Competition Tribunal Tribunal de la Concurrence

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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.
Petro-Canada
The Chancellor Holdings Corporation
ICG Propane Inc.

Respondents

REASONS FOR ORDER REGARDING THE COMMISSIONER'S MOTION CONSIDERED AT THE PRE-HEARING CONFERENCE ON MAY 25, 1999: ICG MONITOR ISSUE, CONFIDENTIALITY ISSUES, CONFIDENTIALITY LEVEL OF THE ZIP DISK, AND ANDREW CARROLL'S EXAMINATION

Dates of Pre-hearing Conference:

May 25 and 26, 1999

Member:

McKeown J. (presiding)

Counsel for the Applicant:

The Commissioner of Competition

William J. Miller
Jo'Anne Strekaf
Jennifer Quaid

Counsel for the Respondents:

Superior Propane Inc.
ICG Propane Inc.

Neil Finkelstein
Melanie Aitken
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Petro-Canada
The Chancellor Holdings Corporation

Randal T. Hughes

COMPETITION TRIBUNAL

REASONS FOR ORDER REGARDING THE COMMISSIONER'S MOTION CONSIDERED AT THE PRE-HEARING CONFERENCE ON MAY 25, 1999: ICG MONITOR ISSUE, CONFIDENTIALITY ISSUES, CONFIDENTIALITY LEVEL OF THE ZIP DISK, AND ANDREW CARROLL'S EXAMINATION

The Commissioner of Competition

v.

Superior Propane Inc. et al.

These matters were argued at a pre-hearing conference held on May 25 and 26, 1999 and an order was issued on May 27, 1999. The following are the reasons for that order.

The Commissioner of Competition ("Commissioner") moves for an order providing that:

(a) the appointed monitor to ICG Propane Inc. ("ICG"), Kristine Robidoux, be replaced by an independent professional;

(b) the Tribunal direct the parties regarding the nature of the documents and confidential information to be designated as Level A or as Level B pursuant to the Interim Confidentiality Order dated April 9, 1999 and directing Superior Propane Inc. ("Superior") and ICG to reconsider the confidentiality level of their documents and designate them as Level A or Level B in accordance with the Tribunal's direction;

(c) documents containing the mingled confidential business information of Superior and ICG, as

in the case of the Zip Disk, be designated as Level A documents pursuant to the Interim Confidentiality Order; and

(d) Andrew Carroll, a representative of Superior, be produced for examination for discovery.

I. ICG MONITOR ISSUE

The Tribunal reviewed the written arguments submitted by counsel for the Commissioner and counsel for Superior and ICG with respect to the motion proposing that the current monitor to ICG be replaced by an independent professional.

The Tribunal is of the opinion that the monitor shall be replaced by an independent professional. The parties are unable to agree on what falls within the terms of the Consent Interim Order. The Tribunal does not seek to be placed in a position where the monitor's activities must be reviewed by it on a frequent basis. It must be conceded by the parties that they now can only have confidence in an independent monitor. Notwithstanding that there is no allegation of misconduct by the monitor with respect to the Consent Interim Order, as soon as counsel for a company involved in a merger is challenged as the monitor, an independent person must be chosen as monitor for the acquired company. In light of the facts brought forward by counsel, I can only regard this as a bold experiment that failed. I endorse the process agreed upon by counsel for the Commissioner and counsel for Superior and ICG to replace the monitor appointed to ICG.

Therefore, the Commissioner shall make a list of two or three names which meet the criteria set out below, by Friday, May 28, 1999. The parties shall respond to the list by Wednesday, June 2, 1999. The criteria that the person shall meet are the following: to be a senior accountant, who may call upon assistance at his or her discretion; to be a member of a major accounting firm which does not currently act for either the Commissioner or the respondents; the Commissioner shall pay all costs; and the person shall be approved by the parties in the manner described or, failing that, by the Competition Tribunal. In addition, the monitor shall be required to answer reasonable and material requests for information by the parties and give that information to all parties subject to the confidentiality rules in effect. Finally, there shall be monthly meetings of the monitor with all parties upon reasonable notice.

Then, on the issue of deciding whether or not the information produced by the monitor should be with or without prejudice to the litigation, counsel for the Commissioner argues that any of the information provided by the monitor or obtained through the monitor process should be on the record and should be information that the Commissioner and the respondents can rely upon. Counsel also submits that in order to ensure that the monitor process is not used as a fishing expedition, the monitor can refuse to provide the information requested if he or she feels that the Commissioner is asking improper questions. Finally, counsel argues that there is no reasonable basis to suggest that the monitor's information should be without prejudice to the litigation.

Counsel for Superior and ICG responds that it is not the role and expertise of the monitor to consider what information is relevant or not for purposes of litigation. Further, he submits that while the Commissioner is entitled, under subparagraph 28(d) of the Interim Consent Order, to receive a written report from the monitor from time to time, there are no other provisions in the Interim Consent Order which set out any obligations of the monitor to the Commissioner or items which must be completed by the monitor for the use or information of the Commissioner.

In my view, the information obtained by the parties from the monitor shall be without prejudice to the litigation unless otherwise agreed between the parties, provided that such information is obtained with prejudice to the operation of the Consent Interim Order.

The Tribunal recognizes that the function of the monitor should be limited to monitoring ICG in order to ensure that it is preserved as an independent, viable, ongoing and competitive business pending the final disposition of the application. The information obtained through the monitoring process may not be information relevant to the litigation and therefore should not be used for the purpose of litigation except as subject to the rules of discovery. If a party wishes to have certain information, which has been obtained through the monitoring process, become part of the record for the purpose of litigation, it may request the other party to produce a further and better affidavit of documents or proceed in such other manner as it deems fit.

II CONFIDENTIALITY ISSUES

On April 9, 1999, the Tribunal issued an Interim Confidentiality Order ("Confidentiality Order"). Pursuant this order, all documents over which parties made a confidentiality claim are to be classified as either Level A or Level B. Level A documents can be disclosed to counsel and independent experts while Level B documents can be disclosed to counsel, independent experts and two designated representatives of each party.

The Tribunal is of the opinion that the respondents Superior and ICG shall reconsider the confidentiality level of their documents for which they seek a Level B designation and designate all their documents as described in the three categories stated in the order issued May 26, 1999 as Level A (restricting disclosure to counsel and Superior's experts). These three categories are:

> (a) the commercially sensitive information that would have a material impact on the competitive decision-making of Superior's operational managers and employees. Commercially sensitive information includes, among other things, information relating to individual customers, prices, discounts, rebates, customer inducements, marketing strategies, strategic business plans and any other matter that may have a material impact on Superior's competitive decision-making;

(b) the type of information which Petro-Canada has designated as Level A, which includes presentations to the Petro-Canada board on the status of the "Project Wizard" public offering of ICG, documents containing sales volumes and budgets, offers for ICG assets by parties other than Superior, information on supply, market outlook, and for the last three years, information on distribution and costs; and

(c) the branch-specific financial information regarding margins, revenue and profitability.

In coming to this decision, I have tried to balance factors such as the scope of legitimate claims for confidentiality based on commercial sensitivity that would have a material impact on the competitive decision-making of Superior's operational managers and employees in the event that the application of the Commissioner is successful, the integrity of the Tribunal process, and the requirements of counsel for the respondents to consult with their clients in preparing their case.

III. CONFIDENTIALITY LEVEL OF THE ZIP DISK AND ANDREW CARROLL'S EXAMINATION

Counsel for the Commissioner argues that the examination of Mr. Carroll, an additional representative of Superior, is necessary at this stage to answer questions in respect of the Zip Disk, which is a computer disk prepared by Superior containing information regarding Superior and ICG, as well as in respect of the activities of the Transaction Planning Team (the "TPT"), its analysis of the efficiencies resulting from Superior's acquisition of ICG and any documents created by or contributed to by Mr. Carroll.

Further, counsel submits that the Zip Disk contains commercially sensitive information regarding both Superior and ICG which should remain designated as Level A, and indeed, which should not be available to Mark Schweitzer, the President and Chief Operating Officer of Superior, at this time. Therefore, it is submitted that as Mr. Carroll has already seen the information contained in the Zip Disk, his examination would not require any additional sharing of that information. Finally, he submits that Mr. Carroll is in the best position to answer detailed and specific questions about the efficiencies calculation and the underlying assumptions and factual information on which it was based.

Counsel for Superior and ICG responds that the information contained in the Zip Disk is not competitively sensitive and that therefore, it must be designated as Level B, and that Mr. Schweitzer must be entitled to review the Zip Disk to assist Superior in preparing its efficiencies claim. Further, he submits that the motion brought by the Commissioner seeking leave to examine Mr. Carroll should not be granted on the basis that the Commissioner has not met the test entitling him to examine an additional representative for discovery as Mr. Schweitzer has satisfied his obligation to inform himself in respect of the matters at issue in this application. Further he submits that there is a heavy burden on a party who wishes to examine an additional representative for discovery. The rule which allows an applicant to apply for a second discovery witness does not come into play until the initial discovery witness is demonstrably found wanting.[1] He submits that the Commissioner has not met this test.

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[1] See *Northlands Indian Band v. Canada* (1996), 118 F.T.R. 123 (Proth.) at 126, citing *Richter Gedeon Vegyeszeti Gyar RT. V. Merck & Co.* (1995), 62 C.P.R. (3d) 137 (F.C.A.), at 140. See also Rule 237 of the Federal Court Rules.

The Tribunal is of the opinion that the Zip Disk shall be designated as Level B, thereby permitting Mr. Schweitzer to review the data as necessary background for assessing the efficiencies claim. In reaching this decision, the Tribunal takes into consideration the effect of designating the Zip Disk as Level A versus Superior's ability to prepare its case.

As for the Commissioner's request to examine an additional representative of Superior, the Tribunal is of the opinion that it is premature at this time to order Mr. Carroll to be produced for examination for discovery. The objectives of oral discovery are to "obtain admissions and relevant information which is in the knowledge of the opposing party".[2] In the context described by counsel for the Commissioner and counsel for Superior and ICG, it does not appear that the Commissioner has been impeded in satisfying these objectives. It appears to the Tribunal that Mr. Schweitzer has answered the questions during discovery, including some relating to the TPT and the Zip Disk and has also undertaken to provide answers when necessary. Therefore, the Commissioner's request to examine an additional representative of Superior is dismissed.

DATED at Ottawa, this 9th day of June, 1999.

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

(s) W.P. McKeown
W.P. McKeown

[2] See *Director and Investigation and Research v. Canadian Pacific Ltd.* (1997), 78 C.P.R. (3d) 242 at 245 (Comp. Trib.).