

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Commissioner of Competition for a consent interim order pursuant to sections 92, 104 and 105 of the *Competition Act*, R.S.C. 1985 c. C-34;

AND IN THE MATTER OF the merger of British American Tobacco p.l.c. and Rothmans International B.V. whereby British American Tobacco p.l.c. will acquire, *inter alia*, indirect control of Rothmans Inc. and thereby the controlling interest of Rothmans Inc. in Rothmans, Benson & Hedges Inc.;

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

BRITISH AMERICAN TOBACCO P.L.C.

Respondent

APPLICANT'S MEMORANDUM OF ARGUMENT ON INTERIM RELIEF

1. This is an application by the Commissioner of Competition (the "Commissioner") pursuant to sections 92, 104 and 105 of the *Competition Act* (the "Act") for a consent interim order (the "consent interim order application") pending the final determination of the Commissioner's application for a consent order pursuant to sections 92 and 105 of the Act (the "application"). In the latter application, the Commissioner seeks an order in respect of the transaction whereby the respondent, British American Tobacco p.l.c. ("BAT"), will acquire, *inter alia*, indirect control of Rothmans Inc. and thereby the controlling interest of Rothmans Inc. in Rothmans, Benson & Hedges (the "merger").

2. In the consent interim order application, the Commissioner seeks an interim order requiring BAT and its affiliates not knowingly to take any action as indirect shareholders of Rothmans, Benson & Hedges (“RBH”) that adversely affects the competitiveness, assets, operations or financial position of RBH, except with the approval of the Commissioner .

THE LAW

A. Interim Orders

3. Subsection 104(1) of the Act provides:

104(1) Where an application has been made for an order under this Part, other than an interim order under section 100, the Tribunal, on application by the Commissioner, may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

4. The Commissioner has made an application for a consent order pursuant to sections 92 and 105 of Part VIII of the Act in respect of the merger and submits that, having regard to all of the circumstances, the principles ordinarily considered by superior courts in granting interlocutory or injunctive relief warrant the making of the proposed consent interim order.

Competition Act, s. 104

Notice of Application for a Consent Order

5. The Supreme Court of Canada has recently restated the principles to be considered by courts when granting interlocutory or injunctive relief. Prior to granting interlocutory relief, the Tribunal should be satisfied that:

- (a) there is a serious issue to be determined;

- (b) in the absence of an interim order, irreparable harm is likely to result;
and
- (c) the balance of convenience favours issuing the interlocutory relief.

RJR-Macdonald Inc. v Canada (Attorney General), [1994] 1 S.C.R. 314, at p. 334.

Manitoba (Attorney General) v Metropolitan Stores Ltd., [1987] 1 S.C.R. 110.

American Cyanamid Co. v Ethicon Ltd., [1975] A.C. 396.

- 6. This three-part test has been applied by the Tribunal in determining an application for an interim order under section 104 of the Act.

Canada (Director of Investigation and Research) v Southam Inc. (1991) 36 C.P.R. (3d) 22 (C.T.).

B. The Consent Order Process

- 7. Section 105 of the Act provides:

105. Where an application is made to the Tribunal under this Part for an order and the Commissioner and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal may make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested.

- 8. When proceedings are brought on consent, the Tribunal has stated that its role is to determine only whether the consent order meets a minimum test. The Tribunal further treats the Commissioner's proposal with initial deference and will assume at the outset that the proposed consent order will meet its stated objectives.

Director of Investigation and Research v. Bank of Montreal et al., 68 C.P.R. (3d) 527 at 537.

ARGUMENTS

A. Serious Issues

9. In assessing whether an applicant for injunctive relief has raised serious issues in the proceeding in respect of which relief is sought, the threshold to be met is a low one. The Tribunal must make a preliminary assessment of the merits of the case to determine whether there is a serious question to be tried, as opposed to a frivolous and vexatious claim.

RJR-Macdonald, at pp. 337 and 338.

10. The Commissioner has conducted a thorough review of the merger and its effect on the relevant product and geographic markets, namely the market for manufactured cigarettes and fine cut tobacco throughout Canada.
11. It is submitted that the issues raised by the Commissioner in the application following his review of the merger are neither frivolous nor vexatious and meet the first part of the test for the issuance of an interim order.

B. Irreparable Harm

12. In assessing irreparable harm where the applicant is a public authority, the issue of the public interest is to be considered not only as a factor in the balance of convenience, but also as an aspect of irreparable harm to the interests of the authority. The onus on the public authority is low where the promotion of compliance with a statutory scheme is at issue.

RJR-Macdonald, supra, at p. 346.

13. In assessing whether irreparable harm has been established, the Tribunal has confirmed that protecting divestiture as a valid remedial option is a strong impetus for interim relief in merger cases:

Protecting divestiture as a valid remedial option will always be a strong impetus for interim relief in merger cases. The futility of attempting to “unscramble the eggs” upon the later finding that the merger will indeed likely lessen competition substantially is apparent. The legislative scheme attempts to guard against this eventuality by, for example, instituting a regime for pre-notification of some mergers and allowing the Director to apply for interim relief under ss. 100 and 104.

Southam, supra, at p. 26.

14. It is submitted that irreparable harm will occur in this case in the absence of an interim order. The business being acquired is a vigorous competitor in the tobacco industry in Canada. If BAT were permitted to operate that business, post merger, BAT's decision-making regarding that business would be affected by its indirect stake in Imperial, another competitor in the market which, in turn, would be likely to limit significantly or curtail the current state of competition between Imperial and Rothmans, Benson & Hedges (“RBH”). This would cause irreparable injury to the public interest in the maintenance of competition. Further, if BAT and its affiliates are allowed to take any action as indirect shareholders of RBH that adversely affects the competitiveness, assets, operations or financial position of RBH, the Tribunal's ability to order divestiture of the business would be significantly impaired, causing further irreparable harm in the maintenance of competition.

C. Balance of Convenience

15. It is submitted that the balance of convenience in this case clearly favours the granting of the proposed consent interim order, in that the public interest in maintaining and encouraging competition outweighs any inconvenience or harm to the respondent that may result, as evidenced by the consent of the respondent to the interim order.

RELIEF SOUGHT

16. The applicant and the respondent have agreed that pending the final determination of the application by the Tribunal, a consent interim order in the form attached to the notice of application should issue. The applicant therefore seeks, pursuant to sections 104 and 105 of the Act, the issuance of the consent interim order attached hereto.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Hull, Quebec the 13th day of May, 1999.

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