

Competition Tribunal



Tribunal de la Concurrence

CT – 1998-002 – Doc #122

IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34,
and the Competition Tribunal Rules, SOR/94-290, as amended;

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 Commissioner of Competition
under section 92 of the Competition Act.

B E T W E E N:

The Commissioner of Competition

Applicant

- and -

Superior Propane Inc.
ICG Propane Inc.

Respondents



**ORDER ARISING FROM PRE-HEARING CONFERENCE ON SEPTEMBER 2 AND 7,
1999: CONFIDENTIALITY ISSUES AT THE
HEARING, ACCESS TO EXPERT REPORTS, SWORN SUMMARIES
AND SUBPOENA DUCES TECUS**

Dates of Pre-hearing Conference:

September 2 and 7, 1999

Member:

Nadon J. (presiding)

Counsel for the Applicant:

The Commissioner of Competition

William J. Miller
Jo'Anne Streckaf
Jennifer Quaid

Counsel for the Respondents:

Superior Propane Inc.
ICG Propane Inc.

Melanie L. Aitken
Russell Cohen

Counsel for Ultramar Limited:

Glenn Hainey

COMPETITION TRIBUNAL

ORDER ARISING FROM PRE-HEARING CONFERENCE ON
SEPTEMBER 2 AND 7, 1999: CONFIDENTIALITY ISSUES AT THE
HEARING, ACCESS TO EXPERT REPORTS, SWORN SUMMARIES
AND SUBPOENA DUCES TECUS

The Commissioner of Competition

v.

Superior Propane Inc.

ICG Propane Inc.

FURTHER TO the motion brought by Superior Propane Inc. (“Superior”) and ICG Propane Inc. (“ICG”) for further directions regarding access to the expert reports served and filed by the parties;

AND FURTHER TO the motion brought by Superior and ICG for an order requiring the Commissioner of Competition (“Commissioner”) to provide the respondents with all sworn affidavits of his witnesses’ evidence on or before September 7, 1999 failing which the “without prejudice” summaries served on August 23, 1999 will convert to “with prejudice” statements;

AND FURTHER TO the motion brought by Superior and ICG for directions regarding the issuance of subpoena *duces tecus* in respect of the Commissioner’s witnesses and others;

AND FURTHER TO the motion brought by the Commissioner for an order directing Superior and ICG to forthwith, and in any event by no later than September 10, 1999, comply with paragraphs 4 and 5 of the Order Regarding the Commissioner’s Motions Considered at the

Pre-hearing Conference on May 25, 1999, dated May 27, 1999 (“May 27, 1999 Order”) and reconsider the confidentiality level of all their documents and designate to the Commissioner which of their respective documents, or portions thereof, contain Level A information as described in the three categories specified in the May 27, 1999 Order. In the alternative, directing Superior and ICG to forthwith designate the appropriate confidentiality level, as defined in the various confidentiality orders granted in this application, of all of their documents which are anticipated to be included in the joint or independent books of documents to be submitted by the parties at the hearing which:

(a) in the case of the documents identified by the respondents, shall be designated by no later than September 8, 1999; and

(b) in the case of documents identified by the Commissioner, shall be designated by no later than September 10, 1999;

AND FURTHER TO the motion brought by the Commissioner for an order directing that any confidentiality designations for documents anticipated to be included in the joint or independent books of documents to be submitted by the parties at the hearing which cannot be resolved by the parties (subject to the approval of the Tribunal) shall be determined by the Tribunal at the September 14, 1999 pre-hearing conference;

AND FURTHER TO the motion brought by the Commissioner for an order directing that portions of the sworn statement of Ross Bayus, sworn August 8, 1999 and provided to the respondents on August 23, 1999 be held in Level A confidentiality or be redacted with respect to the portions thereof referred to in the affidavit of John Pecman and Ross Bayus, filed, such that this affidavit will receive circulation within the respondents at no greater a level than had been achieved by Friday August 27, 1999 consistent with the undertaking of the respondents in that regard;

AND ON READING the notice of motion and the memoranda of argument of Superior and ICG, and the affidavit of David Stevens, dated August 30, 1999, the letter from Melanie L. Aitken to Jo'Anne Strekaf dated August 26, 1999, and the memorandum of the Commissioner in reply and response to the memorandum of the respondents;

AND ON READING the notice of motion dated August 30, 1999, the notice of motion dated September 3, 1999 and the memorandum of argument of the Commissioner, the letter from Jo'Anne Strekaf to Melanie L. Aitken dated August 26, 1999, the affidavits of John Pecman, dated August 30 and September 1999, the affidavit of John Pecman (re redaction) dated August 30, 1999 and the affidavit of Ross Bayus dated September 2, 1999, the response of the respondents regarding confidentiality issues at the hearing and the redaction of portions of the Ultramar witness statement, the affidavit of Martha Cook, dated September 1, 1999, the affidavit of David Stevens, dated August 17, 1999 and the supplementary affidavit of David Stevens, dated August 30, 1999, in response;

AND ON HEARING the submissions of counsel for the Commissioner and the respondents, Superior and ICG;

THE TRIBUNAL ORDERS THAT:

Confidentiality Issues

1. Superior and ICG shall designate all of their documents which are anticipated to be included in the joint or independent books of documents to be submitted by the parties at the hearing, in accordance with the confidentiality designation (Level A, A-1 or B) as defined in the various confidentiality orders granted in this application by September 14, 1999. With respect to the Order Regarding the Commissioner's Motion Considered at the Pre-hearing Conference on May 25, 1999, dated May 27, 1999, the first sentence of paragraph 5 (a) shall be read as if it were written as follows:

5. The respondents Superior and ICG shall designate all their documents as described in the following categories as Level A:

(a) the commercially sensitive information that would have a material impact on the competitive decision-making of Superior's and ICG's operational managers and employees.

2. A pre-hearing conference shall be held on September 21, 1999, at 10:00 a.m. in Calgary, Alberta, to deal with any outstanding claims of confidentiality and procedural matters.

3. As directed by Mr. Justice McKeown and upon consent by the parties in the Interim Confidentiality Order, dated April 9, 1999, the documents designated as confidential pursuant to the Interim Confidentiality Order and the various confidentiality orders granted by the Tribunal in this application shall remain confidential throughout the hearing.

Access to Expert Reports

4. The confidentiality designation as defined in the various confidentiality orders granted by the Tribunal in this application shall apply to expert reports.

5. The Tribunal directs that access to expert reports shall be in accordance with the various confidentiality orders granted by the Tribunal in this application. Therefore, Mark Schweitzer, President and Chief Operating Officer of Superior shall only have access to those portions of the expert reports designated as Level A-1. As to Peter Jones, Vice-President and Chief Operating Officer of ICG, he shall only have access to documents to which the public has access.

Redaction of Portions of the Ultramar Witness Statement

6. The sworn statement of Ross Bayus, General Manager, Wholesale and Industrial Sales for Ultramar Ltd. dated August 8, 1999, may be circulated in an unredacted version. However, the following persons having possession of such statement are hereby directed to provide a confidentiality agreement for the parts of the statement identified as containing commercially sensitive information in the form attached as Schedule A to the Interim Confidentiality Order dated April 9, 1999:

(a) those who have come into possession of the sworn statement of Ross Bayus on or after August 27, 1999 shall execute a confidentiality agreement with respect to the two portions of the statement for which the Commissioner sought an order of confidentiality;

(b) those who have or will come into possession of the sworn statement on or after September 3, 1999 shall execute a confidentiality agreement with respect to the three parts of the statement for which the Commissioner sought an order of confidentiality.

7. The confidentiality agreements signed pursuant to this order shall be filed promptly with the Registrar of the Tribunal who shall retain them in confidence until completion or final disposition of this application and any related appeals, at which time the agreements may be disclosed to the parties upon request.

Pro-forma Affidavits of Witnesses Evidence Under Oath

8. The Commissioner shall serve on the respondents the Commissioner's pro-forma affidavits of witnesses evidence under oath that have not yet been provided by September 20, 1999.

Order Regarding Scheduling

9. Paragraph 1 of the Order Regarding Scheduling dated February 16, 1999 shall be revoked and replaced by the following:

1. The hearing of this application shall commence on Thursday, September 23, 1999 at 10:00 a.m. in Calgary, Alberta.

DATED at Ottawa, this 8th day of September, 1999.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Marc Nadon

Marc Nadon