

SCHEDULE B

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Director of Investigation and Research, for orders pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34 as amended;

AND IN THE MATTER OF the acquisition by ADM Agri-Industries, Ltd. of the milling assets of Maple Leaf Mills Inc.

BETWEEN:

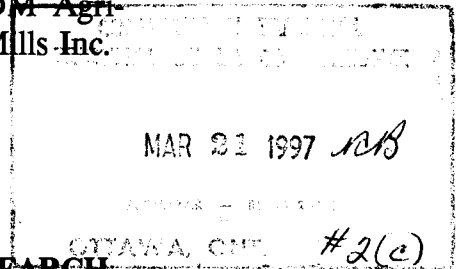
THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

and

ADM AGRI-INDUSTRIES, LTD.

Respondent



**APPLICANT'S MEMORANDUM OF ARGUMENT
ON INTERIM RELIEF**

INTRODUCTION

1. This is an application by the Director of Investigation and Research (the "Director") pursuant to sections 104 and 105 of the *Competition Act* (the "Act") for a consent interim order pending the final determination of his application for a consent order pursuant to sections 92 and 105 of the Act. In the application, the Director seeks an order in respect of the transaction whereby the respondent, ADM Agri-Industries, Ltd. ("ADM"), acquired the milling assets of Maple Leaf Mills Inc. in Canada (the "merger").

2. In the consent interim order application, the Director seeks an interim order requiring ADM to hold separate the operations of and to maintain the independent viability of a mill situated in Montreal, Province of Quebec (the "Oak Street mill") .

3. Prior to the closing of the merger, ADM executed an undertaking to hold separate the Oak Street mill, which undertaking remains in effect until the Tribunal approves the interim order, to which ADM has also consented. The undertaking to hold separate and the proposed consent interim order are to the same effect.

THE LAW

A. Interim Orders

4. Subsection 104(1) of the 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 Director, 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.

5. Where the Director has made an application under Part VIII of the Act, the Tribunal is empowered to issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief. The Director 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.

Competition Act, s. 104

Notice of application for a consent order

6. 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 page 334.

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

See also:

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

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

Canada (D.I.R.) v. Southam Inc. (1991), 36 C.P.R. (3d) 22 (C.T.), at 23-25;

Canada (D.I.R.) v. Air Canada (1989), 27 C.P.R. (3d) 476 (C.T.), at 513-14.

B. The Consent Order Process

8. Section 105 of the Act provides:

105. Where an application is made to the Tribunal under this Part for an order and the Director 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.

9. 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 Director'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., CT9502/93, June 20, 1996 (C.T.), at pages 12-13.

ARGUMENTS

A. Serious Issues

10. 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 pages 337 and 338.

11. The Director has conducted a thorough review of the merger and its effect on the relevant product and geographic markets, namely the provision of bulk hard wheat bakery flour milling in the Quebec/Atlantic Canada market.

12. It is submitted that the issues raised by the Director 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

13. 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 promotion of compliance with a statutory scheme is at issue.

RJR-Macdonald, at page 346.

14. 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 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.

Southam, supra, at page 26.

15. It is submitted that irreparable harm will occur in this case in the absence of an interim order. If ADM is permitted to operate the Oak Street mill as an integral part of its overall business, the loss of a vigorous competitor in the marketplace pending final determination by the Tribunal will cause irreparable injury to the public interest in the maintenance of competition. Further, if the Oak Street mill is not operated as a viable, ongoing and distinct entity in the market pending final determination, the Tribunal's ability to order divestiture of the Oak Street mill would be significantly impaired, causing further irreversible harm in the maintenance of competition.

C. Balance of Convenience

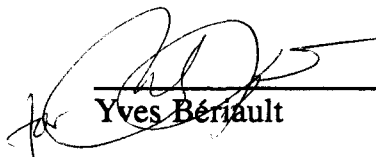
16. It is submitted that the balance of convenience in this case clearly favours the granting of the proposed consent interim order, in that the public interest in maintaining and encouraging competition outweighs any inconvenience or harm to the respondent that may result, as evidenced by the consent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


RELIEF SOUGHT

17. 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 as Schedule C 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 Montréal, this 20th day of March, 1997.


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