

**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 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:

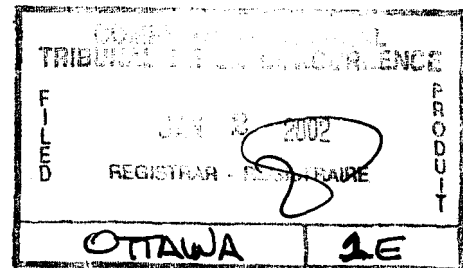
**COMMISSIONER OF COMPETITION**

(applicant)

- and -

**UNITED GRAIN GROWERS LIMITED**

(respondent)



**DRAFT INTERIM CONSENT ORDER**

- [1] **FURTHER** to the December 19, 2001 application of the Commissioner of Competition (the "Commissioner") pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act") for an order directing the Divestiture of certain assets and certain other remedies in respect of 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 FURTHER** to the application of the Commissioner for an interim consent order pursuant to sections 92 and 104 of the Act directing that certain assets encompassed by the Merger be maintained and preserved pending the hearing and final determination of the application pursuant to section 92 of the Act;
- [3] **AND UPON READING** the notice of application dated December 19, 2001, the motion for a interim consent order, the draft interim consent order, the affidavit of David Ouellet dated December 19, 2001, and the consent of the parties, filed herein;
- [4] **AND UPON THE DETERMINING** that this is an appropriate case for the issuance of an interim consent order pursuant to sections 92 and 104 of the Act;
- [5] **AND UPON CONSIDERING THAT** the Commissioner and Agricore United have reached an agreement which is reflected in this interim order;
- [6] **AND IT BEING UNDERSTOOD** that nothing in this application shall be taken as an admission now or in the future by Agricore United or the Commissioner of any facts,

submissions or legal arguments for any other purposes, including any further application under sections 92, 104 or 106 of the Act;

**THE TRIBUNAL ORDERS THAT:**

**Definitions**

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

- (a) "Agricore" means Agricore Ltd., a corporation continued under the provisions of the *Canada Business Corporations Act* (Canada);
- (b) "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";
- (c) "Closing Date" means November 1, 2001;
- (d) "Commissioner" means the Commissioner of Competition appointed pursuant to section 7 of the Act;
- (e) "CWB" means the Canadian Wheat Board, an organization established under *The Canada Wheat Board Act* (Canada);
- (f) "Divest" means to implement a Divestiture;

- (g) "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, except as permitted upon the consent of the Commissioner, any right, title, control, interest, liability or obligation in respect of any of the assets 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 Port Terminal as permitted by this order;
- (h) "Full Capacity Operation" means a circumstance where terminal authorizations issued by the relevant terminal, which permit a Person to deliver grain to that terminal, equal available capacity at that terminal;
- (i) "Independent Grain Companies" means those grain handling companies with no ownership interest in a port terminal in Vancouver and with no affiliation with an owner of a port terminal in Vancouver. For the purpose of this order, a grain handling company is affiliated with a port terminal owner if it has a 20% or more direct or indirect shareholding or ownership interest in the port terminal owner, or if a port terminal owner, other than Agricore United, has a 20% or more direct or indirect shareholding or ownership interest in the grain handling company;
- (j) "Merger" means the merger of the port terminal grain handling operations of Agricore and UGG in the Port of Vancouver pursuant to the acquisition of Agricore by UGG pursuant to the Merger Agreement dated as of July 30, 2001;
- (k) "Pacific Terminal" means the Pacific Elevators Limited port terminal facility, more particularly described in Schedule "A";
- (l) "Person" means any natural person, corporation, association, firm, partnership or other business or legal entity;
- (m) "Port Terminal Divestiture Option" has the meaning set out in Schedule "A";
- (n) "Port Terminals" means, subject to Schedule "A", the UGG Terminal and the Pacific Terminal;
- (o) "Purchaser" means the Person(s) or entity(ies) who purchase(s) a Port Terminal;
- (p) "UGG Terminal" means the UGG port terminal located at 1155 Stewart Street, Vancouver, BC V6A 4H4; and
- (q) "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**

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

## **Maintenance of the Port Terminals**

- [9] During the term of this order, Agricore United shall take such steps as are necessary to maintain the competitive viability of both the UGG Terminal and the Pacific Terminal and shall not dispose of any material assets of the UGG Terminal or the Pacific Terminal.
- [10] Without limiting the generality of the foregoing, during the term of this order, Agricore United shall provide 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 UGG Terminal and the Pacific Terminal in accordance with standards similar to those existing prior to the Closing Date.
- [11] Except as set out in paragraphs 13 to 16 below, during the term of this order, 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 UGG Terminal or the Pacific Terminal, make any material changes to such operations, or terminate any current employment, salary or benefit

agreements for any management personnel employed in relation to either the UGG Terminal or the Pacific Terminal.

[12] During the term of this order, Agricore United shall honour all existing contracts for the handling of grain for Independent Grain Companies. In addition, Agricore United shall offer to handle for Independent Grain Companies in the aggregate a minimum of 125,000 tonnes of grain per month (1.5 million tonnes per year), by way of contracts, through either the UGG Terminal or the Pacific Terminal or through terminal arrangements entered into by Agricore United with other terminals. Where Agricore United enters into a terminal arrangement for the handling of an Independent Grain Company's grain with a third party, there shall be no additional cost to the Independent Grain Company as a result of the use of such third party's facility beyond that contemplated in paragraph [14] below.

[13] During the term of this order, new contracts for the handling of Independent Grain Companies' grain shall be based on reasonable commercial terms consistent with past practice, and shall include: (1) a contract term that ends on a date certain, provided that the Independent Grain Company shall have an option to terminate the contract upon either (i) a trustee being appointed pursuant to an order of the Tribunal to divest one of the Port Terminal Divestiture Options, or (ii) a Divestiture of one of the Port Terminal Divestiture Options, (2) a commitment by the Independent Grain Company that Agricore United will handle all of its Vancouver volume for the duration of the contract, and (3) renegotiation or arbitration in the event of major regulatory change. Agricore United may

terminate such an agreement if the Independent Grain Company does not ship all of its Vancouver volume during the term of the contract through Agricore United.

[14] During the term of this order, prices for the handling of Independent Grain Companies' grain under any new contract shall be based on Agricore United's tariffs as filed with the Canadian Grain Commission under the *Canada Grain Act* (Canada) and Agricore United shall pay a diversion premium of at least \$2 per tonne. Diversion premiums negotiated between Agricore United and an Independent Grain Company shall remain confidential. Any non-CWB tariff increase or any diversion premium decrease (CWB or non-CWB grain) from these initial levels must be commercially reasonable.

[15] In the event that bottlenecks, bountiful crop production or other causes create a situation of Full Capacity Operation at a port terminal facility designated to handle Independent Grain Companies' grain in respect of a given period (the "Relevant Period"), a terminal authorization for any given Independent Grain Company's grain will be issued in an amount equal to  $(A \div B) \times C$

**where:**

**A** = the relevant Independent Grain Company's shipment of grain through the Port of Vancouver for the last three completed months before the Relevant Period;

**B** = the total shipments of grain through the Port of Vancouver for the last three completed months before the Relevant Period; and

**C** = the available capacity at the designated port terminal facility for the Relevant Period.

In the event that an Independent Grain Company's terminal authorizations are reduced pursuant to this provision, all shippers to that terminal will have their terminal authorizations reduced on the same basis.

- [16] During the term of this order, any disputes as to compliance with the commitments in paragraphs 13 to 16 as to price, tariffs, diversion premiums or other terms shall be settled by way of an arbitration procedure as outlined in Schedule "B" that is consistent with existing commercial practice and with terms of reference that have regard to market conditions and structure, capacity utilization, costs of operation, reasonable rate of return on investment and regulatory framework. During any arbitration procedure, Agricore United shall continue to provide port terminal services to the Independent Grain Company that initiated the arbitration.
- [17] Notwithstanding any other provision of this order, Agricore United shall have no obligation to deal with an Independent Grain Company that defaults in payment or breaches other material terms of its contract with Agricore United.
- [18] Agricore United shall provide a copy of this order to the Manager of Vancouver Operations and Agricore United shall direct such manager and any servants or agents of the parties operating and managing the UGG Terminal and the Pacific Terminal to do so in accordance with the terms of this order.
- [19] During the term of this order, Agricore United may, with the approval of the Commissioner, implement one of the Port Terminal Divestiture Options.

### **Compliance Inspection**

- [20] 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 2 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 5 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 those interviews.

#### **Notices**

[21] Notices, 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 confirmed personal delivery or 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 Agricore United:

201 Portage Avenue  
TD Centre  
Winnipeg, Manitoba  
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, Ontario  
M5X 1B1

Attention: Kent Thomson  
John Bodrug

Fax: (416) 863-0871

### **General**

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

[23] In the event of a dispute as to the interpretation or application of this order, or breach of this order by Agricore United, the Commissioner or Agricore United shall be at liberty to apply to the Competition Tribunal for a further order.

**Term of Interim Order**

[24] This order shall remain in effect until a further order of the Competition Tribunal or completion of a Port Terminal Divestiture Option, whichever occurs first.

DATED at Ottawa, this        day of        , 2001.

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

by \_\_\_\_\_  
Name

## SCHEDULE "A"

**Port Terminal Divestiture Option**: means, at Agricore United's option, the Divestiture of one of the following:

- Option 1: all of Agricore United's shares in Pacific Elevators Limited ("PEL") and Western Pool Terminals Ltd. ("WPTL") and its interest in the Loan Agreement between PEL, WPTL and Alberta Wheat Pool dated January 11, 1996 (the "Pacific Terminal"); or
- Option 2: the UGG Terminal.

Once a Divestiture is implemented, the remaining Port Terminal ceases to be a "Port Terminal" for the purposes of this order.

## SCHEDULE "B"

### ARBITRATION PROCEDURES

#### 1. Initiation of Arbitration Proceedings

(a) If any party to a port terminal handling agreement (the "Agreement") wishes to have any matter under this Agreement arbitrated in accordance with the provisions of the Agreement, it shall give notice to the other party hereto specifying particulars of the matter or matters in dispute and proposing the name of the person it wishes to be the single arbitrator. Within 15 days after receipt of such notice, the other party to the Agreement shall give notice to the first party advising whether such party accepts the arbitrator proposed by the first party. If such notice is not given within such 15 day period, the other party shall be deemed to have accepted the arbitrator proposed by the first party. Failing agreement of the parties on a single arbitrator within such 15 day period, either party may apply to a judge of the Manitoba Queen's Bench for the appointment of a single arbitrator. The arbitrator, whether agreed on by the parties or appointed by the Court (the "Arbitrator"), shall have the qualifications set out in paragraph (b).

(b) The Arbitrator shall be at arm's length from all parties and as to the five year period prior to the Arbitration shall not be a member of any accounting or legal firm or firms who advise or who have advised any of the parties, nor shall the Arbitrator be an individual who has been retained by any of the parties.

#### 2. Submission of Written Statements

(a) Within 15 business days of the appointment of the Arbitrator, the party initiating the arbitration (the "Claimant") shall send to the other party (the "Respondent") a Statement of Claim setting out in sufficient detail the facts and any contentions of law on which it relies, and the relief that it claims.

(b) Within 15 business days of the receipt of the Statement of Claim, the Respondent shall send to the Claimant a Statement of Defence stating in sufficient detail which of the facts and contentions of law in the Statement of Claim it admits or denies on what grounds and on what other facts and contentions of law the Respondent relies.

- (c) Within 10 business days of receipt of the Statement of Defence, the Claimant may send the Respondent a Statement of Reply.
- (d) All Statements of Claim, Defence and Reply shall be accompanied by copies of all essential documents on which the party concerned relies and which have not previously been submitted by any party, and (where practicable) by any relevant samples.
- (e) After submission of all the Statements, the Arbitrator will give directions for further conduct of the arbitration, which shall include meetings and hearings conducted in conformity with the Rules set forth below.

3. **Meetings and Hearings**

- (a) Meetings and hearings of the Arbitrator shall take place in the City of Winnipeg, Manitoba or in such other place as the Claimant and the Respondent shall agree upon in writing and such meetings and hearings shall be conducted in the English language unless otherwise agreed by such parties and the Arbitrator. Subject to the foregoing, the Arbitrator may fix the date, time and place of meetings and hearings in the arbitration, and will give all the parties adequate notice of these provided the Arbitration shall commence within 30 days after the exchange of the Statements. Subject to any adjournments, which the Arbitrator allows, the final hearing will be continued on successive working days until it is concluded.
- (b) All meetings and hearings will be in private unless the parties otherwise agree.
- (c) Any party may attend any meetings and hearings personally and/or be represented at any meetings or hearings by legal counsel or other representative.
- (d) Each party may examine, cross-examine and re-examine, as the Arbitrator shall deem appropriate, all witnesses at the arbitration.
- (e) The Arbitrator may appoint one or more experts to report to him or her on specific issues to be determined by the Arbitrator. The expert shall be at arm's length from all parties and as to the five year period prior to the Arbitration shall not be a member of any accounting or legal firm or firms who advise or who have advised any of the parties, nor shall the expert be an individual who has been retained by any of the parties. The Arbitrator may require a party to give such expert(s) any relevant information, or to provide access to any relevant documents, goods, materials or other property for the expert's inspection. If a party so requests or if the Arbitrator considers it necessary, such expert(s) shall, after delivery of his or her written or oral report, participate in a hearing where the parties have the opportunity to put questions to him or her and to present expert witnesses in order

to testify on the points in issue.

4. **The Decision**

- (a) The Arbitrator will make a decision in writing and, unless both the parties otherwise agree, will set out reasons for his or her conclusions and findings in the decision.
- (b) The Arbitrator will send the decision to the parties as soon as practicable after the conclusion of the final hearing, but in any event no later than 60 days thereafter, unless that time period is extended for a fixed period by the Arbitrator on written notice to each party because of illness or other cause beyond the Arbitrator's control.
- (c) The decision shall be final and binding on the parties and shall not be subject to any appeal or review procedure provided that the Arbitrator has followed these Rules provided herein in good faith and has proceeded in accordance with the principles of natural justice.

5. **Jurisdiction and Powers of the Arbitrator**

- (a) By submitting to arbitration under these Rules, the parties shall be taken to have conferred on the Arbitrator the jurisdiction and powers set out in clause 5(b) below, each of which is to be exercised at the Arbitrator's discretion subject only to these Rules and the relevant law with the object of ensuring the just, expeditious, economical and final determination of the dispute referred to arbitration.
- (b) The Arbitrator shall have jurisdiction to:
  - (i) Determine any question of law arising in the arbitration;
  - (ii) Determine any question as to the Arbitrator's jurisdiction;
  - (iii) Determine any question of good faith, dishonesty or fraud arising in the dispute;
  - (iv) Order any party to furnish further details of that party's case, in fact or in law, or to produce any documents, goods, materials or other property relevant to any fact or law at issue in the arbitration;
  - (v) Proceed in the arbitration notwithstanding the failure or refusal of any

party to comply with these Rules or with the Arbitrator's orders or directions, or to attend any meeting or hearing, but only after giving that party written notice that the Arbitrator intends to do so;

- (vi) Receive and take into account such written or oral evidence tendered by the parties as the Arbitrator determines is relevant, whether or not strictly admissible in law;
  - (vii) Make one or more interim awards, including without limitation, interim awards to secure all or part of any amount in dispute in the arbitration and injunctive relief;
  - (viii) Hold meetings and hearings, and make a decision (including a final decision);
  - (ix) Order the parties to produce to the Arbitrator, and to each other for inspection, and to supply copies of, any documents or classes of documents in their possession or power which the Arbitrator determines to be relevant; and
  - (x) Order the preservation, storage, sale or other disposal of any property or thing under the control of any of the parties.
- (c) In addition, the Arbitrator shall have such further jurisdiction and powers as may be allowed by the *Arbitration Act* of Manitoba, as amended or substituted from time to time.
- (d) Notwithstanding the parties' intention that the Arbitrator be able to act free of Court proceedings as set forth herein, the parties consent to the decision of the Arbitrator being entered in any Court having jurisdiction for the purposes of enforcement.

6. **Arbitration Costs**

The Arbitrator's fees and all expenses and disbursements incurred by the Arbitrator in the conduct of the arbitration shall be shared equally between the parties. Expenses and disbursements, including without limitation, legal fees and expenses, travel costs and photocopying incurred by a party for its own participation in the arbitration shall be for the account of such party. The Arbitrator shall not be empowered to award costs to either party.

7. **Confidentiality**



All statements and evidence submitted for the arbitration, the decision of the Arbitrator, the fact of the arbitration itself and all other aspects regarding the arbitration shall be kept strictly confidential except as otherwise required by applicable law.