFIDENTIAL

- 3 -

Please do not hesitate to contact me if you have any questions with respect to the foregoing.

Yours very truly,



George N. Addy

GNA/rs

cc: Sheridan Scott  
*Competition Bureau*

Graham Law  
*Department of Justice*

Chris Martin  
*Agricore United*

**TAB 37**



DAVIES WARD PHILLIPS & VINEBERG LLP

44th Floor  
1 First Canadian Place  
Toronto Canada M5X 1B1

Tel 416 863 0900  
Fax 416 863 0871  
www.dwpv.com

June 15, 2005

John D. Bodrug  
Dir 416 863 5576  
jbodrug@dwpv.com

File No. 205664

**BY E-MAIL**

**CONFIDENTIAL**

Mr. Graham Law  
Barrister and Solicitor  
525 East 80<sup>th</sup> Street, #4-A  
New York, New York 10021

Dear Graham:

**Agricore United ("AU") – Port Terminals**

Further to our telephone conversation earlier today and my letter to Doug Milne on May 30, 2005 (a copy of which is attached), I am writing concerning the implications of the recent decision of the Competition Tribunal (the "Tribunal") in *RONA Inc. v. The Commissioner of Competition* for the October 17, 2002 consent agreement between the Commissioner of Competition (the "Commissioner") and AU (the "AU Consent Agreement"). Before commenting on the implications of the decision, I will summarize its key aspects (which, as of now, is available only in French).

**The Tribunal's Decision in RONA**

On January 10, 2005, RONA Inc. filed an application with the Tribunal pursuant to paragraph 106(1)(a) of the *Competition Act* (the "Act") for an order rescinding the consent agreement between it and the Commissioner which was registered with the Tribunal on September 4, 2003 (the "RONA Consent Agreement") in connection with RONA's acquisition of the competing Réno Dépot chain of retail home improvement stores. Among other things, the RONA Consent Agreement required that RONA divest a big box home improvement store located in Sherbrooke, Québec (the "Sherbrooke Store").

---

<sup>1</sup> CT-2003-007, Public Version of Reasons for Order, May 30, 2005, released by the Tribunal on June 6, 2005.

*The Parties' Positions*

In its notice of application, RONA argued that clear evidence of the imminent opening of a big box home improvement store in Sherbrooke by Home Depot amounted to a change in circumstances that justified rescinding the RONA Consent Agreement. RONA also argued that, if Home Depot's expansion plans in Sherbrooke had been known at the time the RONA Consent Agreement was entered into, the Commissioner would not have had any concerns about the Sherbrooke market in the first place and RONA would not have agreed to divest the Sherbrooke Store. Rather, the merger would have proceeded in Sherbrooke as it did in other markets, without the necessity of any divestiture.

The Commissioner contested RONA's application on several grounds. For example, while acknowledging that Home Depot would shortly enter the Sherbrooke market, the Commissioner argued that the RONA Consent Agreement should not be rescinded because the divestiture process was in full swing and an agreement of purchase and sale had been signed by a prospective buyer and the trustee appointed pursuant to the RONA Consent Agreement. In those circumstances, the Commissioner argued that rescinding the RONA Consent Agreement would, among other things: (i) threaten to make consent agreements unenforceable and ineffective; and (ii) cause unfair prejudice to the prospective purchaser of the Sherbrooke Store. The Commissioner also argued that, even if RONA could satisfy the statutory test for rescission, the Tribunal should nevertheless exercise its discretion to deny RONA's application.

*The Tribunal's Findings*

The Tribunal rejected each of the arguments advanced by the Commissioner and issued an order rescinding the RONA Consent Agreement. The Tribunal found that new evidence of an imminent opening of a Home Depot big box store in Sherbrooke constituted a change from the circumstances that prevailed at the time the RONA Consent Agreement was executed. In the Tribunal's view, the opening of a Home Depot store in Sherbrooke within the next year would resolve the Commissioner's concerns with respect to the Sherbrooke market.


Further, the Tribunal found that the parties would not have entered into the RONA Consent Agreement had there been, at that time, proof of Home Depot's expansion plans in Sherbrooke. In this regard, the Tribunal held that the intention of the parties must be measured as at the time of the application to vary or rescind the consent agreement and not by reference to the time the consent agreement was entered into.

The Tribunal also made some other significant points dealing with applications to vary or rescind consent agreements. For example, the Tribunal said that a consent agreement is in substance a negotiated instrument between the parties rather than an order of the Tribunal. Consequently, determining whether a change in circumstances justifies varying or rescinding a consent agreement requires the Tribunal to inquire into the intentions of the

parties. In this regard, the Tribunal rejected the Commissioner's submission that the relevant inquiry involves treating the consent agreement as though it were an order made by the Tribunal and determining, in light of the alleged change in circumstances, whether the Tribunal (not the parties) would have made the order.

In addition, the Tribunal indicated that the ability to vary or rescind consent agreements as the circumstances warrant is consistent with Parliament's intention that the consent agreement process be as flexible as possible to allow for the efficient resolution of competitive concerns in a naturally evolving marketplace. The Tribunal added that the Commissioner has the obligation to remain sensitive to market circumstances throughout the life of a consent agreement, and suggested that the Commissioner ought to have taken advantage of the flexibility in the process to amend the RONA Consent Agreement as evidence of Home Depot's expected entry in the Sherbrooke market became more and more concrete. In this regard, after finding that the Commissioner and her representatives had become focussed on RONA's divestiture of the Sherbrooke Store, the Tribunal cautioned that a consent agreement [translation] "is not an end in itself [but] one of among several ways to advance the purposes of the Act, and its force derives from its utility, not from its mere existence".


#### Application to AU Consent Agreement

 An inability of a purchaser group of independent grain companies to secure commitments of independent grain companies (including the group members' own volumes) to use the purchased terminal would demonstrate both the absence of any need for a divestiture to provide an alternative Vancouver port terminal for independent grain companies and the inability to make an effective divestiture in light of current market conditions.

Indeed, as we have previously discussed, including during the meeting that George Addy and Christopher Margison had with the Bureau on June 8, 2004, in our view there is already a sufficient basis of changed circumstances to warrant a variation to the AU Consent Agreement to remove any divestiture requirement. To summarize our previous submissions on this point:

- Significant excess capacity continues to be available at each of the port terminals in the Port of Vancouver, including the port terminals operated by SWP and JRI. (In this regard, as indicated by the Tribunal in *Hillsdown*, "[i]f other firms in the market have excess capacity, they can respond to a supra-competitive price rise by flooding the market at a lower price level".)
- Agricore United understands that a number of independent grain companies entered into long-term handling agreements with third party Vancouver port terminal operators after the AU Consent Agreement was registered with the Tribunal. As evidenced by Terminal One's recent difficulties in seeking to negotiate for grain volumes in Vancouver, these contracts tie up a significant portion of the independent grain that would otherwise be available for Terminal One (or any other owner of the UGG terminal) to compete for. Had the parties known that such a substantial volume of independent grain would be tied up under long-term handling agreements at this time, they would not have entered into a consent agreement requiring the divestiture of a Port Terminal. In the absence of a sufficient quantity of independent grain, any remedy requiring the divestiture of a port terminal would be fatally undermined absent the purchaser entering into a handling agreement with the Canadian Wheat Board, a result that would prejudice independent grain companies and that neither party intended.
- The behavioural provisions included in the AU Consent Agreement are working to address any possible concerns about access to terminal capacity in the Port of Vancouver by independent grain companies.

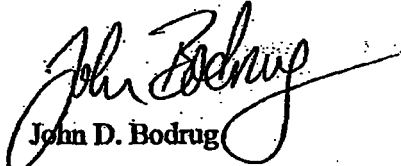
In light of the foregoing, while reserving AU's rights to apply for a section 106 variation to the AU Consent Agreement even under current circumstances, we submit that the Commissioner should consent to an amendment to the AU Consent Agreement to remove any divestiture requirement if Terminal One does not complete the Proposed Transaction.





Please do not hesitate to contact me if it would be helpful to discuss the foregoing.

Yours very truly,



John D. Bodrug

JDB/seg

**[CONFIDENTIAL]**

**TAB 38**

CT- 2005-008

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act* R.S.C. 1985, c. C-35 as amended;

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

**AND IN THE MATTER OF** filing and registration of a Consent Interim Agreement, pursuant to section 105 of the *Competition Act*.

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

**- AND -**

**SASKATCHEWAN WHEAT POOL INC.**

**-AND-**

**JAMES RICHARDSON INTERNATIONAL LIMITED**

**CONSENT INTERIM AGREEMENT**

COMPETITION TRIBUNAL	
TRIBUNAL DE LA CONCURRENCE	
F	CT- 2005-008
I	JUL 5 2005
L	
E	
D	
REGISTRAR - REGISTRAIRE	
OTTAWA, ON	000(a)

Registry of the Competition Tribunal	
Grefe du Tribunal de la concurrence	
REGISTERED / ENREGISTRÉ	
JUL	5 2005
JUIL	
FOR REGISTRAR /	
POUR REGISTRAIRE	

**WHEREAS** Saskatchewan Wheat Pool Inc. and James Richardson International Limited, together with their Affiliates, 6362681 Canada Ltd. and 6362699 Canada Ltd., have entered into a series of agreements (collectively, the "JV") dated April 6, 2005 creating joint ventures in connection with the Marketing of grain handling services to Third Party Graincos and the operation of their respective port terminal grain handling terminals in the Port of Vancouver;

**AND WHEREAS** SWP and JRI have requested an advance ruling certificate from the Commissioner of Competition in connection with the JV;

**AND WHEREAS** the Commissioner of Competition has not yet completed her inquiry in respect of the JV;

**AND WHEREAS** the object of this Consent Interim Agreement is to provide the

Commissioner of Competition with adequate time to complete her inquiry and to ensure that, prior to the completion of that inquiry, Saskatchewan Wheat Pool Inc. and James Richardson International Limited take no action that would impair the ability of the Competition Tribunal to remedy the effect of the JV on competition for port terminal grain handling services under section 92 of the *Competition Act* because that action would be difficult to reverse;

**AND WHEREAS** the Commissioner of Competition and Saskatchewan Wheat Pool Inc. and James Richardson International Limited agree that upon the signing of this Consent Interim Agreement, it shall be filed with the Tribunal for immediate registration;

**NOW THEREFORE** Saskatchewan Wheat Pool Inc. and James Richardson International Limited and the Commissioner of Competition have agreed to the terms of this Consent Interim Agreement as follows:

**I. DEFINITIONS**

1. For the purposes of this Agreement, the following capitalized terms have the following meaning:
  - (a) "Affiliate" has the meaning given to it in subsection 2 (2) of the Act;
  - (b) "Agreement" means this Consent Interim Agreement entered by Saskatchewan Wheat Pool Inc. and James Richardson International Limited and the Commissioner of Competition pursuant to section 105 of the Act;
  - (c) "Commissioner" means the Commissioner of Competition appointed pursuant to section 7 of the *Act* (Canada);
  - (d) "Hold Separate Monitor" means the Person appointed pursuant to Part IV of the Agreement, and any employees, agents or other persons acting for or on behalf of the Hold Separate Monitor;
  - (e) "JRI" means James Richardson International Limited, a corporation existing under the laws of Canada, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates;
  - (f) "JV" means the joint ventures between JRI and Saskatchewan Wheat Pool Inc., and their Affiliates, 6362681 Canada Ltd. And 6362699 Canada Ltd., as reflected in their agreements dated April 6, 2005, pursuant to which JRI and Saskatchewan Wheat Pool Inc. have agreed to coordinate the Marketing of grain handling services to Third Party Graincos. and the operation of their grain handling

terminals in the Port of Vancouver;

- (g) "Marketing" means any action taken to promote or sell services and, without limiting the generality of the foregoing, includes the setting of prices, rates, rebates, allowances, diversion premiums, tariffs and terms of service;
- (h) "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.
- (i) "SWP" means Saskatchewan Wheat Pool Inc., a corporation existing under the laws of Canada, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates;
- (j) "Third Party Graincos" means all Persons, who do not have an interest in port terminal grain handling facilities in the Port of Vancouver, in which neither JRI or SWP have any interest, who, in the past, currently, or in the future, have been, are, or will be, provided with any grain handling services by JRI and/or SWP in the Port of Vancouver;
- (k) "Tribunal" means the Competition Tribunal established by the *Competition Tribunal Act* (Canada), R.S.C. 1985, c. 19 (2nd Supp.), as amended.

- 2. For the purposes of this Agreement, "Confidential Information" means competitively sensitive or proprietary information pertaining to the provision of grain handling services to Third Party Graincos including, without limiting the generality of the foregoing, with respect to the provision of grain handling services to Third Party Graincos, any and all information pertaining to marketing methods or techniques, pricing, terms of service, revenues, costs, customer lists or other trade secrets pertaining to marketing.

## II. APPLICATION

- 3. The provisions of this Agreement apply to:
  - (a) JRI;
  - (b) SWP;
  - (c) 6362681 Canada Ltd.;
  - (d) 6362699 Canada Ltd.;
  - (e) all other Persons acting in concert or participating with (a) to (d), above with

respect to the matters referred to in this Agreement, who shall have received actual notice of this Agreement;

- (f) the Commissioner; and
- (g) the Hold Separate Monitor.

### **III. HOLD SEPARATE**

4. SWP and JRI shall, during the term of this Agreement, take all necessary steps to ensure they operate independently in respect of the Marketing of grain handling services to Third Party Graincos at the Port of Vancouver and at the Prince Rupert Terminal.
5. SWP and JRI shall, during the term of this Agreement:
  - (a) maintain and hold such physical assets, including computer systems and databases used in connection with the Marketing of grain handling services to Third Party Graincos, in good condition and repair, normal wear and tear excepted, and to standards at least equal to those maintained prior to the date of this Agreement;
  - (b) take all commercially reasonable steps to maintain quality and service standards for Third Party Graincos at the level that existed prior to the date of this Agreement, save as required by prudent management of such;
  - (c) not communicate Confidential Information to any Person, including each other, other than the Hold Separate Monitor, the Commissioner, or as otherwise permitted herein;
  - (d) not, to any material extent, alter, or cause to be altered, the management of those parts of their companies that market port terminal grain handling services to Third Party Graincos as they existed prior to the date of this Agreement, except as may be necessary to comply with the terms of this Agreement or to replace employees that may resign, save as required by prudent management; and;
  - (e) not terminate or alter any current employment, salary or benefit agreements for any employees working in those parts of their companies that market port terminal grain handling services to Third Party Graincos, to any material extent, save as required by prudent management.

6. SWP shall not offer employment to employees of JRI employed, directly or indirectly in the marketing of port terminal grain handling services to Third Party Graincos. The foregoing shall apply *mutatis mutandis* to JRI.

#### IV. MONITOR

7. Upon registration of this Agreement, the Commissioner shall appoint a Hold Separate Monitor. The choice of Hold Separate Monitor shall be subject to the consent of JRI and SWP, which consent shall not be unreasonably withheld. The Hold Separate Monitor shall be responsible for monitoring the compliance of JRI and SWP with this Agreement. If JRI and SWP have not opposed, in writing, including the reasons for opposing, the selection of the Hold Separate Monitor within 10 days after notice by the Commissioner to JRI and SWP of the identity of the Hold Separate Monitor, JRI and SWP shall be deemed to have consented to the selection of the Hold Separate Monitor.
8. If the Hold Separate Monitor ceases to act or fails to act diligently and consistent with the purposes of this Agreement, the Commissioner may appoint a substitute Hold Separate Monitor consistent with the terms of paragraph 7 of this Agreement. This Agreement shall apply to any substitute Hold Separate Monitor appointed pursuant to this paragraph.
9. SWP and JRI shall be jointly responsible for all fees or expenses reasonably and properly charged or incurred by the Hold Separate Monitor, or any substitute thereof appointed pursuant to this Agreement, in connection with the execution or performance of the Hold Separate Monitor's duties under this Agreement.
10. The Hold Separate Monitor shall have full and complete access to all personnel, books, records, documents and facilities of SWP and JRI that pertain, directly or indirectly to the Marketing of port terminal grain handling services to Third Party Graincos. SWP and JRI shall cooperate with any reasonable request of the Hold Separate Monitor. Neither SWP nor JRI shall take any action to interfere with or impede the Hold Separate Monitor's ability to discharge his/her duties and responsibilities.
11. The Hold Separate Monitor shall serve without bond or other security, on such reasonable and customary terms and conditions as are agreed, with the approval of the Commissioner. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of SWP and JRI such persons as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities under this Agreement. The Hold Separate Monitor shall account for all expenses incurred, including fees for his/her services, and such account shall be subject to the approval of the Commissioner.



12. SWP and JRI shall indemnify the Hold Separate Monitor and hold him/her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the duties of the Hold Separate Monitor, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Hold Separate Monitor.
13. The Hold Separate Monitor shall report in writing to the Commissioner: (i) every 20 days after being appointed until this Agreement is terminated; and (ii) at any other time as requested by the Commissioner or her staff, concerning SWP and/or JRI compliance with this Agreement.
14. Neither SWP nor JRI shall exert or attempt to exert any influence, direction or control over a Hold Separate Monitor which may adversely affect the discharge of the Hold Separate Monitor's duties under the terms of this Agreement.
15. This Agreement shall not be construed as providing the Hold Separate Monitor with ownership, management, possession, charge or control of SWP or JRI.
16. The Hold Separate Monitor shall execute a confidentiality agreement with JRI, SWP and their Affiliates, 6362681 Canada Ltd. and 6362699 Canada Ltd. in which the Hold Separate Monitor will undertake not to disclose any competitively sensitive or proprietary information acquired in the performance of the Hold Separate Monitor's duties to any person except to the Commissioner.
17. If the Hold Separate Monitor considers that SWP and/or JRI is in default of any of the terms of this Agreement, he/she shall immediately notify the Commissioner of the breach, who shall forthwith give notice to SWP and JRI setting out the particulars of such default.
18. If the Hold Separate Monitor advises the Commissioner that SWP and/or JRI is in default of any of the terms of this Agreement, or if the Commissioner otherwise believes such to be the case, then for the purpose of determining or securing compliance with this Agreement, subject to any valid claim to a legally recognized privilege, and upon written request, SWP and/or JRI shall permit any duly authorized representative of the Commissioner:
  - (a) upon a minimum of 3 days notice to SWP and JRI, access during office hours of SWP and/or JRI, to inspect and copy all books, ledgers, accounts, correspondence, memorandum, and other records and documents in the possession or under control of SWP and/or JRI relating to compliance with this Agreement; and

- (b) upon a minimum of 8 days notice to SWP and/or JRI, and without restraint or interference from SWP and/or JRI, to interview directors, officers or employees of SWP and/or JRI on matters in the possession or under the control of SWP and/or JRI relating to compliance with this Agreement.

**V. NOTIFICATION**

19. Each of SWP and JRI shall provide a copy of this Agreement to each of their officers, employees, or agents having managerial responsibility for any obligations under this Agreement, no later than 5 days from the date this Agreement is registered.
20. Notices, reports and other communications required or permitted pursuant to any of the terms of this Agreement, shall be in writing and shall be considered to be given if dispatched by personal delivery, registered mail or facsimile transmission to the parties:

**1. If the Commissioner**

**The Commissioner of Competition  
Competition Bureau**

**Place du Portage, 21st floor  
50 Victoria Street, Phase I  
Gatineau, Quebec K1A 0C9  
Attention: Senior Deputy Commissioner (Mergers)  
Fax: (819) 954-0998**

**With a copy to:**

**Director, Competition Law Division  
Competition Law Division  
Department of Justice  
Place du Portage, 22nd floor  
50 Victoria Street, Phase I  
Gatineau, Quebec K1A 0C9**

**Attention: Director of Competition Law Division  
Fax: (819) 953-9267**

**2. If to SWP:**

**Address 2625 Victoria Avenue, Regina, SK  
Attention: Ray Dean, General Counsel/Corporate Secretary**

Tel: (306 ) 569-4200  
Fax: (306) 569-5133

**2. If to JRI**

Address 2800 One Lombard Place  
Winnipeg, MB R3B 0X8

Attention: Jean-Marc Ruest  
Tel: (204) 934-5488  
Fax: (204) 943-2574

**VI. GENERAL**

21. SWP and JRI agree that they will take such steps as are necessary to ensure that 6362681 Canada Ltd. and 6362699 Canada Ltd, which are wholly owned by SWP and JRI, take such measures, including adopting any necessary resolutions or obtaining any necessary authorizations, to ensure they are bound by the terms of this Agreement.
22. This Agreement shall remain in effect for 60 days from the registration of this Agreement with the Tribunal. The Commissioner hereby covenants to JRI and SWP to forthwith register this Agreement with the Tribunal upon execution and delivery of this Agreement by all parties hereto.
23. SWP and JRI agree to the registration of this Agreement by the Tribunal, on usual terms, covering the matters agreed to herein. The Commissioner may extend any of the time periods contemplated by this Agreement, other than the time period in paragraph 22 of this Agreement.
24. SWP and JRI and the Commissioner may mutually agree to amend this Agreement in any manner pursuant to subsection 106(1) of the Act.
25. The computation of any time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. I-21 as amended.
26. This Agreement constitutes the entire agreement between the Commissioner, SWP and JRI with respect to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral.
27. In the event of a dispute as to the interpretation or application of this Agreement, including any decision by the Commissioner pursuant to this Agreement or breach of this

Agreement by the Respondents, the Commissioner, SWP or JRI shall be at liberty to apply to the Tribunal for a further order interpreting any of the provisions of this Agreement.

- 28. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which taken together shall constitute one and the same instrument. In the event of any discrepancy between the English and French versions of this Agreement, the English version shall prevail.

DATED at Winnipeg, Manitoba, this 30<sup>th</sup> day of June, 2005.

FILED AND REGISTERED BY the Tribunal, this day of mm/dd/yy.

Murdair Walsh  
 Commissioner of Competition  
 July 4, 2005

SASKATCHEWAN WHEAT POOL INC.

per \_\_\_\_\_

JAMES RICHARDSON INTERNATIONAL LIMITED

per Walter N. Fox

WALTER N. FOX  
VICE PRESIDENT

June 30, 2005

-9-

Agreement by the Respondents, the Commissioner, SWP or JRI shall be at liberty to apply to the Tribunal for a further order interpreting any of the provisions of this Agreement.

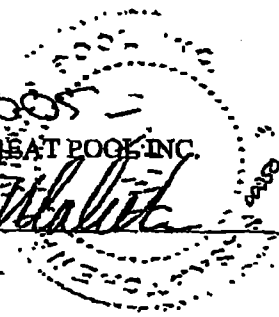
- 28. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which taken together shall constitute one and the same instrument. In the event of any discrepancy between the English and French versions of this Agreement, the English version shall prevail.

DATED at Regina, Saskatchewan this 30 day of June, 2005.

FILED AND REGISTERED BY the Tribunal, this day of mm/dd/yy.

Mendavi Lest  
 Commissioner of Competition  
 July 4, 2005

June 30, 2005  
 SASKATCHEWAN WHEAT POOL INC.  
 per James Richardson  
 Reg



JAMES RICHARDSON INTERNATIONAL  
 LIMITED  
 per

---

**TAB 39**

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act* R.S.C. 1985, c. C-35 as amended;

**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 of Vancouver;

**AND IN THE MATTER OF** filing and registration of an Consent Interim Agreement, hereafter (the "Agreement"), pursuant to section 105 the *Competition Act*.

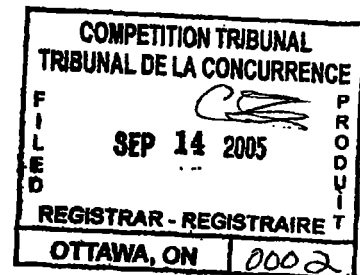
**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

**- AND -**

**SASKATCHEWAN WHEAT POOL INC.**

**-AND-**



**JAMES RICHARDSON INTERNATIONAL LIMITED**

---

**CONSENT INTERIM AGREEMENT  
AMENDING AGREEMENT**

---

**WHEREAS** Saskatchewan Wheat Pool Inc. ("SWP"), James Richardson International Limited ("JRI") and the Commissioner of Competition ("Commissioner") filed a Consent Interim Agreement with the Competition Tribunal on July 5, 2005;

**AND WHEREAS** the Consent Interim Agreement was registered by the Tribunal on July 5, 2005;

**AND WHEREAS** the Consent Interim Agreement will expire on September 3, 2005;

**AND WHEREAS** SWP, JRI and the Commissioner have agreed to extend the term of the Consent Interim Agreement;

**NOW THEREFORE SWP, JRI and the Commissioner have agreed that the Consent Interim Agreement is amended by deleting paragraph 33 thereof and replacing it with the following:**

**This agreement shall remain in effect until September 16, 2005, save and except for if on or before September 16, 2005, the Commissioner advises SWP and JRI that the Commissioner intends to file an application under s.92 of the *Competition Act* in respect of all or part of the JV, in which case this agreement will expire on September 26, 2005; or, upon agreement of the parties, on an earlier date.**

**DATED at Gatineau, this 2nd day of September, 2005.**

**FILED AND REGISTERED BY the Tribunal, this      day of              mm/dd/yy.**

**SASKATCHEWAN WHEAT POOL INC.**

Per: \_\_\_\_\_  
\_\_\_\_\_

**JAMES RICHARDSON INTERNATIONAL LIMITED**

Per: \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_ *Andrew Lewis* \_\_\_\_\_  
**COMMISSIONER OF COMPETITION**

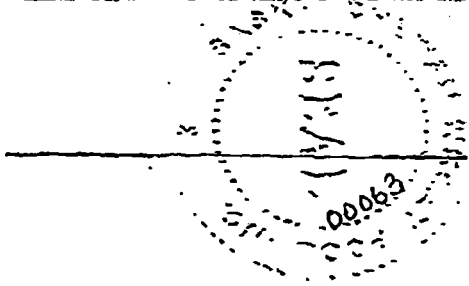


NOW THEREFORE SWP, JRI and the Commissioner have agreed that the Consent Interim Agreement is amended by deleting paragraph 33 thereof and replacing it with the following:

This agreement shall remain in effect until September 16, 2005, save and except for if on or before September 16, 2005, the Commissioner advises SWP and JRI that the Commissioner intends to file an application under s.92 of the Competition Act in respect of all or part of the JV, in which case this agreement will expire on September 26, 2005; or, upon agreement of the parties, on an earlier date.

DATED at Gatineau, this 2nd day of September, 2005.

FILED AND REGISTERED BY the Tribunal, this day of mm/dd/yy.



SASKATCHEWAN WHEAT POOL INC.

Per: *Francis Walek*

Senior Vice President  
Grain Group

*James Richardson*

GENERAL COUNSEL  
CORPORATE SECRETARY

JAMES RICHARDSON INTERNATIONAL LIMITED

Per: *James Richardson*

COMMISSIONER OF COMPETITION