File No. CT-98/2

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*, R.S.C. 1985, c.C-34, as amended, and the *Competition Tribunal Rules*, SOR/94-290, as amended (the "*Rules*");

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b) of the *Competition Act* relating to the proposed acquisition of ICG Propane Inc. by Superior Propane Inc.;

AND IN THE MATTER OF an application by the Director of Investigation and Research for an order pursuant to section 92 of the *Competition Act*.

AND IN THE MATTER OF an application pursuant to s 104 of the *Competition Act*.

B E T W E E N:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

SUPERIOR PROPANE INC., PETRO-CANADA INC., THE CHANCELLOR HOLDINGS CORPORATION and ICG PROPANE INC.

Respondents

APPLICANT'S MEMORANDUM OF ARGUMENT ON INTERIM RELIEF

I INTRODUCTION

1. This is an application brought pursuant to the provisions of s 104 of the Competition Act (the "Act") for an interim order or orders pending further order of the Tribunal in the nature of a hold separate order ensuring that the business of ICG Propane Inc., ("ICG") acquired by Superior Propane Inc. ("Superior") on December 7, 1998 will not be integrated into Superior's business pending the resolution of the Director's s 92 application brought on December 7,1998.

2. The parties are in agreement that the matter should be dealt with by way of an interim hold separate order in the form attached to Mr Pecman's affidavit and as submitted to the Tribunal, and have consented thereto (the Petro-Canada group does not oppose the application).

3. Section 104 requires the Tribunal to make an order in accordance with the principles ordinarily considered by superior courts in deciding whether to grant interlocutory injunctive relief. It is submitted that they re those in the three-stage test set out by the Supreme Court of Canada in ***Metropolitan Stores***, and recently re-stated in ***RJR-MacDonald****:*

(a) "First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried."

(b) "Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused."

(c) "Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."

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

***RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311 at p. 334**

4. This three-stage test was applied by the Tribunal in ***Southam,*** in the context of an interim s 104 order in a merger case.

***DIR v. Southam Inc.* (1991), 36 C.P.R. (3) 22**

5. The three parts of this test are not separate, "water-tight categories". Strength in one aspect of the test may compensate for weakness in another.

***B.C. (A.G) v. Wale,* [1987] 9 B.C.L.R. 333 (B.C.C.A.)**

II SERIOUS QUESTION TO BE TRIED

6. Prior to the House of Lords' decision in ***American Cyanamid***, an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first aspect of the test. In ***American Cyanamid*** it was held that the applicant must only demonstrate "that the claim is not frivolous or vexatious: in other words, that there is a serious question to be tried." The scale of consideration is not that of a trial judge assessing all the evidence before him, there must be enough to ensure that the court does not fall into fatal error. When an order is made on an interlocutory basis, it is by definition made for the time being. It is made for purposes that are not directionally the same as the issues that will eventually solve the ***lis*** between the parties.

7. In this case the review of the merits by the Tribunal must only determine the existence of a serious question, not a case that will necessarily prevail. Nor must the

Director demonstrate a case as in a motion for summary judgment: that if disposed of on interlocutory motion is so clear that it will not permit the continued existence of a real issue for trial

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

8. In ***RJR-MacDonald*,** the Supreme Court of Canada confirmed that the ***American Cyanamid*** test is to be applied in Canada, and went on to hold that it represents a very low threshold:

> "What then are the indicators of a serious question to be tried? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case ...
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable."
>
> ***RJR-MacDonald Inc*. (supra) at pp. 337 and 338**

9. It is submitted that the Affidavit of Mr. Pecman and the s 92 application of the Director demonstrate a strong *prima facie* case and that an order should be issued under section 104.

10. It is submitted that pursuant to the order and reasons of this Tribunal in ***Director v Superior et al***, (s 100 application , December 6 1998), the threshold on this branch of the test is significantly more cursory than that which Rothstein J charged himself under s 100 (1)(a) in that case. Nor is there any question of the ***"Woods"*** final order test being applicable herein to raise the proof threshold. The parties have closed the Merger. All that is at stake is the preservation of some commercial vehicle to permit a range of effective

remedies by the Tribunal should that prove necessary, consistent with some minimal attention to the parties' business interests. (Indeed Rothstein J did not accept that "finality" could be raised by the parties when the possible termination of one party's rights only came about as the result of the party's own negotiations undertaken in the face of public interest imperatives such as the Director's investigations).

III IRREPARABLE HARM TO THE PUBLIC INTEREST

11. It is submitted that irreparable harm may occur to competition in this case. There is no mechanism for repairing the harm to competition which will occur if Superior is permitted to commingle the assets underlying the share purchase agreement pending the outcome of the Director's application under section 92 of the *Act*.

12. In ***RJR-MacDonald,*** the Supreme Court suggested that the onus on a public authority to demonstrate irreparable harm to the public interest is low where promotion of compliance with a statutory scheme is at issue:

> "In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. ***The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility.*** Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action. A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought.
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> ***RJR-MacDonald*** **(supra) at p. 346**

13. In ***RJR-MacDonald,*** the issue was the harm to the public which would result from the tobacco manufacturers not being obliged to comply with the *Tobacco Products Control Act.* Similar reasoning can be applied here, where the issue is the harm to the public interest in competition which will occur if Superior can commingle the acquired assets in the face of a serious question that the proposed merger is likely to lessen competition substantially. Hence, there is likely to be irreparable harm to competition in the absence of an interim order.

14. The issue of irreparable harm in the context of a merger was recognized by Mr. Justice Teitelbaum of the Tribunal as being the following:

> "The Director has no private interest in the present proceedings before the tribunal. It is the public interest in maintaining and encouraging competition in Canada that he argues will be irreparably harmed in the absence of an interim order. He further argues that injury to the public interest may be caused by the lack of an adequate remedy should the tribunal eventually order divestiture of the acquired businesses only to find that they were no longer viable, independent units and the harm to competition in the market in the meantime. The two are clearly linked; the more integrated and coordinated are the operations of the various publishers, the less they are actively competing in their markets.
>
> 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 a 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.
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> ***Director of Investigation and Research v. Southam*** **(supra) at p. 26**

IV BALANCE OF CONVENIENCE

15. It is submitted that the balance of convenience in this case clearly favours the granting of the "hold-separate" interim order.

All of which is respectfully submitted.

Dated at Hull, in the Province of Quebec, this 10th day of December 1998.

William J Miller
Counsel for the Applicant
Department of Justice
Industry Canada Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Hull, Quebec K1A 0C9
Telephone: (819) 997-3325
Telecopier: (819) 953-9267

TO: The Registrar of the Competition Tribunal

AND TO: The Respondents