File No.

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*, R.S. 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 interim order pursuant to section 100 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

INTRODUCTION

1. This is an application by the Director of Investigation and Research (the "Director") pursuant to s. 100 of the *Competition Act* (the "*Act*") for a an interim order in respect of the proposed merger whereby Superior Propane Inc. ("Superior") is to merge with ICG Propane

Inc. (“ICG”) through the purchase of all of the shares of ICG owned indirectly by Petro Canada Inc. (“Petro Canada”). No application has been made under s. 92 of the *Act.*

2. The Director seeks an interim order requiring the Respondents not to close the transaction now scheduled for Monday, December 7, 1998. In the words of the statute, the Director seeks an order prohibiting the accomplishing of any act or thing which the Tribunal considers may constitute or be directed toward the completion or implementation of the proposed merger, for a period of no more than twenty-one (21) days after the Order becomes effective.

THE LAW

3. Section 100 of the *Act* provides:

> **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, or
> (b) there has been a failure to comply with section 114 in respect of the proposed merger,
>
> 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.
>
> (2) Subject to subsection (3), at least forty-eight hours notice of an application for an interim order under subsection (1) shall be given by on or behalf of the Director to each person against whom the order is sought.
>
> (3) Where the Tribunal is satisfied, in respect of an application made under subsection (1), that
> (a) subsection (2) cannot reasonably be complied with, or

(b) the urgency of the situation is such that service of notice in accordance with subsection (2) would not be in the public interest,

it may proceed with the application *ex parte*.

(4) An interim order issued under subsection (1)

(a) shall be on such terms as the Tribunal considers necessary and sufficient to meet the circumstances of the case; and
(b) subject to subsection (5), shall have effect for such period of time as is specified therein.

(5) An interim order issued under subsection (1) in respect of a proposed merger shall cease to have effect

(a) in the case of an interim order issued on *ex parte* application, not later than ten days, or
(b) in any other case, not later than twenty-one days,

After the interim order comes into effect or, in the circumstances referred to in paragraph (1)(b), after section 114 is complied with.

(6) Where an interim order is issued under paragraph (1)(a), the Director shall proceed as expeditiously as possible to commence and complete proceedings under section 92 in respect of the proposed merger.

4. The Director has commenced an inquiry under s. 10 of the *Act* respecting a possible application under s. 92 of the *Act*. The Competition Tribunal (the "Tribunal") is empowered under s. 100 of the *Act* to issue such interim order as it considers appropriate, having regard to the following principles:

(a) The proposed merger is reasonably likely to substantially prevent or lessen competition;

(b) If an order is not granted, actions are likely to be taken which would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition because of the difficulty in reversing such action.

5. The Director is prepared to act expeditiously to draft and file an application under s. 92 before the expiry of any order that the Tribunal may deem appropriate to grant under s. 100.

6. This interim remedy is a purely statutory construct. Unlike s. 104 of the *Act*, which embraces that body of relatively familiar law regarding the grant of the equitable remedy of injunction, it is submitted that the Tribunal should be substantially guided by the provisions of the *Act*. Accordingly, if the matter is within the statute, the Tribunal should, unless a clear injustice would arise thereby, grant the interim order. While a residual discretion is implied by the use of the word "may" in s. 100 ("may issue an order"), it is submitted that the Tribunal is not vested with a general discretion as is exemplified under s. 104.

7. It is submitted that s. 100 was designed to accommodate the precise instant circumstances: A pending closing of a transaction which the Director finds problematic, and with respect to which the Director has been unable to both complete his inquiry and commence a full application under ss. 92 and 104. An order under s 100 provides a "breathing space" for the final consideration of the public interest, before steps are taken which will diminish the Tribunal's ability to make the most effective remedial order.

ARGUMENT

A. Reasonably likely

8. In assessing the first element of s. 100, i.e. whether the proposed merger is reasonably likely to prevent or lessen competition substantially, it is submitted that the threshold to be met is a low one. The Tribunal must make a preliminary assessment on the

merits of the case to determine if the merger is reasonably likely to prevent or lessen competition substantially, as opposed to the full test of likelihood found in s 92.

S. 92 *Competition Act*
Nozick, ***The 1997 Annotated Competition Act***, p. 206
Campbell, ***Merger Law and Practice*****,** p. 353
Crampton, ***Mergers and the Competition Act***, p. 647

9. It is further submitted that by adding the qualifier "reasonably" to "likely", Parliament clearly intended a lower threshold of probability to the analysis of any substantial lessening or prevention of competition arising from the proposed transaction, than that called for in s. 92.

Campbell, ***supra***, pp. 353-354
Crampton, ***supra****,* p. 647

10. The Director has conducted a review of the merger and its effect on the relevant product and geographic markets, which may include seven (7) product markets and over one hundred geographic markets. The affidavit of John Pecman demonstrates the serious competitive concerns which the Director has uncovered in his review of the matter. Upon even a cursory analysis a reasonable case of economic injury attendant upon the closing of this transaction has been made out.

11. It is submitted that the first part of the test for the issuance of an interim order has been met.

B. Actions likely to impair eventual remedy because of irreversible situation

12. It is submitted that should the Respondents close the sale of ICG on December 7 as threatened, this action will set in motion a train of events which are likely to impair the Tribunal's ability to order an efficient remedy to alleviate any substantial lessening or prevention of competition.

13. In assessing whether such actions are likely to lead to an irreversible situation, the Tribunal has confirmed that, for instance, 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 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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> ***Canada (D.I.R.)* v. *Southam Inc.*** (1991), 36 C.P.R. (3d) (C.T.) 22, at 26.

14. It is submitted that the said impetus is even greater in instances where closing has not yet happened. The issue then devolves into a consideration whether in a pre-closing situation, as here, an injunction (in the nature of "anticipatory" dissolution) is to be granted or some other remedy considered such as a "hold separate" to simply reserve a remedy of divestiture.

15. It is submitted that the Tribunal on this application must be satisfied that the closing and the attendant integration of the merging parties, (the "action") would substantially impair the ability of the Tribunal to remedy the competitive effect of the merger because the action would be difficult to reverse. It is submitted that the "action" in the provision

means more than the mere commercial and legal steps requisite to the transfer of equity ownership of ICG to Superior. Superior must be taken as a rational actor compelled by business logic (indeed its Board of Directors and management are under a similar legal duty to act in the best interests of the company) to take the maximum advantage of the value given for the acquisition.

16. Accordingly, unless hindered, the closing (the "action") will imply the complete integration of the business of ICG with that of Superior's.

17. Is such integration "difficult to reverse"? This suggests, in all of its triteness, the analogy of the "scrambled eggs" (see Campbell, *supra*).

18. The track record, pre-closing is not good, whether in reality or perception, ICG is already a weakened competitor in the run up to the closing.

19. It is submitted that where possible, rescission or, as here, an order blocking the closing is the preferred remedy under the *Act*. The principal remedy under the *Clayton Act*, s. 7, is an injunction. While a hold separate order is appropriate in certain necessitous circumstances, it is a second best solution and fraught with risk of anti-competitive harm.

> *"The primary error in the district court's reasoning* [in refusing an injunction in favour of a hold separate order] *as to the availability of adequate ultimate relief involves its conclusion that the very strength of the Commission's showing on the likelihood of success on the merits would induce "both PPG and Swedlow to keep the latter as viable and attractive to potential third-party purchasers as possible." 628 F. Supp. At 887. There may be some realism in the court's assessment of the parties' incentives but it appears perverse from antitrust perspective. According to this logic, the stronger the showing of an antitrust violation, the less the relief to which the Commission is entitled. The statute itself indicates that likelihood of success weights in favor of an injunction, and this*

*court has clearly stated that "a likelihood of success finding weighs heavily in favor of a preliminary injunction blocking the acquisition." Weyerhaeuser, 665 F 2d at 1085. The reasoning of Weyerhaeuser also suggests that, under the circumstances of this case, even a severe hold separate order could not certainly protect against interim competitive harm or ensure the adequacy of eventual relief. The highly competitive nature of the aircraft transparency market and the heavy utilization of advanced forms of technology make reliance on a hold separate order problematical. Unlike the situation in Weyerhaeuser, where no potential for transfer of trade secrets was involved, the PPG/Swedlow merger presents a substantial risk of transfer of trade secrets and other confidential information. "A hold separate order that cordons the acquired assets, even if it preserves the possibility of divestiture, may risk transfer of confidential information from the acquired, 'held separate' company to the acquiring company. If that transfer occurs, ultimate divestiture will not fully restore competition ..." 665 F. 2d at 1085-86 (footnotes omitted). Thus, if an employee of PPG or Swedlow, whether deliberately or inadvertently, violated the district court's no transfer rule, or if the district court mistakenly approved an apparently innocent transfer, substantial irreparable harm might result. The Weyerhaeuser court also stated that under a hold separate order, "competition *1509 **78 between the enterprises will not retain the vigor it had prior to the merger." 665 F. 2d at 1086 (footnote omitted). The court concluded that hold separate orders would not be appropriate "where the competitiveness of firms in a particular industry turns, in large part, on aggressive or innovative management initiatives." Id. The record indicates that success in the aircraft transparency industry depends almost entirely upon innovation in development of new materials and on aggressive management. The judgment of the district court is affirmed in part, reversed in part, and remanded with instructions to enter a preliminary injunction against the acquisition of Swedlow by PPG."*

F.T.C. v. PPG Industries, 1986-2 Trade Cases ¶67-235 p 61,186

20. While in certain circumstances the equities must be weighed, it is submitted that such an exercise is not relevant under s. 100, and the limited and preservative nature of

the remedy afforded thereunder would appear to presage a fuller hearing on the merits, where such equities may be more fully examined on the merits.

21. For the Tribunal to consider something less than an injunction preventing a closing (as referred to herein) it is submitted that certain minimal standards must be met which are not present here:

> *As a consequence of this legislative intent, courts have construed Section 7 to condemn an acquisition if the requisite anticompetitive consequences are found in any one of the various lines of commerce in which the acquired and acquiring companies are engaged. "It is not necessary to analyze separately and in detail each line of commerce as found by the court, since a merger violates Section 7 if the proscribed effect occurs in any line of commerce 'whether or not that line of commerce is a large part of business of any of the corporations involved...'"*[citations omitted]
>
> *"Finally we note the defendant's offer of a curative divestiture of its welding fittings business. The offer was made in the midst of the hearing. No specificity attended it. We said at the time that such undefined proposals should not be considered in the heat of a hearing for preliminary injunction. Such a proposal might be considered on a motion to modify or vacate a preliminary injunction, but then only if it appears that the divested business will continue as an independent entity whose competitive position in the newly structured market is comparable to or better than its predivestiture position.*
>
> *.....*
>
> *"As we have previously noted, section 7 of the Clayton Act manifests a congressional intent, which itself manifests the public interest, 'to arrest apprehended consequences of intercorporate relationships before those relationships [can] work their evil....' US v E I duPont de Nemours & Co, and while plaintiff's shareholders are entitled, as a general proposition, to the price that robust bidding in the market place would bring them, they are not entitled to that price if the cost is an unlawful acquisition of plaintiff by the defendant."*
>
> ***Chemetron Corp. v. Crane Co.*** (1977), 1977-2 Trade Cases ¶ 61,717 at 72, 925 at 72,930.

22. Rescission is, given the difficulties apparent with divestiture or even a hold-separate structure, regardless of the fact of judicial supervision, the preferred remedy, even when a transaction has closed.

> ***FTC v. Elders Grain Inc.*** (1989), 1989-1 Trade Cases ¶ 68,411 at p. 60,264.

23. However , once a merger has been completed all remedies, whether rescission, divestiture, or dissolution are *post facto* second best choices:

> *"'Once a merger has been completed, it is very difficult, costly, and time consuming to 'undo it".*
>
> *During the course of litigation, the acquiring firm may be in a position to strip the acquired firm of key assets and management, thus rendering divestiture of the acquired firm as a viable entity highly unlikely. Even if divestiture is finally achieved, US experience demonstrates that is unlikely to be a successful remedy. For one thing divestiture or dissolution remedies provide great opportunities for delaying tactics. Enforcement officials, at least in the US generally seek divestiture of specific assets, or of lines of commerce, rather than a 'going concern'. In this kind of partial divestiture there is little likelihood of a viable competitor arising from the ashes. This has led a number of commentators to conclude that "comprehensive implementation of meaningful structural reorganisation seldom occurs".*
>
> ***For these reasons, it appears vital to attack questionable mergers before completion.'"***
>
> ***Australian Meat Holdings Pty. v. Trade Practices Commission*** (1989), ATPR ¶ 40,932 at p. 50,099.

24. The disadvantages of putting ICG on the shelf while the legality of the Merger is debated are apparent:

> *"One method to accomplish divestiture is to allow NAT [the putative owner] to sell the paper....that gives NAT's present owners too much control over the ultimate fate of the Times. If they were of a mind to do so, they could make certain that the Times could come out of all of this less able to compete with their other very powerful and very valuable newspaper properties in this area. As we noted above, if divestiture is ordered ....this should be accomplished by appointing an independent trustee. The Times has already been under common ownership with the Morning News since February....the public interest is injured each day that competition... is prevented under this arrangement...witnesses testified that competition has....already lessened in a number of almost imperceptible ways.*
>
> *.....*
>
> *The court's concern with divestiture through an independent trustee is that such procedure would create a prolonged period of uncertainty in the market and would be expensive. It would also seem that this method would be least likely to insure that the Times would be sold for anything approaching market value...The sale would be a 'fire sale.'*
>
> *Additionally, the court is concerned with the amount of disruption that would occur in the actual operation of the Times.....All of this process would be disruptive and make it difficult for the paper to retain officers and other employees vital to its successful operation.*
>
> *In short, the court firmly believes that the divestiture remedy would likely be a cure worse than the disease. The court has a great deal of fear that divestiture through a trustee would insure that the Times would come out of this litigation so weakened that it could not survive, to the detriment of all concerned, and especially its readers.*
>
> *On the other hand the remedy of rescission has a great deal of appeal..."*
>
> ***Community Publishers Inc. v. Donrey; U.S. v. Donrey*** (1995), 1995-1 Trade Cases ¶ 71,049 at p. 74,985 at 74,989.

25. It is submitted that allowing this transaction to proceed before the Director's final determination of his options will likely lead to an irreversible situation. If Superior is permitted to make the assets and operations of ICG an integral part of its overall business,

the loss of a vigorous competitor in the market place pending final determination by the Tribunal will cause injury to the public interest in the maintenance of competition.

26. It is further submitted that Superior may obtain competitively sensitive information about ICG's operations if the transaction is allowed to proceed.

27. Furthermore, the damage to customer and supplier relationships of ICG in the event of the submergence of its identity into that of Superior's, would hamper its ability to operate as a viable competitive alternative to Superior. Should the Tribunal order that the transaction is sanctionable as being anti-competitive then its choice of remedy will be restricted.

RELIEF SOUGHT

28. The Applicant submits that, pending his determination of the issues and his possible commencement of proceedings pursuant to s. 92, an interim order should be issued. The Applicant therefore seeks, pursuant to s. 100 of the *Act*, the issuance of an interim order restraining the closing of the Merger on December 7, 1998, or such other interim order as may appear just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, this 30th Day of November, 1998.

William J. Miller
Department of Justice
Counsel to the Director of
Investigation and Research
Place du Portage, Phase I
2220 - 50 Victoria Street
Hull, Quebec K1A 0C9

Telephone: (819) 997-3325
Facsimile: (819) 953-9267