Tribunal 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 section 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 interim order pursuant to section 100 of the *Competition Act*.

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

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

Respondents

MEMORANDUM OF ARGUMENT OF THE RESPONDENT SUPERIOR PROPANE INC.

PART I ~ NATURE OF THE APPLICATION

1. The Director of Investigation and Research (the "Director") seeks an interim order pursuant to section 100 of the *Competition Act* (the "Act") enjoining the respondents from completing the acquisition by Superior Propane Inc. ("Superior") of all of the issued and outstanding shares of ICG Propane Inc. ("ICG") from The Chancellor Holdings

Corporation, a wholly-owned subsidiary of Petro-Canada (the "Proposed Acquisition"), pursuant to a purchase and sale agreement dated July 20, 1998 (the "SPA").

2. An injunction is an extraordinary remedy that, in the circumstances, is both excessive and unwarranted. Moreover, in the present case, the order the Director seeks at the eleventh hour is tantamount to a final order because, as the Director knows, it would potentially terminate Superior's contractual rights to buy the ICG business, obviating the need for him to commence, as is the proper course, a s. 92 Notice of Application to alert the parties and the public to his concerns.

3. At this juncture, what the Competition Tribunal (the "Tribunal") must ensure is only that its ability to ultimately make an order under s. 92 of the *Act* is preserved. As with all interim applications, this Tribunal should guard against pre-judging this matter. To do otherwise would, for all practical purposes, deny the respondents an opportunity for a proper adjudication of the case.

4. There are fundamental issues in dispute between the Director and Superior on such key issues as market definition and barriers to entry. Even apart from this, Superior is claiming that, pursuant to s.96 of the *Act*, this transaction will generate $300 million in efficiencies (net present value) that will arise solely as a result of the merger, and will be greater than any substantial lessening of competition. If that is correct, s.96 mandates that no order can be made pursuant to s. 92. Only after a consideration of all of the evidence will this Tribunal be in a position to determine these issues.

5. On the efficiencies issue, the Director's evidence is clear that he refuses to accept responsibility for even considering the question. However, Parliament has specifically recognized in the *Act* that mergers that result in efficiency gains are beneficial to the Canadian economy. Not only does s.1 of the *Act* identify as one of its purposes the promotion of the "efficiency and adaptability" of the Canadian economy but, in fact, s. 96

of the *Act* makes express that the Tribunal shall not make an order under s. 92 of the *Act* where the efficiency gains from the merger offset any lessening of competition. The Director is asking the Tribunal to pre-judge this issue.

PART II ~ KEY FACTS

6. At the outset, the Tribunal should take note of the following salient facts:

7. First, the Director has investigated this matter intensively for five months, conducted extensive oral and documentary discovery in the week of October 19, 1998 pursuant to s.11 of the *Act*, advised the parties on October 30, 1998 that he opposed the transaction and was not likely to change his mind by November 30, 1998 (which, evidently, he has not), received notice of the intended December 7, 1998 closing on November 16, 1998 and, in spite of all that, he has still not commenced his Notice of Application.

8. Second, in seeking a 21 day order pursuant to s. 100 of the *Act* instead of proceeding with a Notice of Application pursuant to s. 92 and an interim order under s. 104, he has placed the parties in an untenable position. To the Director's knowledge, Petro-Canada has the right to terminate the agreement on December 15, 1998. Accordingly, the order the Director seeks will be a final order, potentially terminating Superior's contractual rights to buy the ICG business, without having an adjudication of the case on the merits.

9. Third, the Director's evidence that allowing a closing will substantially impair the Tribunal's ability to order a remedy is limited to paragraphs 47 and 50 of Mr. Pecman's affidavit. No grounds are given for Mr. Pecman's "fears" that ICG will have a "diminished" reputation and ability to market itself absent a complete injunction on closing; and no reason is given why some other interim order, such as that at Exhibit "U" of the Affidavit sworn by Mark Schweitzer, dated December 3, 1998 (the "Schweitzer Affidavit"), will preserve the Tribunal's ability to remedy any potential substantial lessening of competition.

10. Fourth, ICG's senior management has a significant incentive to leave ICG on closing. They have change of control (exercisable within 180 days) provisions in their employment contracts, which offer significant economic inducements to leave. As such, new but experienced and committed management will be required promptly to prevent an erosion of the ICG business. In this case, Superior managers, in whom Superior has confidence, are ready and willing to sever all employment ties with Superior, with no guarantee of being able to return, in order to manage ICG independently in the interim to preserve and enhance its value.

11. Fifth, while this is not disclosed in the Director's evidence, there are 14 ICG locations that do not overlap with Superior's locations. Their merger, thus, will have no competitive effect in those markets; i.e., the pre-merger competitive state in those markets remains the same. As such, with respect to those branches at least there are no grounds whatsoever to support an interim order preventing the implementation of that part of the merger.

PART III ~ ISSUES AND THE LAW

A. Test on Section 100 Application for an Interim Order

12. Section 100 provides that the Tribunal "may" make "interim orders"; that is, orders which, in all the circumstances, will preserve all the parties' rights and interests until the competition issues are finally decided. The merger may, after all, be lawful and in the public interest.

13. An interim order is available under section 100 of the *Act*, as follows:

> 100.(1) Where, on application by the Director, the Tribunal finds, in respect of a proposed merger in respect of which an

application has not been made under section 92 or previously under this section, that

> (a) the proposed merger is reasonably likely to prevent or lessen competition substantially and, in the opinion of the Tribunal, 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 section 92 because that action would be difficult to reverse, ...

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 the proposed merger. [emphasis added]

14. An interim order under section 100 can only be granted where the following elements are satisfied:

(i) First, the Tribunal must find, as a precondition to granting relief:

a. that the proposed merger is reasonably likely to prevent or lessen competition substantially; and

b. in the Tribunal's opinion, if the order is not granted, someone is likely to do something that would substantially impair the Tribunal's ability to ultimately award an effective remedy because that action would be difficult to reverse.

If either of these two preconditions is not satisfied, the Tribunal has no discretion at all to issue an interim order.

(ii) Second, even if these two conditions are satisfied, the Tribunal "may" (i.e., not "must") issue an order. The Tribunal thus has a discretion even where

the two preconditions are satisfied, but s. 100 is silent as to the factors which govern the exercise of that discretion. There is thus a gap in s. 100 which, it is submitted, should be filled by resort to the common law rules governing the issuance of interim injunctions; i.e., a weighing of the balance of convenience and irreparable harm to the parties.

15. Thus, contrary to paragraph 20 of the Director's Memorandum of Argument, the Tribunal should balance the equities in considering whether to grant an interim order.

16. The decision of the Federal Court in *Canada (A.G.) v. Fleet Aerospace* is instructive in this regard. In *Fleet*, Justice Muldoon considered s. 29.1 of the *Combines Investigation Act* [now s. 33 of the *Act*], which provides a code respecting interim orders in criminal matters and, as interpreted by the Federal Court, excluded the common law tests. In the course of his reasons, however, Muldoon J. stated:

> Counsel for the two principal protagonists, the applicant and Fleet Aerospace Corporation (Fleet) agree that s. 29.1 of the Act provides an extraordinary remedy. Ordinarily when competent legislatures make laws for the constitution, maintenance and organization of superior courts of record and confer upon those courts jurisdiction to issue an injunction, that bestowal of jurisdiction, without more, imports the co-called common-law powers and jurisprudence of and about injunction. There is, however, more in this situation. Section 29.1 of the *Combines Investigation Act* is a specially legislated form of injunction, for the issuance of which jurisdiction is conferred on both this court or any superior court of criminal jurisdiction as defined in the *Criminal Code*. This kind of injunction and the conditions prescribed for its issuance are specifically formulated by Parliament in s. 29.1 of the *Combines Investigation Act*.
>
> <u>In such circumstances, the common-law jurisprudence will be invoked to fill in, or bridge gaps in the legislation, or to clarify any principle which seems to be necessary but incompletely discernible in the legislative text. Section 29.1 of the *Combines Investigation Act*, then, is a mini code of civil</u>

> procedure. Counsel did not disagree in this: they accepted that the applicable tests upon which to uphold or reject the application are to be found in this code, with "guidance" only to be drawn from the common-law jurisprudence. Counsel averred also that s. 29.1 has generated no jurisprudence of its own to date. [emphasis added]
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> *Attorney-General of Canada v. Fleet Aerospace Corp. et al*, (1985), 5 C.P.R. (3d) 470; Superior's Book of Authorities

17. Section 100, in granting to the Tribunal the discretion (i.e., "may") whether to grant an order despite the satisfaction of the preconditions contained therein, contains a "gap". While it does not expressly import the common law tests for an interim order, it is submitted that "guidance" may be drawn from the common law jurisprudence because those tests are intrinsic to the notion of an "interim order."

B. Guiding Principles on Interim Order Applications

18. The decision in *Canada (Director of Investigation and Research)* v. *Southam*, the only contested interim order case to date under the *Act*, is helpful in setting out the purpose of an interim remedy under the *Act*. In that case, the Director's application was made pursuant to s.104 (which the Director could have done here had he moved with even a modicum of expedition), but the key issue was the same; i.e., how to best preserve the possibility of a divestiture remedy. Justice Teitlebaum said the following about the applicable standards:

> [The Director] 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.
>
> The Tribunal must look to balancing the equities between the parties by canvassing the alternative forms of interim relief. If an interim order is to issue, it should be adequate to its purpose but not any more intrusive or restrictive than is absolutely necessary. The balancing operation cannot be an exact science since the relative degrees of harm or inconvenience are largely unquantifiable. [emphasis added]
>
> *Canada (Director of Investigation and Research) v. Southam Inc.* (1991), 36 C.P.R. (3d) 22 (C.T.) at 26, Applicant's Book of Authorities

19. It is the very nature of an interim order that it not be final; that is, that it be reversible after a hearing. In this case, an order to enjoin the transaction completely for a period ending after the critical December 15, 1998 date would potentially terminate Superior's contractual rights and any possibility of completing the Proposed Acquisition. Such an order would completely disregard Superior's interests.

20. Moreover, in this case, completely enjoining the transaction goes far beyond what is "absolutely necessary" (i.e., see *Southam*, paragraph 19 above) to preserve the divestiture remedy. Indeed, a hold-separate in *Southam* was enough. As Teitlebaum J. stated:

> In the event that the tribunal eventually orders a divestiture of some or all of the publishing businesses acquired by Southam Inc., there must still be something to be divested in order to remedy a substantial lessening of competition. How is this to be achieved? This is to be achieved only be ensuring that the three businesses, although owned directly or indirectly by

> Southam Inc., are kept and operated, to the fullest extent possible, separate from each other and separate from Southam. [emphasis added]
>
> *Canada (Director of Investigation and Research)* v. *Southam Inc., supra* at 27

C. Application to this Case

(i) Efficiencies and Preservation of the ICG Business

21. This merger is about efficiencies. Section 96 expressly prohibits the Tribunal from issuing an order where, after a hearing on the merits, the Tribunal finds that the efficiencies outweigh the effects of any substantial lessening of competition. An interim order which effectively puts an end to this transaction would make it impossible for those efficiencies to be achieved in the public interest, and would effectively prejudge that issue. Section 96(1) states:

> 96.(1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made. [emphasis added]

22. For a net purchase price of approximately $175 million, Superior expects to realize from the Proposed Acquisition efficiencies of approximately $300 million (net present value). These will result from rationalizing duplicate local operations in areas where Superior's and ICG's operations overlap, and realizing significant operational efficiencies and savings in corporate office overhead.

23. The effect of the injunction sought by the Director here would be to render it impossible to achieve these efficiencies, which are clearly in the public interest, as indicated by ss. 1 and 96 of the *Act*. In light of those two sections, efficiencies are a relevant consideration on an application for interim relief as they go directly to the issue of whether the Tribunal may ultimately order a remedy.

(ii) Substantial Lessening of Competition

24. As referred to above, on an interim application pursuant to s.100 the Director must establish that the Proposed Acquisition is "reasonably likely to prevent or lessen competition substantially", a test which cannot be satisfied on the basis of evidence of concentration or market share alone. Section 92(2) of the *Act* prohibits the Tribunal from making an order under s. 92 on the basis of evidence of market share alone:

> 92.(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share. [emphasis added]

25. The issue of market share was also addressed by the Tribunal in *Canada (Director of Investigation and Research)* v. *Hillsdown*:

> As has already been noted, market share is not necessarily a reliable determinant of market power. As an *indicia* of such, it may either overstate or understate a firm's market power. If other firms in the market have excess capacity, they can respond to a supra-competitive price rise by flooding the market at a lower price level. As a result, the best question to ask when assessing market power, in some circumstances, is whether the respondents' current competitors have capacity available to serve what otherwise could be the merged firm's customers. One of the most significant sources of high supply

> elasticity is the excess capacity of competing firms. [emphasis added]
>
> *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (C.T.) at 318; Superior's Book of Authorities

26. In this application, the Director argues that the appropriate market within which to assess market power is restricted to propane and cites the parties' market share in the same markets. In fact, it is apparent upon an examination of the industry that propane, which accounts for only 2% of Canadian energy demand, competes with alternate energy sources, such as fuel oil, natural gas, electricity and wood.

> Affidavit of Mark Schweitzer, sworn December 3, 1998 ("Schweitzer Affidavit") at para. 29

27. A good illustration of the potency of the competition posed by alternate fuels is the steadily declining market for propane. For example, as a result of competition from alternate fuels, residential propane demand has dropped from 2.6% in 1984 to 1.0% in 1996, which translates into an annual decrease of 6.1% in the demand for propane in this segment. During this same period, natural gas and electricity demand have had an estimated growth rate of 2.7% and 2.3%, respectively.

> Schweitzer Affidavit at para. 30

28. The Director further argues that there are no meaningful disciplines on the ability of propane distributors to set prices. In fact, in each branch area, Superior's prices are set by local area branch managers. They are constrained by prevailing local conditions in establishing their margins, and simply react to a number of factors over which they have no control, ranging from regional weather patterns, to the relative power of the customers served in the particular area, to, most significant of all, the availability of and prices set by

suppliers and distributors of alternate fuels for each end-use for which propane is purchased.

Schweitzer Affidavit at para. 18

29. Further, contrary to the Director's suggestion of collusion between ICG and Superior, which is completely unsubstantiated, the evidence is that, by contrast to Superior where prices are set in each local branch by the local branch managers, ICG prices are set by regional managers. Thus, not only is there no evidence of any collusion, that notion of collusion between ICG regional managers and each Superior branch manager is highly implausible.

30. The Director also argues that there are significant barriers to entry to the propane distribution business, and that entry does not discipline pricing. In fact, historically there has been a stream of new regional and local entrants into propane distribution. That trend shows no sign of abating. This is due to the relatively insignificant start-up costs, the excess supply of propane in Canada and the negligible regulatory hurdles. Indeed, the acquisition will attract further competitors as a result of the rationalization of Superior's and ICG's operations.

Schweitzer Affidavit at paras. 42, 45-48

31. Low barriers to entry were cited in *Canada (Director of Investigation and Research)* v. *Hillsdown* as a check on the ability to exercise market power, regardless of market share:

> In the absence of significant entry barriers it is unlikely that a merged firm, regardless of market share or concentration, could maintain supra-competitive pricing for any length of time. An attempt to do so would cause competitors to enter the

> market and the additional supplies created in that manner would drive prices back to the competitive level.
>
> *Canada (Director of Investigation and Research) v. Hillsdown*, *supra* at 324

32. Indeed, despite his position in this case, the Director determined only five years ago in a merger between Superior and Premier Propane Inc. that there are low entry barriers in the propane industry. In fact, low barriers and competition from substitute fuels were two factors specifically cited by the Bureau in determining that it would not challenge that 1993 transaction. At the time, James Bocking, Senior Deputy Director, wrote to the parties:

> On the basis of the information available, I am of the view that there are not grounds for the Director of Investigation and Research to initiate proceedings before the Competition Tribunal in respect of the transaction under the merger provisions of the Act. Analysis of the available information indicates that the combined market shares of Superior and Premier in many markets are above the threshold levels established in the Merger Enforcement Guidelines. However, other relevant factors, such as relatively low entry barriers and competition from substitute products such as gasoline and natural gas, warrant the conclusion that the merger will not likely result in a substantial lessening of competition. [emphasis added]
>
> Schweitzer Affidavit at para. 27, Exhibit H

33. The Director has neither disclosed his 1993 views in his materials here nor, more importantly, led any evidence to explain why there are now, only five years later, high barriers to entry in this industry and no significant competition from "substitute products such as gasoline and natural gas".

(iii) No "Substantial Impairment" of a Remedy

a. Director has Failed to Satisfy Test

34. For the Director's application to succeed, the Tribunal must find that, absent an injunction order, its ability to issue an appropriate remedial order will be substantially impaired.

35. It is clear that a remedy is not denied merely because the level of pre-merger competition cannot be re-established. Rather, what the Tribunal must be able to restore is competition to the point when it can no longer be said to be substantially less than it was before the merger. As stated by Iacobucci J. in *Southam*:

> The evil to which the drafters of the *Competition Act* addressed themselves is substantial lessening of competition. See *Competition Act*, s. 92(1). It hardly needs arguing that the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger. This is the test that the Tribunal has applied in consent cases. The Tribunal attempted to distinguish this case from those cases on precisely the ground that here the Director did not consent to the appellants' proposed remedy. But the distinction is not a sensible one. I can think of only two reasons why the test should be more forgiving where the parties have consented to a remedy. The first is that parties who have not consented should be punished for their obduracy. The second, which is related to the first, is that the law should provide parties with an incentive to come to a consensual arrangement. Neither reason is valid on closer analysis. The burden of a harsh standard falls entirely on one of the parties: the company. No punishment falls on the Director when he or she is obdurate, and the harsh standard gives him or her no incentive to consent to a remedy. Therefore, even if there is a policy of encouraging consent and punishing obduracy, it is not well served by the imposition of a more stringent standard in cases in which the parties have not consented. The better approach is to apply the same standard

in contested proceedings as in consent proceedings. [emphasis added]

Director of Investigation and Research v. *Southam Inc.*, [1997] 1 S.C.R. 748 at 790

36. Applying that here, the Director must demonstrate what remedy must be preserved, not to restore the status quo ante, but rather to reduce the impact of the merger to a level where the lessening of competition, if any, is no longer "substantial".

37. In this case, the only evidence filed by the Director consists of two paragraphs that Mr. Pecman, a Bureau officer, "fears" that ICG will be "further diminished in perception and in reality as an independent marketer." No grounds are given for Mr. Pecman's "fears". No reason is given as to why this likely diminution in ICG's ability to continue to market itself is likely to occur. No reason is given as to why no divestiture can be ordered if there was a closing and new, experienced and committed management was inserted to replace departing, or potentially departing, ICG management. And no reason is given why even locations where there is no overlap between Superior and ICG should have to be held separate.

Affidavit of John Pecman, sworn November 30, 1998, at paras. 47 and 50

b. Proposed Hold-Separate

38. It is submitted that the reasonable interests of the parties can be addressed here by an order in the form of the draft order attached as Exhibit "U" to the Schweitzer Affidavit and as Schedule "A" hereto, which permits the following, and would not "substantially impair" the Tribunal's ability to order a remedy under s. 92:

(i) closing of the transaction by December 15, 1998 pursuant to the SPA, so that Superior's legal rights are not potentially lost;

(ii) recapitalization of ICG, as described in paragraph 13 of the Schweitzer Affidavit;

(iii) insertion by Superior of experienced and committed management at ICG to prevent the erosion of the value of the business on the basis that these managers sever all employment ties with Superior, have no legally enforceable guarantee that they will be re-hired, and sign the appropriate undertaking of confidentiality about ICG's business and operations;

(iv) appointment by Superior of up to 3 of 6 ICG directors, subject to the restrictions in the draft order;

(v) integration of the non-overlapping ICG locations, where there is no evidence of any substantial lessening of competition whatsoever, or any evidence that would substantially impair the Tribunal's ability to remedy any such lessening following a hearing; and

(vi) the adoption by ICG of a standard income fund policy for the distribution of excess cash flow to unitholders (after provision is made for reasonable working capital and capital expenditure requirements).

39. The above would create a complete hold-separate of all ICG locations where there is competition between ICG and Superior. Further, it contemplates that the competitive operations of ICG and Superior will be separately managed by independent managers.

40. It would also address Superior's concern that ICG's senior management will leave ICG following closing due to financial incentives in their employment contracts, triggered by a change of control (exercisable within 180 days). Others will leave due to uncertainty. The concern, as noted by Sanderson and Wallwork, is that "the economic or

competitive viability of a product line or company can be quickly dissipated without active or secure management."

> Sanderson and Wallwork, *Divestiture Relief in Merger Cases*, (1993), 38 McGill L.J. 757 at 769; Superior's Book of Authorities

41. Under the proposed hold-separate, there is no evidence that any harm would result if Superior inserted two new senior managers, i.e., current senior Superior officers who would sever all employment ties with Superior and give undertakings as to confidentiality. It is instructive in this regard that, in *Southam, supra,* the Tribunal accepted that an employee of the acquiror could maintain a sufficient degree of independence to be a monitor. In this case, Superior will go even farther by requiring the new ICG management to sever all employment ties with Superior.

> *Canada (Director of Investigation and Research)* v. *Southam Inc., supra*

42. It should be noted that hold-separate orders have routinely been issued in Canada. While those have largely been consent orders, the fact is that:

(i) the Director has effectively conceded by his acquiescence that they are effective; and

(ii) failed to lead any evidence why this case is different from those to the point that a complete enjoining of the transaction is necessary here.

> *Director of Investigation and Research* v. *Quebecor Printing Inc.* (Consent Interim Order) CT-95/01; Superior's Book of Authorities

Director of Investigation and Research v. *Seaspan International Ltd., et al.* (Consent Interim Order) CT-96/1; Superior's Book of Authorities

Director of Investigation and Research v. *Southam Inc.* (Consent Interim Order) CT-90/1; Superior's Book of Authorities

D. Response to Director's Reliance on the U.S. Antitrust Experience

43. Contrary to the Director's argument, hold-separate orders are routinely granted in the U.S. because they are considered an appropriate form of preliminary relief. In the U.S., it is a long-held and firmly established principle of equitable relief "to mould each decree to the necessities of the particular case." Not surprisingly, therefore, the hold-separate remedy, far from being a recent development, has been in use since the *Brown Shoe* case, the first case in which the U.S. government sought a preliminary injunction against a merger.

Hecht Co. v. *Bowles*, 321 U.S. 321, 329 (1944); Superior's Book of Authorities

United States v. *Brown Shoe Co.*, 1956 Trade Cases ¶ 68,244 (E.D. Mo. 1956), *affd,* 1962 Trade Cases ¶ 70,366 (U.S.S.C.); Superior's Book of Authorities

44. In general, a hold-separate is the preferred interim order in the U.S., absent compelling circumstances to the contrary. In *FTC* v. *Exxon,* the Court rejected the Federal Trade Commission's request for a preliminary injunction in favour of a hold-separate order. The Court found that effective preliminary relief could be fashioned through a hold-separate. The Court of Appeals in the *Exxon case* confirmed the propriety of the district Court's analysis, explaining that:

> ... courts have often denied requests for a preliminary injunction if some less extreme means exists to safeguard the public interest. Perhaps the most common of such means is an order that permits the transaction to go forward, but requires the acquiring company to hold the acquired company as a separate entity during the course of subsequent antitrust litigation. In many cases, such a "hold separate" order is a fully effective means of ensuring that divestiture, if ordered, will be a viable remedy; at the same time, in permitting the transaction to go forward, a hold separate order is "less drastic" than a preliminary injunction. Indeed, one court has stated that, as a condition for granting a preliminary injunction, a court must first consider whether there is an effective but less drastic preliminary remedy, such as a hold separate order, which will prevent this probable interim harm to the public. [emphasis added]
>
> *FTC* v. *Exxon*, 1980-81 Trade Cases ¶ 63,679 (D.C. Cir.) at 77,644-77,645; Superior's Book of Authorities

45. Following the well-established rule against the unnecessary imposition of preliminary injunctions, the district Court in *FTC* v. *Weyerhaeuser* likewise rejected a government request for a preliminary injunction in favour of a hold-separate order (even after the Court determined that the Commission had established a likelihood of success on the merits). As stated in *Weyerhaeuser*:

> In sum, a hold separate order, in face of the FTC showing of a likelihood of success, should not issue absent careful review of the particular features of the proposed merger and a reasoned determination from the evidence that the milder restraint will operate as an adequate preservative (impeding interim harm, and safeguarding eventual divestiture) and, in view of the equities entailed, genuinely serve the public interest. When such a determination is fairly made, however, the hold separate order can secure important benefits that a merger-blocking preliminary injunction would sacrifice. A preliminary injunction may kill, rather than suspend, a proposed transaction. A hold separate order, on the other

> hand, aims to preserve a transaction that may, after all, turn out to be legal. In addition, a hold separate order shifts the risk of decline in value of the challenged assets from the acquired company to the acquiring company. *FTC v. Exxon Corp.* [1980-81 Trade Cases 63,679], 636 F. 2d 1336, 1343-44 n. 26 (D.C. Cir. 1980). Finally, such an order permits the public immediately to reap the unchallenged benefits of a proposed transaction where, as in this case, the Commission disputes only part of the transaction. [emphasis added]
>
> *FTC* v. *Weyerhaeuser*, 1981-2 Trade Cases ¶ 64,263 (D.C. Cir. 1981) at 74,126

46. There will, of course, be some circumstances where a preliminary injunction is the appropriate remedy as, for example, in *F.T.C.* v. *PPG Industries,* a case cited by the Director at paragraph 19 of his factum. That was a case, however, where the merger--an "acquisition was almost certainly illegal"--presented "a substantial risk for the transfer of trade secrets and other confidential information." In that context, the Court was concerned that a hold-separate order would not protect the U.S. military against disclosure of sensitive information between companies in a high technology sector.

> *F.T.C.* v. *PPG Industries,* 1986-2 Trade Cases ¶ 67,235 (D.C. Cir.) at 61,190 and 61,192 Appellant's Book of Authorities

47. That case is in sharp contrast to the present situation. The propane industry is not high tech, nor is it a business of trade secrets and intellectual property. Rather, it is a business of tanks, trucks and some real estate for the storage of equipment. A hold-separate that preserves ICG's physical assets, its operational independence and ensures there is no communication with Superior on operational matters, should provide this Tribunal with the assurances it requires.

PART IV ~ ORDER REQUESTED

48. It is submitted that the reasonable interests of the parties can be addressed, without substantially impairing the ability of the Tribunal to order a remedy, by an order in the form of the draft order attached as Exhibit "U" to the Schweitzer Affidavit and as Schedule "A" hereto, which permits the following:

(i) closing of the transaction by December 15, 1998 pursuant to the SPA;

(ii) recapitalization of ICG as set out in paragraph 13 of the Schweitzer Affidavit;

(iii) insertion by Superior of new managers, all of whom will sever ties to Superior and manage the ICG business independently of Superior, subject to the restrictions in the draft order;

(iv) appointment by Superior of up to 3 of 6 ICG directors, subject to the restrictions in the draft order;

(v) integration of the ICG branches which do not currently overlap with Superior branches, and which therefore do not threaten to substantially lessen competition; and

(vi) adoption of a standard income trust distribution policy, which will not in any way impair the ICG business.

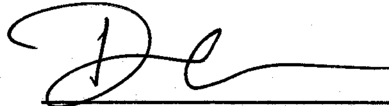
49. In the alternative, any order issued herein by the Tribunal pursuant to s.100 should expire on December 8, 1998, i.e. <u>before</u> December 15, 1998 (the date Petro-Canada is permitted to terminate the agreement). This will permit the Director to file his notice of application pursuant to s. 92, and seek an interim order pursuant to s.104 without going past December 15th. The parties will then be in a position to know <u>before closing</u>

what the terms of the interim order will be on a continuing basis. For example, if Superior is aware that it will be unable to insert new management to replace departing ICG management, it can assess the risk of closing in the face of the large commercial risk of erosion in the value of the ICG business pending a contested hearing on the merits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 3, 1998

NEIL FINKELSTEIN



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