



Reference: *Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp. Trib. 11  
File no.: CT2001007  
Registry document no.: 11b

**PUBLIC VERSION**

IN THE MATTER OF an application for a consent order by the Commissioner of Competition pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application for a consent interim order by the Commissioner of Competition pursuant to sections 92 and 104 of the *Competition Act*;

AND IN THE MATTER OF the merger of Agricore Cooperative Ltd. and United Grain Growers Limited.

B E T W E E N:

**The Commissioner of Competition**  
(applicant)

and

**United Grain Growers Limited**  
(respondent)

Date of hearing: 20020219  
Member: McKeown J. (Chairman),  
Lawrence P. Schwartz and Gerry Solursh  
Date of order: 20020219  
Order signed by: McKeown J.



**CONSENT ORDER**

[1] FURTHER TO the December 13, 2001, application of the Commissioner of Competition pursuant to sections 92 and 105 of the *Competition Act* (the "Act"), R.S.C. 1985, c. C-34, as amended, for a consent order directing the respondent to Divest certain assets and implement certain other remedies in connection with the merger between Agricore Cooperative Ltd. and United Grain Growers Limited, the merged entities which have been carrying on business as Agricore United as of November 1, 2001;

[2] AND UPON READING the notice of application dated December 13, 2001, the Statement of Grounds and Material Facts, the Consent Order Impact Statement, the Affidavits of David Ouellet and Halldor Palson, both dated December 10, 2001 (the "Affidavits"), the Draft Consent Order and the Consent of the parties, filed herein;

[3] AND UPON CONSIDERING THAT the Commissioner and Agricore United have reached an agreement which is reflected in this order;

[4] AND UPON CONSIDERING THAT the Commissioner is satisfied that, on the basis of the considerations outlined in the Consent Order Impact Statement, the remedies provided for herein, if ordered, will be sufficient to eliminate any substantial lessening or prevention of competition resulting from the Merger in respect of the provision of primary grain elevator services in the relevant local geographic markets and any substantial lessening or prevention of competition resulting from the Merger in the canola seed purchasing or processing market in Canada;

[5] AND IT BEING UNDERSTOOD THAT the Commissioner has alleged certain material facts, and that, although Agricore United does not agree with all the facts alleged by the Commissioner, and does not admit any substantial lessening or prevention of competition with respect to the Merger as alleged by the Commissioner, Agricore United does not contest the Statement of Grounds and Material Facts, the Consent Order Impact Statement or the Affidavits for the purposes of this application or any proceeding relating to this order, including an application to vary or rescind this order under section 106 of the Act;

THE TRIBUNAL ORDERS THAT:

### **Definitions**

[6] For the purposes of this order, the following definitions shall apply:

(a) "ADM" means Archer Daniels Midland Company, a company incorporated under the laws of the State of Delaware;

(b) "Agricore" means Agricore Ltd., a corporation continued under the provisions of the *Canada Business Corporations Act* (Canada), R.S.C. 1985, c. C-44, as amended;

(c) "Agricore United" means, following the Closing Date, United Grain Growers Limited, a

corporation existing under the provisions of the *United Grain Growers Act* (Canada), a Special Act of the Parliament of Canada, and affiliates thereof, and carrying on business as "Agricore United";

(d) "CanAmera" means CanAmera Foods Limited Partnership, a limited partnership organized under the laws of the Province of Saskatchewan;

(e) "Closing Date" means November 1, 2001;

(f) "Commissioner" means the Commissioner of Competition appointed pursuant to section 7 of the Act;

(g) "Confidential Information" means competitively sensitive or proprietary information relating to the Primary Elevators not independently known to Persons other than Agricore United, including, without limiting the generality of the foregoing, customer lists, price lists, marketing methods or other trade secrets that relate to the Primary Elevators;

(h) "Divest" means to implement a Divestiture;

(i) "Divestiture" means the sale, transfer, assignment, redemption or other disposition (including, with the approval of the Commissioner, an asset swap arrangement) necessary to ensure that Agricore United does not retain, directly or indirectly, any right, title, control, interest, liability or obligation in respect of any of the Primary Elevators to be Divested inconsistent with the intent of this order, other than obligations in respect of any representations, warranties and covenants included in any agreement between Agricore United and the Purchaser(s) of the Primary Elevators as permitted by this order;

(j) "Merger" means the merger of the Primary Elevator operations of Agricore and UGG pursuant to the acquisition of Agricore by UGG pursuant to the Merger Agreement dated as of July 30, 2001;

(k) "Person" means any natural person, corporation, association, firm, partnership or other business or legal entity;

(l) "Primary Elevators" means those primary elevators identified in Schedule "A" to this order and, in respect of any particular primary elevator, includes all rights, titles and interests in and to all assets and properties, used to operate that Primary Elevator in the ordinary course of business as a grain handling facility in accordance with past practice including: (i) all real property owned, leased or otherwise held by Agricore United and used to operate that Primary Elevator; (ii) all personal property, including supplies and parts, owned, leased or otherwise held by Agricore United and used to operate that Primary Elevator; (iii) all rights of Agricore United relating to that Primary Elevator under any contract entered into with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and joint venture partners; (iv) any transferable governmental

approvals, consents, licenses, permits, waivers, or other transferable authorizations held by Agricore United and used to operate that specific Primary Elevator; (v) any transferable rights of Agricore United relating to that specific Primary Elevator under any warranty and guarantee, express or implied; (vi) all books, records, and files held by Agricore United relating only to that Primary Elevator reasonably necessary to operate that Primary Elevator on a going forward basis; and (vii) all existing customer and vendor lists held by Agricore United and used in the operation of that Primary Elevator. A Primary Elevator ceases to be a "Primary Elevator" for the purposes of this order upon being Divested by Agricore United or the Trustee, as the case may be, whether or not such Divestiture occurs before or after the issuance of this order;

(m) "Primary Elevator Initial Sale Period" has the meaning set out in Confidential Schedule "B";

(n) "Purchaser" means the Person(s) or entity(ies) who purchase(s) one or more of the Primary Elevators in accordance with the procedure for Divestiture set out in this order;

(o) "Trustee" means the Person(s) appointed trustee pursuant to paragraph 18 or 19 of this order to effect the sale of the Primary Elevators, if necessary; and

(p) "UGG" means, prior to the Closing Date, United Grain Growers Limited, a corporation existing under the provisions of the *United Grain Growers Act* (Canada), a Special Act of the Parliament of Canada.

## **Application**

[7] The provisions of this order shall apply to:

(a) Agricore United;

(b) each division, subsidiary or other Person controlled by Agricore United and each officer, director, employee, agent or other Person acting for or on behalf of Agricore United with respect to any matter referred to in this order;

(c) the successors and assigns of Agricore United, and all other Persons acting in concert or participating with it with respect to any matter referred to in this order who shall have received actual notice of this order;

(d) any Trustee appointed pursuant to this order and each employee, agent or other Person acting for or on behalf of such Trustee with respect to any matter referred to in this order; and

(e) a proposed Purchaser and each employee, agent or other Person acting for or on behalf of such proposed Purchaser with respect to any matter referred to in this order.

## **Divestiture of Primary Elevators**

[8] Agricore United shall make reasonable efforts to Divest the Primary Elevators within the Primary Elevator Initial Sale Period in accordance with the procedure for Divestiture set out herein.

[9] If the Divestiture of all of the Primary Elevators has not been completed within the Primary Elevator Initial Sale Period, the Divestiture of any remaining Primary Elevator(s) shall be carried out by the Trustee in accordance with the procedure set out herein.

## **Divestiture Procedure**

[10] Divestiture of the Primary Elevators, whether by Agricore United or the Trustee, shall be completed on the following terms:

- (a) by way of a disposition of each of the Primary Elevators for use as a going concern; and
- (b) to one or more arm's length Purchaser(s) who:
  - (i) will use the Primary Elevator(s) as a grain handling facility in substantially the same manner as it or they were used prior to the Divestiture; and
  - (ii) has the managerial, operational and financial capability to operate the Primary Elevator(s) as contemplated in subparagraph 10(b)(i) above.

[11] Any Person making a *bona fide* inquiry of Agricore United, its agent or the Trustee regarding the possible purchase by that Person or its principal of any one or more of the Primary Elevators, shall be notified that the sale is being made pursuant to this order and provided with a copy of this order, with the exception of the provisions hereof which are confidential as set out in Confidential Schedule "B".

[12] Commencing on April 1, 2002, and for the balance of the Primary Elevator Initial Sale Period, any prospective Purchaser that demonstrates its *bona fide* interest in purchasing one or more of the Primary Elevators shall:

- (i) be furnished with all pertinent information regarding the Primary Elevators that such prospective Purchaser has expressed an interest in purchasing; and
- (ii) be permitted to make such reasonable inspection of any or all of the Primary Elevators and of all financial, operational or other documents and information as may be relevant to the Divestiture, except for any documents which have been or shall be made the subject of an order of confidentiality of the Competition Tribunal.

[13] Agricore United shall not, without the consent of the Commissioner, provide financing for all or any part of any Divestiture under this order which would permit Agricore United to influence or control, directly or indirectly, the Primary Elevators after the Divestiture.

[14] In connection with any Divestiture made pursuant to this order, Agricore United will not require or otherwise cause to be instituted, any restrictions, whether in the form of restrictive covenants, non-compete agreements or other terms or conditions, which in any way limit or impair the ability of any Purchaser of the Primary Elevators to operate the Primary Elevators as a going concern.

[15] Agricore United shall allow the Purchaser of any of the Primary Elevators an opportunity to employ those persons employed primarily in relation to that Primary Elevator (the "Employees") as follows:

(a) not later than 14 days, or such other period as may be agreed upon by the Purchaser and Agricore United, before the date of Divestiture of the Primary Elevator in question, Agricore United shall, to the extent permissible under applicable laws, (i) provide to the Purchaser of the Primary Elevator a list of all the Employees, (ii) allow the Purchaser an opportunity to interview the Employees for purposes of determining whether or not to offer them employment, and (iii) allow the Purchaser of the Primary Elevator to inspect the personnel files and other documentation relating to the Employees; and

(b) Agricore United shall, to the extent permissible under applicable laws, (i) not offer any incentive to any Employee to decline employment with the Purchaser of the Primary Elevator; (ii) remove any contractual impediments with Agricore United that may deter any Employee from accepting employment with the Purchaser of the Primary Elevator including, but not limited to, any non-compete or confidentiality provisions of employment relating specifically to the Primary Elevator, that would affect the ability of the Employee to be employed by the Purchaser of the Primary Elevator; (iii) not interfere with the employment by the Purchaser of the Primary Elevator of any Employee; and (iv) continue employee benefits offered by Agricore United until the Divestiture has been completed, including regularly scheduled raises and bonuses, and regularly scheduled vesting of all pension benefits.

[16] Access by a prospective Purchaser to the information and assets identified in paragraph 12 of this order shall be conditional on the execution of a customary confidentiality agreement containing, among other things, non-solicitation terms relating to personnel and suppliers.

[17] Agricore United shall advise the Commissioner in writing every 60 days of the progress of its efforts to accomplish the Divestitures, including a description of contacts or negotiations and the identity of all parties contacted and prospective purchasers who have come forward, all with reasonable detail. The Commissioner has the right to request additional information from Agricore United regarding the divestiture efforts and Agricore United shall respond to any such requests within a reasonable time having regard to the nature of the request.

## **Trustee Sale**

[18] If all of the Primary Elevators have not been Divested within the Primary Elevator Initial Sale Period, then the Commissioner shall appoint a Trustee. The Commissioner shall select a Trustee, subject to the consent of Agricore United (which shall not be unreasonably withheld), at least 30 days before the expiry of the Primary Elevator Initial Sale Period, and the Trustee shall, upon the expiry of the Primary Elevator Initial Sale Period, be responsible for effecting the Divestitures of the remaining Primary Elevators in accordance with the requirements set out in this order, including Confidential Schedule "B". If Agricore United and the Commissioner fail to agree on the selection of a Trustee, the Competition Tribunal, on the application of the Commissioner or Agricore United, shall appoint a Trustee.

[19] If any Trustee appointed pursuant to paragraph 18 above has ceased to act or failed to act diligently or otherwise in accordance with this order, the Commissioner shall, subject to the consent of Agricore United (which shall not be unreasonably withheld), forthwith appoint a substitute Trustee. If Agricore United and the Commissioner fail to agree on the selection of a substitute Trustee, the Competition Tribunal, on the application of the Commissioner or Agricore United, shall appoint a substitute Trustee.

[20] Agricore United shall assist the Trustee in accomplishing the Divestiture(s). In connection therewith, Agricore United shall provide any prospective Purchaser, that demonstrates its *bona fide* interest in purchasing one or more of the Primary Elevators, with access to all information and assets set out in paragraph 12 of this order, subject to the conditions set out in paragraph 16 of this order. The Trustee shall have such full and complete access, as is reasonable in the circumstances, to the personnel, books, records and facilities of the Primary Elevators and Agricore United shall take no action to interfere with or impede the Trustee's accomplishment of the Divestiture(s).

[21] Agricore United shall not object to any of the Divestiture(s) proposed by the Trustee on any grounds other than the Trustee's malfeasance, gross negligence, bad faith or breach of this order.

[22] Agricore United shall hold the Trustee harmless against any losses, claims, damages or liabilities arising out of, or in connection with, the performance of the Trustee's duties under this order except to the extent that such liabilities, losses, damages or claims result from the Trustee's malfeasance, gross negligence, bad faith or breach of this order.

[23] The Trustee shall have such other powers as the Competition Tribunal may grant to the Trustee upon the request of the Commissioner or Agricore United.

[24] All expenses reasonably and properly incurred by the Trustee in the course of the Trustee sale shall be paid by Agricore United and the proceeds of the Trustee sale shall be paid to Agricore United or as Agricore United may direct.

[25] The Trustee shall Divest the Primary Elevators at the price and on the terms and conditions most favourable to Agricore United then reasonably available, [Confidential].

[26] The Trustee shall execute a customary confidentiality agreement and shall not communicate any Confidential Information except to the extent required by this order.

[27] After the appointment of the Trustee becomes effective, only the Trustee shall have the full power and authority to effect the Divestiture of the Primary Elevators on such terms as are required by this order.

[28] The Trustee shall have the full power and authority to retain, on usual and reasonable commercial terms, financial, legal and other professional advisers, including investment bankers, that may be reasonably necessary or advisable in advising and assisting the Trustee in effecting the Divestiture(s) of the Primary Elevators.

[29] After the Trustee's appointment, the Trustee shall, every 30 days, file reports with the Commissioner and Agricore United, setting forth the Trustee's efforts to accomplish the Divestiture(s), all with reasonable detail. The Commissioner has the right to ask for additional information from the Trustee regarding the Divestiture and the Trustee shall respond within a reasonable time having regard to the nature of the request.

### **Commissioner's Approval**

[30] The Divestiture of one or more of the Primary Elevators is subject to the approval of the Commissioner in writing, which shall be based on the criteria set out in paragraph 10 of this order and shall be obtained in accordance with the notification procedure set out in paragraphs 32 to 35 of this order.

[31] If in any proposed Divestiture, the proposed Purchaser(s) is an existing or planned participant in the relevant market identified in the Statement of Grounds and Material Facts, the Commissioner may, in addition to the criteria set out in paragraph 10 of this order, also take into account the likely impact of the Divestiture on competition in that market in deciding whether or not to approve the Divestiture.

### **Notification**

[32] Agricore United or the Trustee, whichever is then responsible for effecting the Divestiture required herein, shall notify the Commissioner in writing of any proposed Divestiture. If the Trustee is responsible, it shall similarly notify Agricore United. The notice to the Commissioner shall be given at the time a binding offer that is acceptable to Agricore United (if such offer is received during the Primary Elevator Initial Sale Period) or the Trustee, is received. The notice to the Commissioner shall include:



- (a) the identity of the proposed Purchaser(s);
- (b) the details of the proposed transaction;
- (c) information concerning whether the proposed Purchaser(s) would satisfy the terms of paragraph 10 herein above;
- (d) an update of the last report provided pursuant to paragraph 17 of this order or paragraph 29 of this order; and
- (e) the agreement of the proposed Purchaser that it will respond as soon as possible to a request by the Commissioner for additional information regarding the proposed Divestiture.

**[33]** Within 10 days after receipt of the notice referred to in paragraph 32 above, the Commissioner and, where the notice has been provided by the Trustee, Agricore United, may request additional information concerning the proposed Divestiture, the proposed Purchaser(s) and any other potential Purchaser(s). Where the Commissioner requests additional information, Agricore United, the Trustee, or the proposed Purchaser(s), as the case may be, shall provide the additional information within 10 days of the receipt of the request, unless the Commissioner agrees in writing to extend the time. Where Agricore United requests additional information, the Trustee shall provide the additional information within 10 days of the receipt of the request, unless Agricore United agrees in writing to extend the time.

**[34]** Within 15 days after receipt of the notice pursuant to paragraph 32 of this order or, if the Commissioner and/or Agricore United has requested additional information pursuant to paragraph 33 above, within 15 days after receipt of the said information:

- (a) the Commissioner shall notify, in writing, Agricore United and, where appropriate, the Trustee, if the Commissioner objects to the proposed Divestiture on one or more of the grounds set out in paragraphs 10 and/or 31 of this order; and
- (b) in the case of a Divestiture proposed by the Trustee, Agricore United shall notify, in writing, the Commissioner and the Trustee if Agricore United objects to the proposed Divestiture on one or more of the grounds set out in paragraph 21 of this order.

**[35]** If:

- (a) the Commissioner fails to object as contemplated in paragraph 34 or if the Commissioner notifies, in writing, Agricore United and, where appropriate, the Trustee, that the Commissioner does not object; and
- (b) Agricore United fails to object as contemplated in paragraph 34 or if Agricore United notifies, in writing, the Commissioner and the Trustee that Agricore United does not object, then the Divestiture may be completed.

[36] Where the Commissioner or Agricore United has objected to a proposed Divestiture, that Divestiture shall not be completed without the approval of the Competition Tribunal.

[37] Agricore United or the Trustee, as the case may be, shall notify the Commissioner forthwith after one or more Divestitures required by this order has been completed.

### **Maintenance of the Primary Elevators**

[38] Until the completion of the Divestitures by Agricore United or the Trustee, Agricore United shall take such steps as are necessary to maintain the competitive viability of the Primary Elevators, including providing such sales, managerial, administrative, operational and financial support as is necessary in the ordinary course of business to promote the continued effective operation of the Primary Elevators in accordance with standards similar to those existing for the same time period for the previous three years.

[39] Without limiting the generality of the foregoing, Agricore United shall, until the completion of the Divestitures by Agricore United or the Trustee, take such steps as are necessary to ensure that the Primary Elevators have access to transportation services, and in particular rail cars, at levels similar to those existing for the same time period in the previous three years, having regard to market conditions and the corresponding demand for transportation services. If Agricore United provides transportation services at a level which is not similar to those existing for the same time period in the previous three years, it shall notify the Commissioner in writing within seven days of the change in service levels. In its notice, Agricore United shall set out the basis on which the service levels have been altered.

[40] Until completion of the Divestitures by Agricore United or the Trustee, Agricore United shall not, without prior approval from the Commissioner (such approval not to be unreasonably withheld), enter into or withdraw from any material contracts or arrangements relating to the Primary Elevators, make any material changes to such operations, or terminate any current employment, salary or benefit agreements for any management personnel employed primarily in relation to the Primary Elevators.

[41] Agricore United shall provide a copy of this order to each of the Regional Managers and the Territorial Managers responsible for the Primary Elevators, and Agricore United shall direct such managers and any servants or agents of Agricore United operating and managing the Primary Elevators to do so in accordance with the terms of this order.

### **Further Remedies**

[42] Agricore United shall keep all non-public information in its possession regarding CanAmera obtained as a result of Agricore United's direct or indirect interest in CanAmera confidential and separate from ADM (including the ADM nominees to Agricore United's Board of Directors).

[43] Agricore United shall not appoint any director, officer or employee of ADM as a nominee to the Board of Directors of CanAmera.

[44] The Agricore United Grain Operations Committee shall exclude canola oil seed processing from the scope of its mandate.

[45] The restrictions set out in paragraphs 42 through 44 of this order shall remain in effect so long as Agricore United is entitled either to elect a representative to the Board of Directors of CanAmera or holds a greater than 10% interest in CanAmera, but in any event, not beyond November 1, 2011.

### **Compliance Inspection**

[46] For the purpose of determining or securing compliance with this order, subject to any valid claim to a legally recognized privilege, and upon written request, Agricore United shall permit any duly authorized representative of the Commissioner:

(a) upon a minimum of two business days notice to Agricore United, access during office hours of Agricore United to inspect and copy all relevant books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Agricore United relating to compliance with this order; and

(b) upon a minimum of five business days notice to Agricore United, and without restraint or interference from Agricore United, to interview relevant directors, officers or employees of Agricore United on matters in the possession or under the control of Agricore United relating to compliance with this order. Such directors, officers or employees may have counsel present at these interviews.

### **Notices**

[47] Notice, reports or other communications required or permitted pursuant to this order shall be in writing and shall be considered to be given if dispatched by personal delivery or by registered mail or by facsimile transmission to the address or facsimile number below:

- (a) If to the Commissioner:
- The Commissioner of Competition  
Competition Bureau  
Industry Canada  
Place du Portage  
Phase I, 50 Victoria Street  
Hull, Quebec K1A 0C9
- Attention: John L. Syme  
Arsalaan Hyder  
Fax: (819) 953-9267

(b) If to the respondent:

Agricore United  
201 Portage Avenue  
TD Centre  
Winnipeg, MB R3C 3A7

Attention: Christopher Martin

Fax: (204) 944-2299

With a copy to:

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

Attention: Kent Thomson  
John Bodrug

Fax: (416) 863-0871

[48] The Commissioner and Agricore United may, by way of mutual agreement, extend any of the time periods applicable herein, including the time periods set out in Confidential Schedule “B”.

### **General**

[49] In the event of a dispute as to the interpretation of this order, the Commissioner, the Trustee or Agricore United shall be at liberty to apply to the Competition Tribunal for a further order interpreting any of the provisions of this order.

### **Term of Consent Order**

[50] Paragraphs 42 to 44 shall remain in effect for the period provided in paragraph 45 hereof. The rest of the order shall remain in effect until the Divestitures contemplated by this order have occurred or until further order of the Competition Tribunal.

DATED at Toronto, Ontario, this 19<sup>th</sup> day of February, 2002.

SIGNED on behalf of the Tribunal by the presiding judicial member.

[51] Schedule "A"

**Primary Elevators:**

Manitoba

1. UGG elevator at Dutton Siding.

Alberta

2. UGG elevator at Gaudin.
3. UGG elevator at Killam.
4. Agricore elevator at Westlock.
5. Agricore elevator at Bawlf.

Peace River Area

6. Agricore United's choice of:

- (a) Agricore elevator at Rycroft, or
- (b) UGG elevator at Rycroft and UGG elevator at Falher.

6.1 If Agricore United has not Divested the elevator(s) described in paragraph 6(a) or (b) above before the expiry of the Primary Elevator Initial Sale Period, the Trustee may sell the elevators described in section 6(b) unless, prior to the expiry of the Primary Elevator Initial Sale Period, Agricore United gives notice that it elects that the elevator described in paragraph 6(a) be sold by the Trustee, in which case the Trustee shall sell the elevator described in paragraph 6(a).

6.2 Once the Primary Elevator(s) in either paragraph 6(a) or 6(b) is Divested or the Trustee has the right to sell such Primary Elevator(s), the remaining elevator(s) cease(s) to be a "Primary Elevator" for the purpose of this order.

[52] Schedule "B" - CONFIDENTIAL

**NOT PART OF THE PUBLIC RECORD**

COUNSEL

For the applicant:

The Commissioner of Competition

John L. Syme  
Arsalaan Hyder

For the respondent:

Agricore United

Christopher Martin

United Grain Growers Limited

Kent E. Thomson  
John Bodrug