SCHEDULE "D" CT-95/01

THE COMPETITION TRIBUNAL

IN THE MATTER OF an Application by the Director of Investigation and Research and Quebecor Printing Inc. under Sections 100 and 105 of the Competition Act, R.S.C. 1985 c. C-34 as amended.

AND IN THE MATTER OF the proposed acquisition by Quebecor Printing Inc. of the totality of shares of Maclean Hunter Printing Limited and its subsidiary 1074353 Ontario Inc., Litho Plus Limited, The Jasper Printing Group Ltd. and Templeton Studio Ltd,

Between:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

APPLICANT

- and -

QUEBECOR PRINTING INC.

RESPONDENT

APPLICANT'S MEMORANDUM OF ARGUMENT ON INTERIM RELIEF

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I INTRODUCTION

1. Subsection 100(1) of the Competition 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. 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.

3. In contrast to section 104, section 100 is limited to mergers and provides for interim orders where no application under section 92 has yet been brought by the Director.

4. The main purpose of preliminary orders under section 100 is to provide an additional "waiting period" to better enable the Director and his staff to assess the information available for the purpose of deciding whether an application should be made under section 92 of the Act.

Nozick, The 1995 annotated Competition Act, pp. 194

5. The principles ordinarily considered by superior courts in deciding whether to grant interlocutory injunctive relief are 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

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

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

7. 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 THE CONSENT ORDER PROCESS

8. The advantages of the consent order process have been recognized by the Tribunal. For instance, in its Westinghouse/ABB decision, the Tribunal stated (at p. 17):

> "The Tribunal has a somewhat limited role in the matter of consent orders. By virtue of the circumscribed nature of the proceedings and the limited evidence before it, the Tribunal must attach considerable weight to the fact that the parties, the companies directly affected and the Director have judged these measures to be reasonable. It is also fully cognizant of the savings to be realized from settlement of litigation and the service thereby to the public interest. (emphasis added)
>
> **Director of Investigation and Research v. Asea Brown Boveri Inc. (September 6, 1989), CT-89/1**

9. Section 105 was enacted, therefore, as an alternative means of resolving concerns under the Act without having to resort to formal proceedings before the Tribunal. This process is distinct from, yet at the same time complementary to contested applications brought under Part VIII. It represents an alternative and more expeditious means of disposing of cases without the adversarial requirements of a contested application.

10. As in all litigation, a primary rationale for entering into consent proceedings under the Act stems from the expediency and efficiency of those proceedings. Consent orders were envisioned as a streamlined and efficient process under the Act. The Act and the Competition Tribunal Rules (the "Rules") illustrate and support this.

11. Section 105 creates a distinction between consent orders versus contested orders so that less evidence is required to be presented in a consent order proceeding. This is in keeping with the principles of informality and expedition that are foremost in matters before the Tribunal. These principles have long been recognized by the Tribunal, such as by Mr. Justice Strayer in Director of Investigation and Research v. Air Canada. A properly functioning consent order process should save time and money for all concerned:

> "It was open to Parliament to allow anyone potentially aggrieved by a merger to commence a proceeding before the Tribunal against the merging parties, but Parliament elected not to do so. Instead it obviously saw the commencement of such a proceeding and its direction as a matter involving an important public interest which was to be defined and pursued by the Director, a public officer, as he thinks best in the public interest. In such circumstances it is irrelevant that other persons might take a different view of when or how such proceeding should be conducted. Their assistance will no doubt be welcomed by the director in the development of evidence supportive of the allegations he has made but it is he who has the carriage of the proceeding. It is he who, together with the respondents, has the ultimate responsibility of shaping the issues and, indeed, of settling the matter (subject to the approval of the Tribunal should a consent order be required).
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> **Director of Investigation and Research v. Air Canada (1988) 23 C.P.R. (3d) 60**

12. A second touchstone of consent proceedings in general (including those under the Act) is compromise. Calvin Goldman, in his article, "The Merger Resolution Process under the Competition Act: A Critical Time in its Development", recognized at page 14 that consent order applications arise as the result of negotiated settlement between the Director and the parties. Obviously, both parties must perceive the settlement to be preferable to contested litigation. The Respondents agree to be bound by an order which restricts their freedom to one degree or another, while the Director agrees to an order which, while possibly not ideal in either scope or remedies, alleviates his concerns.

> **Calvin S. Goldman "The Merger Resolution Process under the Competition Act: A Critical Time in its Development", 22 Ottawa L.R. 1**

13. Third, the parties desire a consent order because of its certainty. From the Director's perspective, issuance of a consent hold separate order by the Tribunal allows quick and effective enforcement through contempt proceedings, in the event of a breach. It also provides both parties with a more certain environment and a set of rules to govern the business operations during the intervening period.

14. The Tribunal appears now to be recognizing a presumption that an initial draft consent order will accomplish what the Director asserts it will. This has been the practice in courts where public officials are involved; see **Sparling v. Southam Inc. (1988), 41 B.L.R. 22 (Ont. H.C.)**. In **Director of Investigation and Research v. Asea Brown Boveri Inc. (September 6, 1989), CT-89/1**, the Tribunal, led by Mr. Justice Strayer, commented that weight must be given to the fact that the parties find the proposed solutions to be acceptable:

> The Tribunal has a somewhat limited role in the matter of consent orders. By virtue of the circumscribed nature of the proceedings and the limited evidence before it, the Tribunal must attach considerable weight to the fact that the parties, the companies directly affected and the Director, have judged these measures to be reasonable. It is also fully cognizant of the savings to be realized from the settlement of litigation and the service thereby to the public interest.
>
> That is not to say that the parties' judgment will be determinative and the Tribunal a mere rubber stamp; the Tribunal has a mandate to ensure that the proposed order is within the range which may be reasonably expected to meet the objectives of the Competition Act. This will obviously include some consideration of the appropriateness of these measures to combat an alleged substantial lessening of competition, their enforceability and the efforts that were made by those proposing the solution to meet the legitimate concerns of both producers and consumers in the relevant market.
>
> **Director of Investigation and Research v. Asea Brown Boveri Inc. (September 6, 1989), CT-89/1**

15. Mr. Justice Strayer reiterated in **Director of Investigation and Research v. Air Canada (1989), 27 C.P.R. (3d) 476 ("Gemini II")** at 510-515, that the Tribunal should not be quick to second guess that the Director considered the consent order to be appropriate in the circumstances. That comment indicates that the Tribunal at all times assumes the Director is acting in the public interest.

> **Director of Investigation and Research v. Air Canada (1989), 27 C.P.R. (3d) 476**

III PRIMA FACIE CASE

16. 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."

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

17. 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."
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> **RJR-MacDonald Inc. (supra) at pp. 337 and 338**

18. It is submitted that the Affidavit of Mr. Brantz in support of the Statement of Grounds and Agreed Facts demonstrates a strong prima facie case and that an order should be issued under section 100.

IV IRREPARABLE HARM TO THE PUBLIC INTEREST

19. 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 QPI is permitted to commingle the assets underlying the share purchase agreement pending the outcome of the Director's determination whether an application under section 92 of the Act should be brought.

20. 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**

21. 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 QPI can commingle the acquired assets in the face of prima facie proof that the proposed merger is reasonably likely to lessen competition substantially. Hence, there is likely to be irreparable harm to competition in the absence of an interim order.

22. 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**

V BALANCE OF CONVENIENCE

23. It is submitted that the balance of convenience in this case clearly favours the granting of the "hold-separate" interim order as evidenced by the consent of the Respondent to the Order. The alternative for the Respondent, which it is assumed would cause them greater inconvenience, would be for an order prohibiting the Transaction to close.

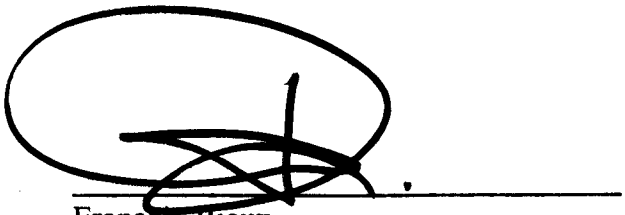
24. Indeed, it has been noted that the Tribunal is not restricted under section 100(1) to granting an interim injunction of the merger itself, but provides the latitude to issue hold separate orders:

"Assuming that the criteria have been met for the granting of an order it seems obvious from the reading of s. 100(1) that the Tribunal is not restricted to granting an interim injunction of the merger itself. Indeed, as has been noted above, it is quite arguable that the "mere" purchase of shares might never meet the criterion of irreversibility. The Tribunal can prohibit any person from doing an act or thing constituting or directed towards "the completion or implementation of the proposed merger". It is suggested that the Tribunal has ample latitude under this section to make an order permitting the purchase of shares or assets but prohibiting the commingling of the underlying assets, a so-called "hold-separate" order, pending a determination by the Director whether to challenge the merger. Such an order would have the advantage of allowing the merger to proceed partially; at the same time it could prohibit such integration as would make it impossible or impracticable to dissolve the merger at a later stage."

Nozick, <u>The 1995 annotated Competition Act</u>, p. 195

All of which is respectfully submitted.

Dated at Hull, in the Province of Quebec, this 16th day of January 1995.



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