

CT - 2002/001

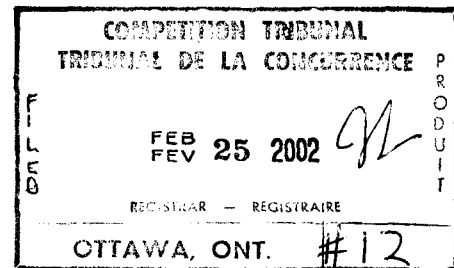
THE COMPETITION TRIBUNALIN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34; as amended;IN THE MATTER OF an application by the Commissioner of Competition under section 92 of the *Competition Act*,

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

BETWEEN:

COMMISSIONER OF COMPETITION
(applicant)

- and -

UNITED GRAIN GROWERS LIMITED
(respondent)**REPLY****I. Introduction**

1. This is the Commissioner of Competition's ("Commissioner's") reply to the Response filed by the Respondent in this proceeding on February 6, 2002 (the "Response").
2. In the "Introduction" section of the Response in this matter, the Respondent states:
 - in paragraph 1 - that it does not contest the Commissioner's allegation that the Respondent's acquisition of Agricore Cooperative Ltd. ("Agricore") (the "Acquisition") is likely to prevent or lessen competition substantially in the market for port terminal grain handling services in the Port of Vancouver; and
 - in paragraph 2 - that it agrees with the Commissioner that a divestiture that satisfies the four conditions set out in paragraph 77 of the Commissioner's Statement of Grounds and Material

Facts ("SGMF") would be sufficient to remedy the alleged substantial lessening of competition ("SLC").

3. However, in paragraph 3 and 4 of the Response, the Respondent submits that, while it agrees with the Commissioner that the divestiture of either of the Pacific Terminal or UGG terminal would remedy the SLC, the "divestiture of that part of the Pacific Complex known as Pacific I" would, by itself, also satisfy the conditions set out in paragraph 77 of the Commissioner's SGMF.

4. In paragraph 5 of the Response, the Respondent states that the sole substantive issue between the parties in this proceeding is therefore whether the divestiture of the "Pacific 1 Terminal" meets the conditions set out in paragraph 77 of the SGMF. In paragraph 5 the Respondent further states that if the Tribunal finds that the divestiture of the "Pacific 1 Terminal" satisfies the conditions set out in paragraph 77 of the SGMF, then the Respondent and the Commissioner will consent to an order requiring the Respondent to divest, at the Respondent's option, one of (1) the "Pacific 1 Terminal", (2) the "Pacific Complex" or (3) the UGG Terminal. In paragraph 6 of the Response, the Respondents state in the alternative, that if the Tribunal finds that divestiture of the "Pacific 1 Terminal" does not satisfy the conditions set out in paragraph 77 of the SGMF, then the Respondent and the Commissioner will consent to an order requiring the Respondent to divest, at the Respondent's option, either (1) the "Pacific Complex" or (2) the UGG Terminal.

5. The Commissioner wishes to make the following submission with respect to the position taken by the Respondent.

6. The Commissioner agrees that the sole substantive issue "between the parties" is whether the divestiture of "Pacific 1 Terminal" would satisfy the conditions set out in paragraph 77 of the SGMF.

7. However, the Commissioner differs from the Respondent in terms of what facts are relevant and necessary for the Tribunal to consider in order to determine whether each of those 4

conditions is satisfied. In particular, the Commissioner states that grain handling services offered in the Port of Vancouver at the Pacific, UGG, or any other terminal cannot be considered in isolation. Grain handling at the Port is only one part of a process which begins with grain being harvested, then sold, delivered to a primary elevator, stored, loaded onto rail cars, shipped to Vancouver for handling at a terminal and ultimately shipped offshore to export markets. The various parts of this process are not independent of one another, but are closely linked as part of an integrated supply chain. The grain handling services in the Port of Vancouver must be viewed in this context. The Commissioner states that to assess the competitiveness of one terminal relative to another, the commercial and operational environment in which those terminals exist must first be understood.

II. Denials

Pacific 1 - A Separate Terminal?

8. In paragraph 9 of its Response, the Respondent states that "the Pacific Complex is comprised of three distinct structures...", which were built separately in the 1920s. In paragraph 10 through 13 and 17 through 19 this "separateness" theme is expanded upon. The Respondent states in paragraph 12 of the Response that the Annex, which is located between Pacific 1 and Pacific 3, "is currently connected to both Pacific 1 and Pacific 3."

9. The Commissioner states that the submission in paragraph 12 of the Response that "Annex 2 is currently connected to both the Pacific 1 Terminal and the Pacific 3 Terminal," is misleading. Annex 2 is not simply "currently" connected to the two other structures. Over 25 years ago, changes were made to the formerly three distinct structures so as to permit all of them to be operated as a single, wholly integrated terminal. Whereas prior to that integration, there were three structures, there is now only one integrated facility - the Pacific Terminal, comprised of Pacific 1, the Annex and Pacific 3.

10. Integration means, of course, that the equipment and facilities which make up the Pacific Terminal, whether located in Pacific 1, the Annex or Pacific 3, are able to work in a coordinated manner. The Pacific Terminal is more efficient and competitive as a result of this integration.

For example, if a railroad wanted to deliver a block of cars to the Pacific Terminal, it could "spot" (i.e. place) some rail cars on the Pacific 1 side of the Terminal and some at Pacific 3 side. These cars could be unloaded simultaneously. The grain taken from the cars could move freely and efficiently on conveyor belts anywhere within the entire Pacific Terminal, whether for cleaning, storage or both. For example, grain unloaded from railcars at Pacific 3 could be cleaned at Pacific 1, and then stored at Pacific 1 or be returned to the Annex or Pacific 3 for storage. If, for example, the grain was subsequently to be shipped from Berth 2, which is located on the Pacific 1 side of the Terminal, it could be taken from storage bins located in any, or all of, Pacific 1, the Annex or Pacific 3. Similarly, grain handling workers, maintenance personnel, managers and other employees can move freely between Pacific 1, the Annex and Pacific 3 via elevated walkways which link those structures.

11. The Commissioner states that what the Respondent is asking the Tribunal to do is to "hive off" part of what has for over 25 years been an integrated terminal so as to re-create an asset which was constructed 80 years ago as an independent structure.

12. The Commissioner states in reply to paragraphs 15 and 17(a) that Pacific 1 is not a physically separate stand alone facility.

13. The Commissioner has no direct knowledge regarding the matters addressed in the second sentences in each of paragraph 17(c) and 19 of the Response.

Pacific 1 has previously "handled" over 2.2 million tonnes?

14. In paragraph 21 of its Response, the Respondent states that Pacific 1 "can handle 2.2 million tonnes of grain per year and has done so in the past. For example, it handled more than 2.2 million tonnes of grain during the 1991-92 crop year."

15. The Commissioner states that before it can be said that a terminal can "handle" a given quantity of grain, it must be established that the terminal can receive, clean (where necessary), store and ship that grain. The Commissioner further states that while in 1991-92 more than 2.2 million tonnes of grain may have been loaded onto vessels and shipped out of Berth 2 at Pacific

1, in handling that grain - from receipt by rail, through cleaning and storage - Pacific 3 and the Annex, as well as Pacific 1, were utilized. In other words, though more than 2.2 million tonnes of grain may have been loaded onto ships on the Pacific 1 side of the Pacific Terminal in 1991-92, that grain was not handled by Pacific 1 alone: it was handled by the Pacific Terminal as an integrated entity.

Additional Denials

16. In reply to paragraph 34, the Commissioner states that Canadian Grain Commission does enforce standards in respect of grain delivered to port terminals. The Commissioner reiterates that the issue of available storage accommodation is difficult to assess, particularly in view of the fact that terminal operators must keep a "float" of storage space available to permit them to move, blend, clean and generally handle grain within in a given terminal. The float required by any given operator at any given time is a matter in the discretion of the operator. The Commissioner maintains that the vertical relationship between primary elevators and port grain terminals does raise competition concerns on the Prairies.

17. In paragraph 35 of the Response, the Respondent states that it "does not accept ... a number of the underlying factual contentions in paragraphs 40, 42, 51, 53, 54, 55, 61, 63, 65, 67, 68, and 76" which the Commissioner relies upon in concluding that the relevant geographic market is the Port of Vancouver, the relevant product market is port terminal grain handling services and that the acquisition of Agricore by the Respondent will likely lead to an SLC in those markets. The Commissioner maintains that the factual contentions in the referenced paragraphs are correct. Moreover, as the Respondent has not identified the contentions that it does not accept, it is impossible for the Commissioner to reply to paragraph 35 of the Response. The Commissioner reserves the right to reply to any factual contentions in any of the referenced paragraphs which the Respondent may, at some future time, specifically challenge.

18. In paragraph 36 of the Response, the Respondent states that it does not agree with a number of allegations in paragraphs 22, 43, 46, 47, 48, 49, 56-60 and 69 of the SGMF and that, in any event, the allegations in those paragraphs are "irrelevant to the matter in dispute between

the parties." The Commissioner takes the same position with respect to the unidentified allegations as in the preceding paragraph. In addition, the Commissioner states that the referenced paragraphs are not irrelevant to the proceeding before the Tribunal.

19. In reply to last sentence in paragraph 37 of the Response, the Commissioner states that there are very few cases in which the necessary coordination required between, among others, shippers, the railways, the port terminal and the vessel, has been achieved so as to permit grain to move from rail cars directly to a vessel without being stored at a port terminal.

20. In reply to paragraph 38 of the Response, the Commissioner maintains that each port listed in paragraph 18 of the SGMF constitutes a relevant geographic market, largely due to transportation costs and the location of customers.

21. In reply to Paragraph 40 of the Response, the fact that Non-Integrated Graincos obtain terminal authorization is necessary but not sufficient. The Commissioner states that to be competitive, Non-Integrated Graincos require terminal access on commercially competitive terms. To be commercially competitive, a terminal authorization must be on terms such that the rail cars carrying the Non-Integrated Graincos' grain are unloaded by the terminal in a time frame which allows the Non-Integrated Graincos to retain their multiple car incentive rail rate earned in the country. In addition, reasonable diversion premiums must be paid by the terminal to Non-Integrated Graincos for supplying their grain originations to the terminal. Though the denial of terminal authorizations may not be common, authorizations have been provided on terms which are not commercially competitive, thereby impacting on the Non-Integrated Graincos' ability to compete effectively for grain originations in the Prairies. The Commissioner also observes that terminal authorization requirements are a relatively recent phenomenon, having been in place for less than two years.

22. The Commissioner has no knowledge of the matters related to grain handling agreements addressed in paragraph 42 of the Response.

23. In reply to the second sentence in paragraph 44 of the Response, the Commissioner notes that notwithstanding the fact that a Non-Integrated Grainco has a handling agreement with a

given terminal, for each shipment it makes, that Grainco must still obtain a terminal authorization. In reply to the third sentence in paragraph 44 of the Response, the Commissioner states that while it is possible to submit a tender to the Canadian Wheat Board before obtaining terminal authorization, it is clearly in a tender company's interest to know, prior to tendering, that a terminal is prepared to unload their cars. Without this assurance, a company could be placed in the position of winning the tender and then being unable to deliver grain and thus defaulting on the tender and on any rail cars it had advance booked. In any event, the tenderer must obtain terminal authorization before cars will be spotted by the railway at the relevant country elevator location. In reply to the second to last sentence in paragraph 44, the Commissioner reaffirms the last sentence in paragraph 38 of the SGMF.

24. In reply to paragraph 45 and 46 of the Response, the Commissioner agrees that the table in paragraph 44 refers only to filed tariffs. However, the Commissioner states that tariffs cannot be considered independently from the diversion premiums paid by the Integrated Graincos to Non-Integrated Graincos which, as noted in paragraph 35 of the SGMF, have declined significantly during the last crop year.

25. In reply to paragraph 47 of the Response, the Commissioner states that the correlation between storage and grain handling (based upon figures appearing in paragraph 50 of the SGMF) is approximately 0.7. In addition, factors such as the cost-efficiency of a terminal, or the management philosophy of a terminal (such as the decision to increase internal prairie originations rather than aggressively pursuing third party originations) can understate the correlation between handle and storage capacity.

26. In reply to paragraph 49 of the Response, the Commissioner notes that the Canadian Wheat Board has historically attempted to match rail shipments to port with specific customer orders. This is not a practice which first began with the advent of CWB tendering. Furthermore, even with the advent of tendering, customer demands are increasingly more product specific, thereby increasing the need for further segregation. All segregations, even though they may be attached to a specific customer order, still require port handling services. This includes, on a regular basis, the requirement for storage in response to a variety of operational situations such as the

late arrival of a vessel or the inability to load a waiting vessel due to poor weather conditions (e.g. rain). The Commissioner reaffirms his view that increasing grain segregations increase the need for, and importance of, storage capacity.


27. In reply to paragraph 51 of the Response, the Commissioner refers back to comments made in paragraph 6 of this reply and reaffirms the statement made in paragraph 72 of the SGMF.

28. In reply to paragraph 52 of the Response, the Commissioner acknowledges that port access on a given CWB shipment, prior to CWB tendering, may not necessarily have been "guaranteed" in situations where the terminal was operating at capacity. Nevertheless, terminal access was not nearly so significant a concern during this period, since a grain handling company's historical annual market share was ensured. Other than the above noted qualification, the Commissioner reaffirms all the statements made in paragraph 73 of the SGMF.

29. In reply to paragraph 53 of the Response, the Commissioner reasserts the statements made in paragraph 74 of the SGMF and is of the view that these facts are directly relevant to the remedy issue currently before the Competition Tribunal.

30. In reply to paragraph 56, the Commissioner states that this would involve not only dividing the Pacific Terminal to re-create a structure built approximately 80 years ago, as discussed in paragraph 10 of this Reply, but also subdividing the Annex, one of the buildings which makes up the Pacific Terminal.

Dated at Hull, Quebec, February 22, 2002

per 

Konrad von Finckenstein, Q.C.
Commissioner of Competition

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