PUBLIC

CT-2002-001

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 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.

B E T W E E N:

UNITED GRAIN GROWERS LIMITED

Applicant

-and-

THE COMMISSIONER OF COMPETITION

Respondent

-and-

THE CANADIAN WHEAT BOARD and MISSION TERMINAL INC.

Intervenors

Expert Rebuttal **AFFIDAVIT OF ROGER WARE**

I, Roger Ware, of the City of Kingston, in the Province of Ontario, make oath and say:

1. Attached to this affidavit and marked as Exhibit "A" is a true copy of my rebuttal report to the report of Dr. Ralph Winter dated January 27, 2006. The contents of Exhibit "A" represent my work, conclusions and opinions in this matter.

2. I swear this affidavit pursuant to Rule 47 of the *Competition Tribunal Rules*.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on February 24, 2006.

ROGER WARE

Commissioner for Oaths/Notary Public

Public Version

EXHIBIT "A"
TO THE AFFIDAVIT OF ROGER WARE, SWORN FEBRUARY 24, 2006

REBUTTAL REPORT OF ROGER WARE

Professor of Economics, Queen's University

Director, LECG, LLC.

DATED: February 24, 2006

Professor Roger Ware
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INTRODUCTION

1. I have read the report of Dr. Ralph Winter dated January 27, 2006. The purpose of this rebuttal report is to respond to certain statements and conclusions contained in Dr. Winter's report.

SUMMARY OF CONCLUSIONS

2. My response to Dr. Winter's report can be summarized as follows:

   (a) Dr. Winter is advancing a theory of economic harm that is fundamentally different from the theory originally advanced by the Commissioner of Competition (the "Commissioner"). In this regard, as discussed in more detail below, it is clear from documents filed with the Competition Tribunal (the "Tribunal") on behalf of the Commissioner and News Releases issued by the Competition Bureau (the "Bureau") in 2001 and 2002 that the Commissioner considered that the purpose of any divestiture of a port terminal pursuant to the Consent Agreement was to provide Independent Grain Companies with access to port terminal grain handling services in the Port of Vancouver at competitive rates. In contrast to this original purpose, Dr. Winter concludes that any divestiture of a port terminal will primarily advance the interests of the Canadian Wheat Board (the "CWB"), a statutory monopoly incorporated pursuant to the provisions of the *Canadian Wheat Board Act* (the "CWB Act"). Dr. Winter also concludes that any divestiture of a port terminal to an entity that enters into a handling agreement with the CWB would be pro-competitive (or at worst neutral), even if it results in one or more Independent Grain Companies – the very entities that the Consent Agreement was designed to protect – being forced to exit the market.

   (b) Dr. Winter ignores the role, influence and power of the CWB as a monopsonist buyer of port terminal grain handling services. In this regard, as discussed in more detail below, the CWB possesses substantial market power, which allows it to exercise significant countervailing power over grain handling companies

carrying on business in Western Canada, including port terminal operators in the Port of Vancouver. Dr. Winter's conclusion regarding the impact of a CWB-supported divestiture simply does not hold when one takes into account the role, influence and power of the CWB.

(c) Dr. Winter's statistics regarding the length of grain handling contracts largely corroborate my own earlier conclusion that the average length of grain handling contracts has increased significantly since the Consent Agreement was executed on October 17, 2002.

(d) Any analysis of the viability of a divestiture must take into consideration the fact that Agricore United uses the UGG Terminal as a canola and malt barley terminal, which results in high levels of efficiency. Some of these efficiency gains would be lost with a divestiture to an entity that enters into a handling agreement with the CWB because much of the canola and malt barley volume would inevitably be replaced with a very wide variety of CWB grains.

3. Each of these points is explained in more detail in my report.

THE COMMISSIONER HAS ADOPTED A NEW THEORY OF ECONOMIC HARM

4. As noted above, Dr. Winter advances a theory of economic harm fundamentally different from that described in documents filed with the Tribunal on behalf of the Commissioner and News Releases issued by the Bureau in 2001 and 2002. It is clear from a careful review of these documents that the Commissioner considered that the purpose of any divestiture of a port terminal pursuant to the Consent Agreement was to provide Independent Grain Companies with access to port terminal grain handling services in the Port of Vancouver at competitive rates, including diversion premiums. For example, the Commissioner stated as follows in the Statement of Grounds and Material Facts filed with the Tribunal in connection with the Section 92 Application:

> For Non-Integrated Graincos to compete effectively with Integrated Graincos, especially under the new CWB tendering regime, it is essential that they have regular and predictable access to a port terminal...In order to compete, it is also important that Non-Integrated Graincos have access

> to all the revenue streams associated with grain handling, such as, country elevation, cleaning, [multi-car incentive] rebates and terminal diversion premiums.[1]

5. In stark contrast to the position previously advanced by the Commissioner, Dr. Winter concludes that any divestiture of a port terminal now is intended to advance the interests of the CWB. Dr. Winter also concludes that any divestiture of a port terminal to an entity that enters into a handling agreement with the CWB would be pro-competitive (or at worst neutral), even if it results in one or more Independent Grain Companies being forced to exit the market.

6. With respect to this latter point, Dr. Winter accepts that a CWB-supported divestiture would result in a loss of diversion premiums to Independent Grain Companies. For example, in paragraphs 73 and 74 of his report, Dr. Winter "[elaborates] ... on the adjustment in upstream markets to the increase in net marginal costs (from the loss in diversion premiums) that a CWB-supported divestiture would involve" (emphasis added). Significantly, Dr. Winter states as follows at paragraph 74 of his report:

> If a particular upstream market is not competitive then prices might not fully adjust to the increase in net marginal costs resulting from the loss in diversion premiums. The impact is a smaller price-cost margin for Grain Companies. This is a procompetitive effect. It may be in this case that some firms [which effectively means or at least includes Independent Grain Companies] in the market are forced to exit [as a result of a CWB-supported divestiture] because the lower prices do not allow them to cover costs. But this will only be the case in local geographic markets where there is excess capacity (if all capacity is needed, there will be no exit). Exit from any local markets with excess capacity by the marginal (i.e. the highest cost) firms does not represent an anticompetitive effect. It represents the rationalization of capacity in the market. The role of a competition policy remedy is not to ensure that the highest cost firms

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1 *Commissioner of Competition* v. *United Grain Growers Limited*, CT-2002-001, Statement of Grounds and Material Facts at paragraph 38 (January 2, 2002). Additional statements regarding the Commissioner's purpose in seeking the divestiture of a port terminal pursuant to the Consent Agreement are set out in Appendix "A" to this report. Moreover, the fact that the purpose of any divestiture of a port terminal pursuant to the Consent Agreement was to provide Independent Grain Companies with access to port terminal grain handling services in the Port of Vancouver at competitive rates, including diversion premiums, is confirmed in the recent cross-examination of Dave Ouellet, conducted in the connection with Agricore United's earlier motion for interim relief. See Appendix "B" to this report.

> survive in a market in spite of excess capacity. It is to protect competition. [emphasis added]

7. Similarly, Dr. Winter indicates as follows at paragraph 77 of his report:

> In all of the circumstances involving the possibility of exit of marginal firms, the ultimate effect of any CWB-supported divestiture may be a more concentrated market structure in local upstream markets. But these markets nonetheless involve lower prices for the set of all services that the CWB requires for its grain (the CWB being a supporter of the divestiture) and the markets are therefore more competitive in performance. The aim of a competitive remedy is never to protect marginal firms (or an unconcentrated "competitive market structure") at the cost of a less competitive performance. [emphasis added]

8. In light of the foregoing, it is clear that the Commissioner's original theory has been turned on its head. While the Commissioner was originally concerned with protecting Independent Grain Companies, she is now focussed on protecting the CWB, a statutory monopoly that, as discussed in more detail below, possesses and frequently exercises significant market power.[2]

9. The new theory of the case presented by Dr. Winter suffers from a fatal flaw: Dr. Winter ignores the role and significance of the CWB as a monopsonist buyer of port terminal grain handling services. This is surprising, as Dr. Winter does state on a number of occasions that the CWB is the largest buyer of port terminal grain handling services and that 65-70% of grain passing through the port of Vancouver is CWB grain for which the CWB acts as sole agent.[3] Dr. Winter also acknowledges that the CWB is, pursuant to section 45 of the CWB Act, the sole purchaser and marketer of wheat, durum and barley grown in Western Canada and intended for export or domestic human consumption.[4]

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2 In this regard, it may also be noted that section 4.1 of the *Competition Act* reflects the intention of Parliament that the *Competition Act* is not intended to support entities that already possess substantial market power, such as the CWB. In this regard, section 4.1 of the *Competition Act* exempts travel agents from sections 45 and 61 of the Act in respect of certain dealings with an airline that possesses greater than a 60% domestic market share.

3 See paragraphs 21, 22, 24, 31, 42, 67, 68, 70, 87, 92, 108, 114 and 125 of Dr. Winter's report.

4 See paragraph 21 of Dr. Winter's report. Section 45 of the CWB Act provides, in relevant part, that "no person other than the [CWB] shall ... sell or agree to sell wheat or wheat products situated in one province for delivery in another province or outside Canada". Any person who contravenes this provision or

This provision creates an effective barrier to entry that, when combined with the CWB's market share, establishes a strong *prima facie* case that the CWB possesses market power with respect to the purchase of port terminal grain handling services in the Port of Vancouver.

10. In addition to the evidence of market share and barriers to entry, I understand that the CWB has exercised and continues to exercise significant market power over grain handling companies carrying on business in Western Canada, including port terminal operators in the Port of Vancouver. Specifically, I am advised by representatives of Agricore United that the CWB has exercised its market power in a number of different ways, including the following:

(a) refusing to pay a grain company's tariffs as filed with the Canadian Grain Commission (the "CGC");

(b) paying to all grain companies the lowest tariff posted by one company for a particular service, rather than the tariffs actually filed with the CGC by each grain company for its services;

(c) unilaterally determining the charge that it will pay for additional services not included in grain companies' tariffs as filed with the CGC;

(d) diverting grain from one facility to another facility or port for unusual reasons that most in the industry feel are not in the best interests of the industry as a whole; and

(e) allowing farmers to be prosecuted for selling grain other than to the CWB or without an export permit.[5]

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otherwise fails to comply with the CWB Act or any regulation made thereunder is subject to fines and/or imprisonment upon conviction.

5 For examples of farmers being prosecuted for selling grain without an export permit, see A. Ewins, "CWB Director Faces Jail Time Over Permit Issue" *The Western Producer* (19 September 2002); B. Wilson, "Alberta Farmers Choose Jail on Principle" *The Western Producer* (31 October 2002); A. Ewins, "Jail

11. Monopsony leads to reduced prices for suppliers and to allocative inefficiency. To illustrate with an example from a different industry, suppose that the competitive wholesale price of fresh tomatoes is $5 a pound, but that a monopsonistic grocery chain is able to restrict demand and force down the price to $4 per pound. This kind of market power creates an allocative inefficiency, just as in the case of the exercise of monopoly or seller power. Some suppliers of tomatoes who would be willing to supply at the competitive price of $5 are effectively foreclosed from the market at the monopsonist's price of $4 per pound and fewer tomatoes are supplied to consumers than would be the case in the absence of grocery store monopsony power. The economic cost of monopsony power is not just the reduced wages for tomato growers (i.e., a transfer of income from farmers to the grocery chain). There is also a dead weight loss, or allocative inefficiency, associated with tomato supply that would have been in production at the competitive price, but which has been restricted by the actions of the monopsonist.

12. Dr. Winter's conclusion regarding the impact of a CWB-supported divestiture does not hold up when the market power of the CWB is taken into account. As a monopsonist, the CWB has the ability to depress prices paid for port terminal grain handling services below the competitive price. Any market power exercised by the port terminal services industry will be a countervailing power to the power of the CWB, and will likely render the industry more competitive *vis-à-vis* the CWB than otherwise. Thus, the proposed divestiture will weaken the ability of the port terminals to exercise countervailing power, and may lead to even greater monopsonistic distortions created by the CWB.

13. The CWB is also a purchaser of upstream services from the Independent Grain Companies, and may distort prices paid for these services away from competitive prices. One such distortion may be at the expense of the Independent Grain Companies through a reduction in diversion premiums that will, as Dr. Winter indicates, threaten the viability of some of these companies.

Decision Undemocratic, Charges Wheat Board Chair" *The Western Producer* (7 November 2002); and B. Duckwork, "CWB Director Chatanay Out of Jail" *The Western Producer* (28 November 2002).

14. Dr. Winter's conclusions concerning the positive effects of a divestiture of the UGG terminal are largely reversed when consideration is taken of the monopsonistic position of the CWB. To illustrate, at paragraph 70 of his report, Dr. Winter states that "[his] assessment starts with the simple observation that the CWB is evidently in favour of such an arrangement" (referring to a divestiture of the type contemplated by Mission Terminal). Competition policy is not designed to please monopsonists, let alone statutory monopsonists, any more than it is designed to please monopolists.[6] And, of course, any policy change that does please a monopsonist is at least as likely to be one that lessens economic efficiency rather than increases it. To emphasise: monopsonists do not have any incentive to purchase inputs at competitive prices, they have the incentive and the ability to force down input prices in order to reduce their total supply costs. Increasing a monopsonist's profits is not increasing efficiency but reducing it.

15. At paragraph 77 of his report, Dr. Winter states that, in response to a CWB-supported divestiture, "these markets nonetheless involve lower prices for the set of all services that the CWB requires for its grain (the CWB being a supporter of the divestiture)...". However, lower prices are not necessarily more competitive or efficient prices, especially in the presence of monopsony power. Recall that a monopsonist drives prices below the competitive price to inefficiently low levels. Thus, driving down the incomes of the Independent Grain Companies and of the port terminals may lead to a loss in efficiency and also pose a threat to the viability of some of these companies.

16. An example of a divestiture arrangement that would, consistent with the Commissioner's original intent, protect the interests of Independent Grain Companies is **[CONFIDENTIAL]**.[7]

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6 Corroboration for this conclusion, specifically in relation to this industry, was recently provided by Gaston Jorré, Senior Deputy Commissioner of Competition, Competition Bureau who stated that "[the Bureau's] principal concern in many competition cases involving agriculture is concentration on the buying side which may allow buyers to artificially reduce prices". See G. Jorré, "Current Competition Issues in the Canadian Agricultural Sector" (Remarks to the Standing Committee on Agriculture and Agri-Food, 21 November 2005), available online http://www.competitionbureau.gc.ca/PDFs/Nov21OpeningStatement_-e.pdf.

7 **[CONFIDENTIAL]**.

17. **[CONFIDENTIAL].**[8]

THE APPROPRIATE CONTEXT OF THE SLC FINDING IN 2002

18. Dr. Winter's report refers frequently to the Tribunal's finding of a substantial lessening of competition (an "SLC") in 2002.[9] Since much of Dr. Winter's discussion regarding the effectiveness of a divestiture remedy is presently directly in the context of that SLC finding, it is important and appropriate to restate carefully the nature and context of that finding.

    (a) Given the uncontested nature of the SLC hearing, Agricore United had no reason to become involved in or be concerned about an assessment of the alleged SLC. Dr. Wilson's analysis, which provided the only analytical basis for the SLC finding, was based on, among other things, untested assumptions regarding the elasticity of demand for Vancouver port terminal services and an econometric model of conjectural variations that was not robust to minor changes in assumptions.

    (b) Most importantly, Dr. Wilson obviously did not consider the new theory of economic harm advanced for the first time by the Commissioner in Dr. Winter's report. Accordingly, Dr. Wilson's analysis did not in any way account for or address the critical role of the CWB as a monopsony buyer of port terminal grain handling services. Had the role of the CWB been considered, any finding of an SLC may have been negated altogether, or challenged by the Tribunal. In addition, had the Commissioner advanced her new theory of economic harm at the time of the SLC hearing, a number of persuasive arguments, including arguments relating to countervailing buying power, would have been available to Agricore United for the purpose of contesting the alleged SLC and the imposition of any remedy, had it wished to do so. Given the Commissioner's original theory

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8 **[CONFIDENTIAL].**

9 See *Commissioner of Competition* v. *United Grain Growers Limited*, CT-2002-001, Findings and Determinations of the Competition Tribunal pursuant to Section 92 of the *Competition Act* (September 12, 2002).

of the case, these arguments were simply not relevant at the time of the SLC hearing.

(c) It is incongruous for the Commissioner in this proceeding to lean on an SLC finding that was made in the context of a theory of economic harm that she has now abandoned and which does not hold up against the new theory being advanced in Dr. Winter's report.

DR. WINTER'S DISCUSSION OF HANDLING AGREEMENTS AND VERTICAL INTEGRATION

19. In my initial report, I explained that the weighted average length of grain handling agreements between Independent Grain Companies and Vancouver port terminal operators has increased almost threefold since the Consent Agreement was executed in October 2002. As discussed in more detail in my initial report, one implication of this change is that Independent Grain Companies have been able to secure greater access to Vancouver port terminals. Another implication is that reduced incidence of double marginalization may have led to greater competitiveness in the overall market for Western Canadian grain. Finally, because a new terminal owner must wait longer for a given volume of grain to come "off contract" (leaving aside the issue of whether it will in fact be able to attract that grain), the viability of a terminal divestiture has been reduced since the Consent Agreement was executed in October 2002.

20. Dr. Winter takes issue with my use of average contract length as a summary statistic because he believes it responds too much to extreme values. I offered the statistics on the mean as one of a number of ways of summarizing the change in the distribution of contract lengths between the date of the Consent Agreement and the date of the Section 106 Application. As an alternative to the averages that I computed in my initial report, I have also computed the median contract length, a statistic that has no tendency to excessively weight extreme values. The median number of days remaining in handling agreements at the time of the Consent Agreement was 440, and that statistic increased to

1,448 by August 2005, the date of the Section 106 Application, an increase of 229%, even greater than the increase in the mean contract length.[10]

21. In addition, I believe that Dr. Winter's own graphical presentation (Figure 9 of his report) reveals the same dramatic increase in contract length that I have identified. In this regard, by 18 months after the two dates, approximately 70% more grain was potentially available after the date of the Consent Agreement than after the date of the Section 106 Application.[11] In sum, the graphical analysis of Dr. Winter, and the means and medians that I computed, are different statistical techniques for summarizing the same data phenomenon: that the lengths of handling contracts has significantly increased.

22. The claim that I made in my initial report was that the market structure in grain handling services, particularly as it affects the Independent Grain Companies, has changed significantly since the Consent Agreement was executed in October 2002. I am still confident that the data supports this conclusion.

DR. WINTER'S ANALYSIS OF THE VIABILITY OF A DIVESTED TERMINAL

23. In paragraphs 50 to 65 of his report, Dr. Winter discusses the likely viability of a divested UGG Terminal. I have some comments on Dr. Winter's analysis. First, at paragraph 52 of his report, Dr. Winter argues that because Agricore United handled 1.0 to 1.5 million tonnes of grain at the terminal in recent years, a buyer could make the terminal

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10 The median measures the middle value of a set of numbers: for example, the median of the series 1, 1 and 3 is simply 1. As can be seen from this example, increasing the largest value to 5 would have no effect on the median. In the context of our sample of handling agreements, the median measures the length of handling agreement carried by the "middle tonne" of grain. So if a small volume of grain with longer handling agreements were to increase the length of those agreements, once again it would have no effect on the median.

11 I cannot agree with Dr. Winter's description of his own graphical analysis as set out in paragraph 41 of his report: "As evident from Figure 9 there is very little difference in the number of weeks over which the cumulative annual volume of various amounts become uncommitted as a result of expiring handling agreements." Dr. Winter's post-2005 line shows a persistent shortfall of 600,000 tonnes relative to the post-2002 line. Dr. Winter's Figure 10 is essentially the same as Figure 9, but with an additional **[CONFIDENTIAL]** tonnes of Agricore United grain added to the post-2005 line. Leaving aside the question of whether adding in this extra grain was appropriate or not, if it was available at all, it would have been available post-2002 as well as post-2005, and so it should have been added to both graph lines, not just the post-2005 line. Doing so would make Figure 10 redundant, as it would be in essence a repeat of Figure 9.

economically viable by handling the same volume. This conclusion by Dr. Winter ignores issues of economies of scope: that larger multiproduct firms can spread fixed costs and exploit cost synergies in order to achieve a level of cost efficiency that may not be available to a smaller operator. This point has particular force with respect to Agricore United and the UGG Terminal. In this regard, Agricore United uses the UGG Terminal as a canola and malt barley terminal, which has allowed the UGG Terminal to achieve a high level of efficiency and exploit the economies of scale associated with a very limited variety of grains. Some of these efficiency gains would be lost with a divestiture to an entity that enters into a handling agreement with the CWB because much of the canola and malt barley volume would inevitably be replaced with a very wide variety of CWB grains. Moreover, the dislocation of the terminal handling business created by the redirection of canola and malt barley to other terminals may also cause significant cost increases.

24. Dr. Winter's conclusion also ignores the fact that canola and malt barley have much higher tariffs than wheat. Thus, the revenue is higher with canola and malt barley, resulting in higher profits and increased viability.

THE EFFECT OF EXCESS CAPACITY

25. As is evident from paragraph 104 of his report, Dr. Winter does not dispute my calculation, as set out in paragraphs 22 to 24 of my initial report, that 2.2 million tonnes of excess capacity has been added to the market (properly defined) since the date of the Consent Agreement. His comments on how to represent that magnitude amount only to statistical semantics; whether we divide the quantity of excess capacity by the volume of business or not, the absolute quantity remains the same. I believe that this increase in excess capacity is likely to lead to increased competition in the market for port terminal grain handling services.

Appendix "A"

Statements Relating to the Purpose Meant to be Achieved Through the Divestiture of a Port Terminal Pursuant to the Consent Agreement

Extracts from the Commissioner's Filings With the Tribunal

- "If UGG is permitted to retain Agricore's interests in port grain terminals at the Port of Vancouver, the only non-Agricore United terminals available for use by Non-Integrated Graincos will be the JRI and SWP terminals."

  Source: *Commissioner of Competition* v *United Grain Growers Limited*, CT-2002-001, Statement of Grounds and Material Facts at paragraph 68 (January 2, 2002)

- "Due to the relationship between grain handling in the country and grain handling at the Port of Vancouver, the ability of Agricore United to exercise market power in Vancouver will also have anti-competitive effects in local primary grain handling markets across Western Canada. Ultimately, by controlling terminal authorization at terminals representing 63% of total grain handling storage capacity in the Port of Vancouver or by reducing or eliminating diversion premiums, Agricore United would be able to have a direct impact on the competitiveness of Non-Integrated Graincos on the Prairies."

  Source: *Commissioner of Competition* v *United Grain Growers Limited*, CT-2002-001, Statement of Grounds and Material Facts at paragraph 72 (January 2, 2002)

- "... with the advent of CWB tendering, integrated companies are able to increase the volume of their own originations in the Prairies and increase their handle without obtaining additional volumes of grain from the Non-Integrated Graincos. As a consequence, the integrated companies may have relatively less incentive to provide the Non-Integrated Graincos with terminal authorization or to share in port grain terminal revenue (through diversion premiums)."

  Source: *Commissioner of Competition* v *United Grain Growers Limited*, CT-2002-001, Statement of Grounds and Material Facts at paragraph 73 (January 2, 2002)

- "If they are unable to obtain terminal authorizations for Vancouver, non-integrated companies will be unable to ship grain to that port. This would, in time, exhaust their primary elevator storage capacity on the Prairies. As a result, they will no longer be able to compete for grain on the Prairies. In addition, if they are denied diversion premiums at the Port of Vancouver, Non-Integrated Graincos will lose the flexibility this revenue stream previously afforded them in competing for grain originations in the Prairies."

  Source: *Commissioner of Competition* v *United Grain Growers Limited*, CT-2002-001, Statement of Grounds and Material Facts at paragraph 74 (January 2, 2002)

- "... the Commissioner applies for a Consent Interim Order to ensure that non-integrated grain handling companies ... have ongoing access to grain terminal services in the Port of Vancouver...."

  Source: *Commissioner of Competition* v *United Grain Growers Limited*, CT-2002-001, Affidavit of David Ouellet, former Senior Commerce Officer at the Bureau, at paragraph 15 (January 2, 2002)

- "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."

  Source: *Commissioner of Competition* v *United Grain Growers Limited*, CT-2002-001, Affidavit of David Ouellet, former Senior Commerce Officer at the Bureau, at paragraph 16 (January 2, 2002)

- "... the Commissioner seeks an interim order requiring that in the period between the issuance of the Draft Interim Consent Order and the Tribunal's disposition of the Application, the Respondent ... take certain steps to ensure that grain handling companies without an interest in Vancouver port terminal facilities ... continue to have access to port terminal grain handling services at the Port of Vancouver."

  Source: *Commissioner of Competition* v *United Grain Growers Limited*, CT-2002-001, Applicant's Memorandum of Argument on Interim Relief at paragraph 4 (January 2, 2002)

- "... in the absence of an interim order, the Respondent would be in a position to take actions that could adversely affect the ability of Non-integrated Graincos 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."

  Source: *Commissioner of Competition* v *United Grain Growers Limited*, CT-2002-001, Applicant's Memorandum of Argument on Interim Relief at paragraph 17 (January 2, 2002)

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- **[CONFIDENTIAL]**
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Extracts from Evidence and Submissions Provided by or on Behalf of the Commissioner During the SLC Hearing

- "In the country, the integrated grain companies compete with one another and also with non-integrated companies who own no terminal port assets. The non-integrated grain companies must depend on those with terminal assets to take their grain. In fact, a non-integrated grain company cannot get railcars to come to their elevator in the prairies unless they have something called a terminal authorization. Such authorizations are dispensed according to the choice of the terminal owners.

  The dynamics associated with the concentration of ownership of terminal assets, the dependence of non-integrated companies on these four owners, the dominant market share of UGG post-merger in the Port of Vancouver, namely 63 per cent, and the need of non-integrated grain companies to be able to secure rail rebates to compete, which themselves are entirely dependent upon the terminal's performance in Vancouver which is plainly out of the non-integrated company's control, among other factors, have led the Commissioner to the view that there must be a significant divestiture."

  Source: *Commissioner of Competition* v *United Grain Growers Limited*, CT-2002-001, Transcript of the SLC Hearing (John Campion, counsel to the Commissioner) at pages 23-24 (September 10, 2002)

- "... but then it really became apparent on reading the documents that the market power on the part of the terminals has a very important impact on the competition in the country's sector and in fact there are ideas and notions that this market power can be used to limit the access of the country – what are called in the text non-aligned graincos to the ports and these were during some time periods."

  Source: *Commissioner of Competition* v *United Grain Growers Limited*, CT-2002-001, Transcript of the SLC Hearing (Dr. William W. Wilson) at page 62 (September 10, 2002)

- "Yes, sir. I discussed this at length in my text, but to summarize we have these, what is called in the text, new or non-integrated grain companies which don't have terminal elevators, and they have to get access to those terminal elevators to export and therefore to be viable.

  The competitive practices in the Port of Vancouver may have an impact on the competition in the country for two reasons: one is in the determination of what is called the diversion premium, that is, effectively establishing the price for terminal services; and then, secondly, establishing contract terms that give access to these, from these interior elevators to these terminal elevators.

If the competitive environment becomes too concentrated in Vancouver, it is certainly possible that these diversion premiums would fall, which would reduce advantages or give advantages to the integrated companies in the country and/or they may – I used the words "vertical foreclose", but they may limit access of these non-integrated companies to the terminal elevators..."

Source: *Commissioner of Competition* v *United Grain Growers Limited*, CT-2002-001, Transcript of the SLC Hearing (Dr. William W. Wilson) at pages 64-65 (September 10, 2002)

- "... third party concerns raised concerns that there would be a substantial increase in the handling costs of grain at port facilities, as well as a reduction in the diversion premiums for the rebates that third parties obtained from port terminals in supplying the product there.

  There also was considerable concern expressed, particularly by the non-integrated companies, that this merger would lead to increased problems with respect to their ability to access a Vancouver port terminal which was essential to their competing on the prairies."

  Source: *Commissioner of Competition* v *United Grain Growers Limited*, CT-2002-001, Transcript of the SLC Hearing (Dave Ouellet, former Senior Commerce Officer at the Bureau) at page 93 (September 10, 2002)

Extracts from the Bureau's News Releases

- "We are taking steps to ensure that farmers and grain handling companies continue to enjoy the benefits of competitive access to the Vancouver port terminal facilities. Access to the Vancouver port terminals is vital in maintaining a competitive and efficient grain handling industry in Western Canada."

  Source: Competition Bureau, News Release, "Competition Bureau to Challenge Part of UGG Acquisition of Agricore" (November 1, 2001), quoting Gaston Jorré, the Senior Deputy Commissioner of Competition responsible for the Mergers Branch of the Competition Bureau

- "This divestiture will ensure that farmers and grain handling companies continue to have competitive access to the Vancouver port terminal facilities. Competition at the port is essential for an efficient grain handling industry in Western Canada."

  Source: Competition Bureau, News Release, "Grain Case Settled: Agricore United Agrees to Divest Port Terminal" (October 17, 2002), quoting Richard Taylor, a current Deputy Commissioner of Competition (Assistant Deputy Commissioner of Competition at the time of the News Release)

Extracts from the Canadian Wheat Board's Filings

- "The ability of a non-integrated company to compete for the farmers' grain in Western Canada often depends on: (a) the level of diversion payments paid out to non-integrated grain companies in return for the processing of their originations at port, and (b) the granting of terminal authorization to unload non-integrated companies' cars at port."

  Source: *Commissioner of Competition* v *United Grain Growers Limited*, CT-2002-001, Affidavit of Adrian C. Measner, President and CEO of the Canadian Wheat Board (Executive Vice President of Marketing at the time of the Affidavit), at paragraph 9 (February 19, 2002)

- The Canadian Wheat Board 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".

  Source: *Commissioner of Competition* v *United Grain Growers Limited*, CT-2002-001, Affidavit of Adrian C. Measner, President and CEO of the Canadian Wheat Board (Executive Vice President of Marketing at the time of the Affidavit), at paragraph 16 (February 19, 2002)

Public Version

Appendix "B"

Extracts from the Cross Examination of Dave Ouellet
on Agricore United's Motion for Interim Relief

[CONFIDENTIAL]