

**THE COMPETITION TRIBUNAL**

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

**IN THE MATTER OF** an application by the Commissioner of Competition under section 104 of the *Competition Act*;

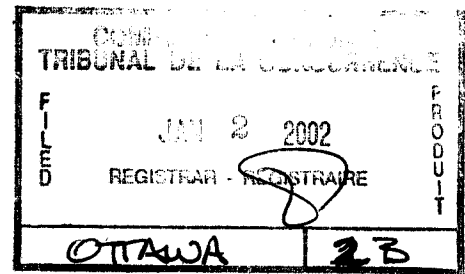
**AND IN THE MATTER OF** the acquisition by United Grain Growers Limited of Agricore Cooperative Ltd., a company engaged in the grain handling business.

**BETWEEN:**

**COMMISSIONER OF COMPETITION**  
(applicant)

- and -

**UNITED GRAIN GROWERS LIMITED**  
(respondent)



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**AFFIDAVIT OF DAVID OUELLET**

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**I, David Ouellet** of the City of Ottawa, Province of Ontario, Public Servant, MAKE OATH AND SAY:

1. I am a Senior Competition Law Officer at the Competition Bureau, Mergers Branch.
2. I have worked as a Competition Law Officer at the Competition Bureau since 1975, and have worked in the Mergers Branch from January 1994 to the present.
3. I have led two investigations of mergers arising in connection with the grain handling industry since 1997. The first proposed merger, in 1997, was an unsuccessful attempt by Alberta Wheat Pool ("AWP") and Manitoba Pool Elevators Limited ("MPE") to jointly

acquire United Grain Growers Limited (“UGG”). The second merger, in November 1998, was the amalgamation of AWP and MPE to form Agricore Cooperative Ltd. (“Agricore”).

4. On or about June 11, 2001, UGG advised the Commissioner of Competition (“Commissioner”) of the then proposed merger transaction. On July 30, 2001, UGG and Agricore publicly announced that their Boards of Directors had unanimously agreed on a merger plan whereby the companies would merge and carry on business as Agricore United. The proposed merger was approved by Agricore's shareholders and member delegates on August 30, 2001.
5. UGG and Agricore completed the statutory long-form pre-merger notification filings, pursuant to section 114 of the *Competition Act* (“Act”), on August 9, 2001. The applicable waiting period under section 123 of the Act is 42 days, which expired on September 20, 2001.
6. I was the Senior Officer assigned to this matter in June 2001, when the Commissioner was first apprised of the proposed merger.
7. Based on my prior knowledge of the grain handling industry and the specific facts relevant to this proposed transaction, as well as in light of discussions with market participants and industry experts, I was of the view that a merger of UGG and Agricore raised serious competition concerns in certain local primary grain handling markets in Alberta and Manitoba, as well as in the grain handling port terminal market in Vancouver, British Columbia. These competitive concerns, which warranted a thorough investigation and careful consideration of potential remedies, were conveyed to counsel for the parties by the Senior Deputy Commissioner of Competition at an early stage in the merger review.

8. I assembled an investigative team consisting of two other competition law officers, an enforcement support officer, and an economist from the Economic Policy and Enforcement Division of the Competition Bureau. An inquiry was commenced by the Commissioner on September 6, 2001, under section 10 of the Act. I requested, and was assigned, legal counsel from the Competition Law Division of the Department of Justice. I also identified and retained an industry expert, two agricultural economists and an industrial organization economist to assist in the Bureau's investigation. One agricultural economist, in conjunction with our industry expert, focussed primarily on potential competition issues relating to primary grain handling in Western Canada, while the other agricultural economist primarily examined competition issues relating to port terminal grain handling.
  
9. The investigation also identified a competition issue with respect to domestic canola processing. CanAmera Foods Limited Partnership ("CanAmera"), with a market share of about 45%, and Archer Daniels Midland Company ("ADM"), with a market share of approximately 20%, are the largest processors in the canola processing market in Canada. Pre-merger Agricore had a 16.67% ownership stake in CanAmera which entitled it to Board representation and access to sensitive commercial and competitive information. Pre-merger ADM had a 42% ownership position in UGG, while post merger it has a 19% ownership interest in Agricore United which could, at ADM's option and subject to certain conditions, ultimately rise to 45%. Post-merger ADM has the right to nominate two representatives to the Agricore United Board of Directors. ADM also has the right to nominate one of four members to the Grain Operations Committee established by UGG. Further, the agreement establishing the committee provides that ADM shall have "...substantial influence over the operating units of UGG that procure, transport and market grain...". Through its Board representation and the Grain Operations Committee, ADM could receive competitive information concerning the operations of CanAmera as well as have the opportunity to influence CanAmera and take competitive advantage of commercially sensitive information which could result in a substantial lessening of

competition.

10. The preliminary examination and the inquiry into the proposed transaction has included the following:

- (a) a review of pre-merger long-form notification information provided by UGG and Agricore under section 114 of the Act;
- (b) a review of information provided voluntarily by UGG and Agricore, including competitive analyses;
- (c) an extensive “field trip” in Western Canada during which members of the investigative team met with and obtained information from competitors and government agencies, as well as touring certain primary and port grain handling facilities;
- (d) over 30 interviews, either in person or by telephone, with market participants, including farmers, competitors, suppliers and government departments and agencies;
- (e) a review of written submissions and reports from various third parties, including market participants;
- (f) meetings and discussions with UGG counsel and representatives of both UGG and Agricore, either in-person or by telephone, to provide and obtain information about the proposed transaction and to discuss emerging issues;
- (g) through the Federal Court of Canada, the issuance of orders, under section 11 of the Act, for the production of records and written returns of information to the parties to the merger;
- (h) through the Federal Court of Canada, the issuance of orders, under section 11 of the Act, for the production of records and/or written returns of information to 18 third-party competitors in, or suppliers to, the Western Canadian grain-handling industry; and
- (i) telephone discussions with representatives of the US Federal Trade

Commission who had reviewed mergers in the grain handling industry in the United States.

11. Concerns expressed through the Commissioner's market contacts regarding the merger include:
- (a) the likelihood of a substantial increase in the handling costs of grain at primary elevators in local markets with high post-merger market shares;
  - (b) the likelihood of a substantial increase in farmers' transportation costs realized through a decrease in hauling allowances offered to farmers for the delivery of grain to primary elevators in local markets with high post-merger market shares;
  - (c) the likelihood of a substantial decrease in the prices offered for non-Canadian Wheat Board grains at primary elevators in local markets with high post-merger market shares;
  - (d) the likelihood of a substantial increase in the handling costs of grain at port terminal facilities at the Port of Vancouver realized in part through a reduction in the diversion premiums offered to third party grain handling companies for port terminal grain deliveries;
  - (e) the likelihood of a substantial increase in the price of products derived from canola oil seed processing; and
  - (f) the likelihood of a substantial decrease in the prices offered for canola seed.
12. Based upon information obtained and analysed in the investigation process, I formed the view that the only effective remedy that would eliminate the likely substantial lessening of competition resulting from the proposed acquisition of Agricore by UGG with respect to primary grain handling in certain local markets in Western Canada and in the Port of Vancouver grain terminal market, would be the divestiture of primary grain handling

facilities in the Peace River and Edmonton areas in Alberta and in the Dutton Siding/ Dauphin area in Manitoba, as well as, the divestiture of a grain terminal facility in the Port of Vancouver. I also formed the view that to address ADM's potential influence on CanAmera, it would be necessary to establish a confidentiality arrangement which would: preclude ADM from gaining access to any non-public information concerning CanAmera; deny ADM officers or employees the right to membership on Canamera's Board of Directors; and exclude canola oil seed processing from the scope of the Agricore United Grain Operations Committee's mandate.

13. On November 1, 2001, the Competition Bureau issued a press release announcing that it would challenge the acquisition of port terminal assets held by Agricore in the Port of Vancouver and would make an application to the Competition Tribunal seeking a divestiture of a port terminal at Vancouver. The press release also indicated that the Competition Bureau and UGG had come to an agreement on a divestiture package of grain elevators in Alberta and Manitoba, as well as, on confidentiality requirements regarding the merged entity's post-merger ownership interest in CanAmera, and would file a second application with the Competition Tribunal for a Consent Order seeking the Competition Tribunal's approval of the agreement.
14. I believe that the Statement of Grounds and Material Facts accurately reflects the findings of the Bureau's investigation.
15. As set out in paragraph 1 of the Commissioner's Application for Interim Order in this matter, the Commissioner applies for a Consent Interim Order to ensure that non-integrated grain handling companies (i.e. without an ownership interest in a grain terminal in Vancouver) have ongoing access to grain terminal services in the Port of Vancouver, pending the Tribunal's determination of the Commissioner's Application.
16. I believe that without the Consent Interim Order, there will be irreparable harm to non-

16. I believe that without the Consent Interim Order, there will be irreparable harm to non-integrated grain handling companies. In particular, the Respondent would be in a position to take actions that could adversely affect the ability of those companies to compete for grain on the prairies, either by limiting access to the most important port grain handling market in Canada, namely Vancouver, or by reducing or eliminating revenue streams flowing from grain handling in the Port of Vancouver.
17. I verily believe that that the Consent Interim Order is necessary to preserve competitiveness in the relevant markets. I also verily believe that the form of the Consent Interim Order proposed by the Commissioner will achieve that purpose.

SWORN BEFORE ME, at the City of Hull, )  
 in the Province of Quebec, )  
 this 19<sup>th</sup> day of December 2001. )  
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Hélène Chartrand

COMMISSIONER OF OATHS



David Ouellet

DAVID OUELLET