

PUBLIC

CT-2008-001

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an interim order pursuant to section 100 of the *Competition Act*;

AND IN THE MATTER OF an inquiry pursuant to paragraph 10(1)(b) of the *Competition Act* into the proposed acquisition by an affiliate of American Iron & Metal Company of all of the issued and outstanding shares of S N F Inc.

BETWEEN:

THE COMMISSIONER OF COMPETITION

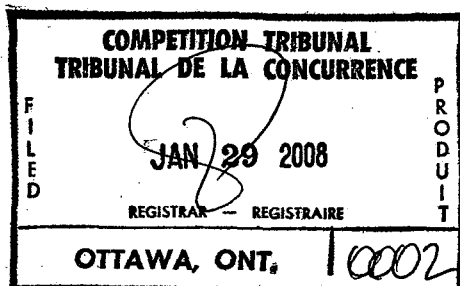
Applicant

- and -

**AMERICAN IRON & METAL COMPANY INC.
6876544 CANADA INC., S N F INC., HAMETAL CANADA INC.
FONDS DE SOLIDARITÉ DES TRAVAILLEURS DU QUÉBEC (F.T.Q.)**

Respondents

**MEMORANDUM OF ARGUMENT OF THE
COMMISSIONER OF COMPETITION – PUBLIC VERSION
(Application for Interim Order)**



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TABLE OF CONTENTS

	Page
PART I – FACTS	
A. Overview	1
B. The Parties	2
C. The Proposed Transaction	3
D. The Scrap Metal Industry	4
(a) Upstream Market – Purchase of Unprocessed Scrap Metal	5
(b) Downstream Market – Sale of Processed Scrap Metal	6
E. Inquiry Not Complete	7
F. Implementation of the Proposed Transaction	8
PART II – ARGUMENT	
A. Test Under Section 100	8
B. Commissioner’s Inquiry is Ongoing	11
C. Commissioner is of the Opinion that More Time is Required to Complete Inquiry	11
D. Closing Will Impair Tribunal’s Ability to Remedy	13
(i) Nature of Potential Lessening of Competition	14
(ii) Kinds of Remedies Sought to be Imposed	15
(iii) Actions Sought to Be Forbidden	15
(iv) What Would be Required to Reverse that Action	18
(v) Effectiveness of Remedies Without an Interim Order	19
E. Relief Sought	20
F. Alternative Relief Sought	20

PART I – FACTS**A. Overview**

1. The Commissioner of Competition (the “Commissioner”) applies for an interim order under section 100 of the *Competition Act* (the “Act”) prohibiting the Respondents from completing the proposed acquisition by an affiliate of American Iron & Metal Company (“AIM”) of all of the issued and outstanding shares of S N F Inc. (the “Proposed Transaction”). In the alternative, the Commissioner seeks an interim order preventing the Respondents from implementing the Proposed Transaction by terminating or disposing of certain shredding operations or related infrastructure.
2. AIM and of S N F Inc. (“SNF”) are the two largest processors of scrap metal in Quebec and the Atlantic Provinces (collectively, “Eastern Canada”). In fact, through the Proposed Transaction, AIM will acquire its only significant rival for the supply of processed ferrous scrap metal in Eastern Canada. The Commissioner has received numerous complaints or expressions of concern from customers of the Respondents and, from other industry participants regarding the significant anti-competitive effects of the Proposed Transaction.
3. The Commissioner received a notification in respect of the Proposed Transaction on December 20, 2007. Given the apparent competition concerns, the Commissioner initiated an inquiry on December 24, 2007.
4. Although the Respondents advised that they wished to close the Proposed Transaction as soon as possible, the written submissions of AIM to the Commissioner indicated that the merger would not close until the earlier of April 30, 2008 or within five business days after receiving the Commissioner’s approval of the Proposed Transaction in the form of an advance ruling certificate or “no-action” letter.
5. Contrary to this written statement, representatives of AIM advised at a meeting held on January 22, 2008 that the Respondents would proceed to close the Proposed Transaction upon the expiry of the waiting period on February 1, 2008. Despite requests by the

Commissioner, the Respondents are not willing to delay the closing of the Proposed Transaction or enter into negotiations regarding a form of hold separate arrangement.

6. The central issue to be determined in this application is whether the Respondents are likely to take any action that would substantially impair the ability of the Tribunal to remedy the effect of the Proposed Transaction on competition because that action would be difficult to reverse.
7. Written submissions by AIM to the Commissioner and the internal documents of AIM expressly state that as part of the implementation of the Proposed Transaction, AIM intends to [CONFIDENTIAL].
8. The Commissioner submits that in the absence of an interim order, the completion and implementation of the Proposed Transaction, including [CONFIDENTIAL], will substantially impair the ability of the Tribunal to remedy the effect of the Proposed Transaction on competition because it will be difficult to reverse.

B. The Parties

9. AIM and SNF are direct and significant competitors in respect of the purchase of unprocessed scrap metal and sale of processed scrap metal in Eastern Canada.

Affidavit of Vincent Millette sworn January 28, 2008 (the "Millette Affidavit") at para. 41.

10. AIM is a privately held company with its head office in Montreal, Quebec. AIM and its affiliates are engaged in the business of collecting and processing ferrous and non-ferrous scrap metal from several locations across Canada. 6876544 Canada Inc. is an affiliate of AIM which is proposing to acquire all of the issued and outstanding shares of SNF.

Millette Affidavit at paras. 2-3.

11. SNF is a privately held company with its head office in Laval, Quebec. SNF and its affiliates are engaged in the business of collecting and processing ferrous and non-ferrous

scrap metal from locations in Quebec and Nova Scotia. Hametal Canada Inc. and the Fonds de solidarité des travailleurs du Québec (F.T.Q.) are the shareholders of SNF.

Millette Affidavit at paras. 4-5.

C. The Proposed Transaction

12. On November 27, 2007, AIM and SNF entered into a Purchase Agreement, under which AIM will acquire all of the issued and outstanding share capital of SNF (previously defined as the "Proposed Transaction").

Millette Affidavit at para. 6.

13. On December 18, 2007, the Competition Bureau ("Bureau") received a long form filing pursuant to section 114 of the *Act* from counsel for the Respondents. The filing provided on December 18, 2007 was incomplete and a complete filing was supplied on December 20, 2007 (the "Filing"). The statutory waiting period of 42 days commenced on December 20, 2007 and ends on January 31, 2008.

Millette Affidavit at para. 7.

14. On December 24, 2007, the Commissioner commenced an inquiry pursuant to section 10(1)(b) of the *Act* with respect to the Proposed Transaction.

Millette Affidavit at para. 9.

15. In earlier correspondence and conversations with individuals at the Bureau, counsel for AIM advised that the parties wished to close the Proposed Transaction as soon as possible. However, in a letter of January 3, 2008, counsel for AIM stated that the Proposed Transaction would not close until the earlier of April 30, 2008 or five business days after the Commissioner approved the Proposed Transaction through the issuance of an advance ruling certificate or "no action" letter. The January 3, 2008 letter states:

The closing of the Transaction is scheduled to occur on the earlier of the following dates: (a) April 30, 2008; or (b) no later than the fifth (5th) business day following the realization of the events required to bring about the completion of the Transaction (as described more fully in the Filing).

Millette Affidavit at para. 10; Letter from A. Neil Campbell to Vincent Millette dated January 3, 2008 at p. 3.

16. The “events required to bring about the completion of the Transaction” referenced above are described in section 2.5 of AIM’s Filing and include the receipt of an advance ruling certificate pursuant to section 102 of the *Act* from the Commissioner or a “no-action” letter from the Commissioner. In other words, the Commissioner would be given an opportunity to complete her review of the Proposed Transaction prior to closing.

Millette Affidavit at para. 11.

17. Contrary to this written statement, at a meeting held between the Bureau and the Respondents on January 22, 2008, a representative of AIM stated that AIM intended to close the Proposed Transaction on February 1, 2008.

Millette Affidavit at para. 14.

18. In the period between January 23 and 25, 2008, counsel for the Commissioner attempted to secure from the Respondents an extension to the closing date in order to be able to complete the inquiry. Additional information was requested from the Parties on a voluntary basis. However, counsel for AIM stated that the Respondents would not grant any extension of the closing date and that the Parties intended to proceed with a closing of the Proposed Transaction on February 1, 2008.

Millette Affidavit at para. 16.

19. Counsel for AIM also confirmed during this period that the Parties were not willing to enter into negotiations regarding the form of a hold separate arrangement for the operations of SNF and AIM.

Millette Affidavit at para. 17.

D. The Scrap Metal Industry

20. AIM and SNF are the principal suppliers of scrap metal recycling services in Eastern Canada. Specifically, SNF and AIM compete with respect to the purchase of unprocessed scrap metal and the supply of ferrous and non-ferrous processed scrap metal.

Millette Affidavit at para. 19.

(a) Upstream Market - Purchase of Unprocessed Scrap Metal

21. In terms of the purchase of unprocessed scrap metal, SNF and AIM compete with respect to the purchase of this product from various suppliers. There are several types of suppliers of scrap metal, ranging from “peddlers” who collect small amounts of scrap metal from residential and commercial operations, to small-sized scrap metal yards that lack sufficient processing equipment, and industrial manufacturers who create scrap as a by-product of their production.

Millette Affidavit at para. 22.

22. Processing firms, such as AIM and SNF, purchase scrap metal from these various vendors, sort the metal into types and grades, and apply some degree of processing to make the product suitable for resale. For example, SNF and AIM purchase demolished cars and process these cars into saleable products, such as ferrous and non-ferrous metals.

Millette Affidavit at para. 23.

23. To be an effective competitor in respect of the purchase of unprocessed scrap metal, it is necessary to have an established and reliable supply network. Such a network takes several years to establish.

Millette Affidavit at para. 25.

24. The merged entity would be, along with ArcelorMittal, one of the largest buyers of unprocessed scrap metal in Eastern Canada. Based on the inquiry conducted to date, the Commissioner is concerned that the Proposed Transaction may substantially lessen competition for the purchase of unprocessed scrap metal in Eastern Canada.

Millette Affidavit at paras. 42 and 46.

(b) Downstream Market - Sale of Processed Scrap Metal

25. In respect of the sale of processed scrap metal, scrap that is processed yields both ferrous (metal containing iron) and non-ferrous metals (such as copper and aluminum). The Commissioner's ongoing inquiry and concerns are focused upon the sale of processed ferrous scrap metal.

Millette Affidavit at paras. 27-28.

26. To be an effective competitor, a processor of scrap metal must have the equipment necessary to sort high-value scrap metal from low value scrap metal and to process scrap metal into the form required by a customer. In this regard, a number of customers noted that to meet their needs, the processing firm must supply processed scrap metal in a shredded form. Many major customers have a preference for shredded scrap metal because it has an acceptable level of contaminants and because it is easier to handle and ship.

Millette Affidavit at paras. 31 and 34.

27. A shredder takes large pieces of scrap metal, such as automobiles bodies, and reduces such pieces into shredded scrap metal. Shredders are significant pieces of capital equipment that can cost \$25 million or more.

Millette Affidavit at paras. 32-33.

28. There are currently eight (8) operating shredders in Eastern Canada. However, three of these shredders are owned by ArcelorMittal and used exclusively for their own processing operations. As such, the shredded scrap metal from ArcelorMittal's shredders is not available for sale to third party customers.

Millette Affidavit at para. 35.

29. Following the Proposed Transaction, the merged entity will control four of the five available shredders in Eastern Canada. SNF owns the newest and most efficient shredder in Eastern Canada. This shredder is located at its Montreal (Laval) facility, and it has a capacity of [CONFIDENTIAL] tons per year. SNF also operates an older shredder at its

Quebec City (St. Augustin) facility with a capacity of [CONFIDENTIAL], and owns a third, inoperative shredder at its Laval facility with a capacity of [CONFIDENTIAL].

Millette Affidavit at para. 36-37.

30. AIM owns two shredders with a capacity of [CONFIDENTIAL] tons per year each. One is located in Montreal and the other is located in Quebec City.

Millette Affidavit at para. 38.

31. As a result of the Proposed Transaction, the merged entity will control four of the five shredders, or approximately [CONFIDENTIAL]% of the untied shredding capacity in Eastern Canada. The sole remaining competitor would be Les Industries Associées de l'Acier Ltée located in Ste-Catherine, Quebec, who represents approximately [CONFIDENTIAL]% of the shredding capacity in Eastern Canada.

Millette Affidavit at para. 36.

32. The information obtained to date gives rise to significant concerns under the *Act*, on the basis of, among other things, the parties' high market shares, significant barriers to entry (including existing excess capacity and the capital costs required for entry, some of which are sunk costs), and little effective remaining competition from domestic or foreign sources (at least partly due to high transportation costs). The parties' market shares are high with respect to some types of ferrous scrap metal. As noted above, with respect to sales of shredded scrap metal in Eastern Canada, there is only one other competitor remaining whose sales and capacity are significantly smaller than either of the parties'.

Millette Affidavit at para. 46.

E. Inquiry Not Complete

33. The Bureau began contacting industry participants with respect to this matter on December 20, 2007, the day that complete customer contact information was provided by the Parties. Bureau staff commenced their investigation over the December holiday period, when a number of market contacts were simply unavailable.

Millette Affidavit at paras. 47 and 51.

34. The Commissioner's inquiry in respect of the Proposed Transaction is not complete and additional time is required to conclude the analysis of the Proposed Transaction. Specifically, the Bureau has not yet reached a conclusion on the precise boundaries of the relevant product and geographic markets, and requires additional data to do so. Among other things, although it seems likely that the various grades of ferrous metal are not within the same relevant product market, this issue has not been finally determined. The Bureau has also not yet conclusively determined whether or to what extent competitors in Eastern Ontario may affect competition in Eastern Canada.

Millette Affidavit at para. 53.

F. Implementation of the Proposed Transaction

35. As outlined in greater detail below, it is evident from the submissions and documents of AIM that it proposes to [CONFIDENTIAL]. As described below, by [CONFIDENTIAL], AIM will substantially impair the Tribunal's ability to issue remedies to address any substantial lessening of competition resulting from the Proposed Transaction.

PART II – ARGUMENT

A. Test Under Section 100

36. Paragraph 100(1)(a) of the *Act* authorizes the Tribunal to issue an interim order of very limited duration to prevent parties from completing or implementing a merger in circumstances where the Commissioner requires more time to complete her inquiry. Section 100 states as follows, in pertinent part:

100. (1) The Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger in respect of which an application has not been made under section 92 or previously under this section, where

(a) on application by the Commissioner, certifying that an inquiry is being made under paragraph 10(1)(b) and that, in the Commissioner's opinion, more time is required to complete the inquiry, the Tribunal finds that in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under that section because that action would be difficult to reverse;

Competition Act, R.S.C. 1985, c. C-34, as amended, s. 100.

37. The current form of section 100 was enacted in 1999 through *Bill C-20 An Act to Amend the Competition Act*. When he introduced the Bill, The Honourable John Manley specifically highlighted the importance of giving the Commissioner sufficient time to complete an inquiry and the need to relax the conditions for obtaining interim relief:

[The Bill's] other most important changes concern prenotification of mergers, regular price claims and prohibition orders. For mergers an effective prenotification process is essential to allow the Competition Bureau to determine in advance whether a transaction would have a negative effect on competition. The proposed amendments will make the prenotification process more efficient and clarify the law concerning certain types of acquisition.

Information requirements would be revised and outlined in the regulations instead of in the Act. There would be greater flexibility to waive the requirement for prenotification or for some of the information required under certain circumstances. Longer waiting periods will provide sufficient time to review proposed transactions thoroughly. Conditions for obtaining interim orders will be relaxed so that the Commissioner will be able to delay the closing of a merger that raises competition issues until an inquiry can be completed. [emphasis added]

House of Commons Debates (16 March 1998) at 4481-82.

38. Similarly, the Legislative Summary prepared by the House of Commons staff to explain the rationale behind the amendment of section 100 echoed the need to relax the requirements to be met by the Commissioner when seeking to delay the closing of a merger transaction:

Deficiencies in the interim order provision (section 100) would be corrected to give the Commissioner sufficient time to pursue an inquiry under section 10. Conditions for obtaining interim orders would be relaxed so that the Commissioner could, while conducting an examination, seek to delay the closing of a merger transaction that gives rise to serious concerns. The interim order provision would be amended to allow such orders to be obtained in circumstances where serious concerns existed, but it had not yet become clear whether or not the Commissioner had, or would have, grounds to challenge the transaction.

Library of Parliament, *Legislative Summary LS-309E: Bill C-20: an Act to Amend the Competition Act and to Make Consequential and Related Amendments to other Acts* (27 November 1997; Revised 9 March 1999) at Section C.

39. As is evident from the above, the purpose of section 100 is to maintain the *status quo* by delaying a transaction for a brief period of time until an inquiry can be completed. Further, through the amendment of section 100, Parliament intended to increase the availability of interim orders in circumstances where, such as the present matter, the parties intend to take steps that will impair the Tribunal's ability to remedy the competitive effects of the merger.
40. In *The Commissioner of Competition v. Labatt Brewing Company Limited et al.*, the Court of Appeal recently described the applicable criteria for orders under section 100:

There are three conditions that must be met before an interim order is granted under paragraph 100(1)(a) of the *Competition Act*:

1. The Commissioner must certify that an inquiry is being made into a proposed transaction under paragraph 10(1)(b) of the *Competition Act*.
2. The Commissioner must be of the opinion that more time is required to complete the inquiry.
3. The Tribunal must be satisfied that if the interim order is not granted, a person is likely to take an action that would substantially impair the ability of the Tribunal to make an order under section 92 to remedy the effect of the proposed transaction on competition because that action would be difficult to reverse.

The Commissioner of Competition v. Labatt Brewing Co. Ltd et al., 2008 FCA 22 (22 January 2008) at para. 17 (hereinafter "*Labatt (F.C.A.)*").

Each of the above three criteria is discussed below.

B. Commissioner's Inquiry is Ongoing

41. As a result of the amendment of section 100 in 1999, the Tribunal is no longer required to embark on a consideration of the merits of the case in determining whether an interim order should issue. In fact, as the Tribunal recently confirmed in *Labatt*, the threshold for the first criterion is "relatively low" and only requires the Tribunal to determine that the Commissioner's inquiry is ongoing.

The Commissioner of Competition v. Labatt Brewing Co. Ltd et al., 2007 Comp. Trib. 9 (30 March 2007) at para. 35 (hereinafter "*Labatt (Comp. Trib.)*").

42. The Commissioner has certified that an inquiry under section 10(1)(b) of the *Act* was commenced and remains ongoing. As such, the first criterion of the test for an interim order is met.

Millette Affidavit at para. 9.; Certificate of the Commissioner of Competition dated January 28, 2008, Exhibit "x" to the Millette Affidavit

C. Commissioner is of the Opinion that More Time is Required to Complete Inquiry

43. The Commissioner first received information regarding the Proposed Transaction on December 18, 2007 and received a complete long form notification filing from the parties on December 20, 2007. On December 24, 2007, the Commissioner commenced an inquiry under paragraph 10(1)(b) of the *Act* on the basis that the Commissioner had reason to believe that grounds exist for the making of an order under Part VIII of the *Act*.

Millette Affidavit at paras. 8-9.

44. Subsequent to the commencement of the inquiry, the Commissioner has obtained information regarding the scrap metal recycling industry and the Proposed Transaction from the parties, their customers, suppliers and competitors and other government departments. Although the inquiry has been pursued expeditiously, the intervening holiday period made it difficult to contact certain industry participants.

Millette Affidavit at paras. 47 and 52.

45. Nevertheless, the information obtained to date gives rise to significant concerns under the *Act*, on the basis of, among other things, the parties' high market shares, significant barriers to entry (including existing excess capacity and the capital costs required for entry, some of which are sunk costs), and little effective remaining competition from domestic or foreign sources (at least partly due to high transportation costs). The parties' market shares are high with respect to all types of ferrous scrap metal, and with respect to sales of shredded scrap metal there is only one other competitor in Eastern Canada, whose sales and capacity are significantly smaller than either of the parties'.

Millette Affidavit at para. 46.

46. Notwithstanding these serious concerns, the Commissioner is of the opinion that additional time is required to complete her analysis of the Proposed Transaction. Specifically, the Bureau has not yet reached a conclusion on the precise boundaries of the relevant product and geographic markets, and requires additional data to do so. Among other things, although it seems likely that the various grades of ferrous metal are not within the same relevant product market, this issue has not been finally determined. The Bureau has also not yet conclusively determined whether or to what extent competitors in Eastern Ontario may affect competition in Eastern Canada.

Millette Affidavit at para. 53.

47. The Commissioner is therefore of the opinion that additional time to complete her inquiry is required. In *Labatt*, the Tribunal's reasons demonstrate that the Commissioner's opinion that more time is required to complete the inquiry is not subject to "judicial review" by the Tribunal and deserves significant deference:

As to the challenge to the time requested and the efficiency of the inquiry, the Respondent suggests that the Tribunal should not accept the Commissioner's evidence. This is not a judicial review and the issue of standard of review is of limited application. In my view, the Tribunal is not in any position, on this evidence, to hold that the Commissioner's opinion is entirely without merit. There is no way for the Tribunal, in this type of application, to inquire in depth into the manner in which the

Commissioner has conducted the inquiry, what resources have been deployed, and what budgetary considerations may be in play.

Labatt (Comp. Trib.) at para. 38.

48. Based on the above, including the Commissioner's opinion that more time is required to complete the inquiry and the evidence regarding remaining issues to be addressed as part of the ongoing inquiry, the second criterion for an interim order under paragraph 100(1)(a) is satisfied.

D. Closing Will Impair Tribunal's Ability to Remedy

49. The test for the third criterion under paragraph 100(1)(a) is not whether the action contemplated by the parties would have irreparable effects or be impossible to remedy. Rather, the test is whether the action contemplated by the parties would be difficult to reverse and thus substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition. As the Court of Appeal recently stated in *Labatt*:

...in assessing whether the third condition for the issuance of an interim order is met, the Competition Tribunal must consider the effectiveness of the available section 92 remedies in the absence of an interim order, assuming there is a determination that the proposed transaction would, or would be likely to, prevent or lessen competition. ...

Labatt (F.C.A.) at para. 17.

50. Further, the Commissioner is not required to establish that the Respondents will take an action that will substantially impair the ability of the Tribunal to remedy the effect of the proposed merger. Rather, paragraph 100(1)(a) requires that the Commissioner establish that such an action is "likely" to be taken in the absence of an interim order.
51. To determine these issues in the context of the circumstances in *Labatt*, the Court of Appeal identified the following relevant considerations:

...an understanding of the nature of the potential lessening of competition that prompted the inquiry, the kinds of remedies that might be sought by the Commissioner in the event the inquiry resulted in a section 92 application, the action sought to be forbidden, what would be required to reverse that action, and the potential effectiveness of the available section 92 remedies with and without an interim order.

Labatt (F.C.A.) at para. 17.

52. Each of the considerations identified by the Court of Appeal is examined below.

(i) Nature of Potential Lessening of Competition

53. Based on the inquiry conducted to date, the Commissioner has concerns that the Proposed Transaction will result in a substantial lessening of competition in two sectors: (i) the supply of processed ferrous scrap metal in Eastern Canada; and (ii) the purchase of scrap metal in Eastern Canada.

Millette Affidavit at paras. 41 and 46.

54. AIM and SNF are the two largest processors of ferrous scrap metal in Eastern Canada. In fact, through the Proposed Transaction, AIM will acquire its only significant rival for the supply of processed ferrous scrap metal in Eastern Canada. The Commissioner's serious concerns are particularly acute with respect to higher value scrap metal processed through shredding facilities. In the event that the Proposed Transaction were to proceed, the merged entity would control approximately [CONFIDENTIAL]% of the shredding capacity available for third parties in Eastern Canada.

Millette Affidavit at paras. 35-36.

55. The Commissioner has received numerous complaints or expressions of concern from customers of the Respondents and from other industry participants regarding significant anti-competitive effects of the Proposed Transaction.

Millette Affidavit at para. 40.

56. As indicated above, the information obtained to date gives rise to significant concerns, on the basis of, among other things, the parties' high market shares, significant barriers to entry, and little effective remaining competition. Other industry participants are concerned that the Proposed Transaction will give the parties the ability to exercise market power by raising prices and disrupting supply.

Millette Affidavit at paras. 40 and 46.

57. AIM and SNF are also significant purchasers of unprocessed scrap metal. Information obtained by the Commissioner suggests that the relevant geographic market for the purchase of scrap metal may be considerably smaller than Eastern Canada.

Millette Affidavit at para. 26.

(ii) Kinds of Remedies Sought to be Imposed

58. Section 92 of the *Act* allows the Tribunal to issue a range of remedies in respect of a proposed or completed merger, including an order preventing the parties from proceeding with a proposed merger (para. 92(1)(f)), requiring a party to a merger to dissolve the merger (para. 92(1)(e)(i)) and requiring a party to dispose of assets designated by the Tribunal (para. 92(1)(e)(ii)).

Competition Act, R.S.C. 1985, c. C-34, as amended, s. 92.

59. In the event that a remedy is required under section 92, the Commissioner submits that the likely remedy will be either an order requiring the parties to not proceed with the merger, dissolve the merger or determine that the parties should be required to divest of one or both of the shredding facilities currently operated by SNF or AIM located in Quebec City and Montreal to a third party to be operated as a going-concern at their respective locations. The creation thereby of a new competitor to the merged entity and corresponding reduction in the capacity of the merged entity may be adequate to address any substantial lessening of competition resulting from the Proposed Transaction.

Millette Affidavit at para. 55.

60. As outlined below, irrespective of whether a broad or narrow remedy is issued under section 92, the closing of the Proposed Transaction and proposed actions of AIM will substantially impair the Tribunal's ability to issue such remedies.

(iii) Actions Sought to Be Forbidden

61. The relevant operations for the purpose of the Commissioner's assessment of the Proposed Transaction are the four shredding facilities currently operated by SNF and

AIM in Quebec City and Montreal¹, as well as the infrastructure and equipment related to these facilities, such as sites where scrap metal is collected, equipment and docking facilities.

Millette Affidavit at paras. 66-67.

62. As described in greater detail below, the Commissioner's primary concern is that as part of the implementation of the Proposed Transaction, AIM will [CONFIDENTIAL].

Millette Affidavit at paras. 58 and 64.

63. It is evident from its own submissions and documents that AIM proposes to [CONFIDENTIAL]. In a letter dated January 17, 2008, counsel for AIM states that [CONFIDENTIAL].

Millette Affidavit at para. 58; Letter from A. Neil Campbell to Vincent Millette dated January 17, 2008 at 13.

64. Further, internal documents prepared by AIM regarding strategic plans for the merged entity demonstrate that [CONFIDENTIAL]. In a document dated November 6, 2007 and described in AIM's Filing as a report to AIM's management, AIM describes [CONFIDENTIAL]:

[CONFIDENTIAL]

¹ SNF also owns another shredder in Laval that is not currently operating and could not be divested as a going concern.

Millette Affidavit at para. 59; AIM long form filing Appendix 6.2, Report to Management (Part 2), November 6, 2007 at 2.

65. Similarly, another strategic planning document produced by AIM states as follows regarding **[CONFIDENTIAL]**:

[CONFIDENTIAL]

Millette Affidavit at para. 60; AIM long form filing Appendix 6.2, Report to Management (Part 1), November 6, 2007 at 2.

66. In addition to the above, the Commissioner also believes that AIM may **[CONFIDENTIAL]**.

Millette Affidavit at para. 61-62.

67. Even if AIM only **[CONFIDENTIAL]**, **[CONFIDENTIAL]** would impair the Tribunal's ability to remedy a substantial lessening of competition in the purchase of scrap metal for shredding in that region. **[CONFIDENTIAL]**.

Millette Affidavit at para. 45.

68. The internal documents of AIM also demonstrate that it proposes to **[CONFIDENTIAL]**:

[CONFIDENTIAL]

Millette Affidavit at para. 63; AIM long form filing Appendix 6.2, Report to Management (Part 1), November 6, 2007 at 2.

69. It is evident from the submissions and documents of AIM that it proposes to **[CONFIDENTIAL]**.

Millette Affidavit at para. 64.

70. As described below, by **[CONFIDENTIAL]**, AIM will substantially impair the Tribunal's ability to issue remedies to address any substantial lessening of competition resulting from the Proposed Transaction. Further, the **[CONFIDENTIAL]** will impair the Tribunal's ability to remedy both the "upstream" concerns relating to a substantial lessening of competition in the purchase of unprocessed scrap metal and the "downstream" concerns relating to a substantial lessening of competition in the sale of processed ferrous scrap metal.

(iv) What Would be Required to Reverse that Action

71. The Commissioner does not believe that the **[CONFIDENTIAL]** could be reversed. **[CONFIDENTIAL]**.

Millette Affidavit at paras. 65-67.

72. The shredders required for the operations of an effective competitor are significant capital assets that cost \$25 million or more. Currently, there are only five shredders in Eastern Canada that supply processed scrap metal to third parties.

Millette Affidavit at paras. 33 and 35.

73. Further, the [CONFIDENTIAL].

Millette Affidavit at para. 65.

(v) Effectiveness of Remedies Without an Interim Order

74. In the absence of an interim order, the Tribunal's ability to issue an effective remedy will be significantly impaired. An effective remedy to address any competition concerns relating to the supply of processed scrap metal and the purchase of scrap metal, will be an order prohibiting the Respondents from proceeding with the merger, dissolving the merger, or requiring the divestiture of either or both of SNF's operating shredding facilities in Quebec City and Montreal as a going concern.
75. In the absence of an interim order, the Proposed Transaction will close and as such, the Tribunal will no longer be able to issue an order prohibiting the Respondents from proceeding with the merger.
76. In terms of the other potential remedies, in the absence of an interim order, AIM will likely [CONFIDENTIAL]. In addition, AIM may [CONFIDENTIAL].

Millette Affidavit at para. 58-64.

77. As the Federal Court of Appeal stated in *Labatt*, to determine whether an interim order is required, the Tribunal must “assume that there is a determination that the proposed transaction would, or would be likely to, prevent or lessen competition”. The actions of AIM in [CONFIDENTIAL] will substantially impair the ability of the Tribunal to address such a lessening or prevention of competition. Specifically, as a result of the [CONFIDENTIAL], the Tribunal will not be able to dissolve the merger or to require AIM to dispose of the relevant operating assets of SNF to a third party so as to create an effective competitor in Eastern Canada in respect of either the purchase of unprocessed scrap metal or the sale of processed ferrous scrap metal.

Labatt (F.C.A.) at para. 17.

E. Relief Sought

78. On the basis of the above, the Commissioner requests an interim order pursuant to paragraph 100(1)(a) of the *Act* precluding the Respondents from completing or implementing the Proposed Transaction for a period of thirty days.

F. Alternative Relief Sought

79. As outlined above, the Commissioner’s primary concern is that as part of the implementation of the Proposed Transaction, the Respondents may [CONFIDENTIAL].
80. In the alternative that the Tribunal determines that the Respondents should be permitted to complete the Proposed Transaction, the Commissioner submits that her concerns regarding the [CONFIDENTIAL] may still be addressed through an order preventing

AIM for a period of thirty days from discontinuing or disposing of shredding facilities and related infrastructure, personnel and equipment.

81. Orders issued pursuant to paragraph 100(1)(a) are not limited to preventing the completion or closing of a proposed merger, but can restrain “any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger”. Further, subsection 100(4) provides that an interim order under paragraph 100(1)(a) may be “on such terms as the Tribunal considers necessary and sufficient to meet the circumstances of the case”.
82. The Tribunal therefore has the jurisdiction to issue an interim order preventing the Respondents from taking steps directed at the implementation of the Proposed Transaction, such as the disposal of SNF’s or AIM’s operating assets or discontinuing the shredding operations of AIM or SNF.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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AUTHORITIES

1. *House of Commons Debates* (16 March 1998) at 4480-82.
2. Library of Parliament, *Legislative Summary LS-309E: Bill C-20: an Act to Amend the Competition Act and to Make Consequential and Related Amendments to other Acts* (27 November 1997; Revised 9 March 1999).
3. *The Commissioner of Competition v. Labatt Brewing Co. Ltd et al.*, 2008 FCA 22 (22 January 2008).
4. *The Commissioner of Competition v. Labatt Brewing Co. Ltd et al.*, 2007 Comp. Trib. 9 (30 March 2007).

STATUTES

- 1 *Competition Act*, R.S.C. 1985, c. C-34, as amended, sections 10, 92 and 100.