

Competition Tribunal



Tribunal de la Concurrence

CT - 98 / 2 – doc # 59

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



**ORDER ARISING FROM PRE-HEARING CONFERENCE ON MAY 25 AND 26, 1999:
DISCOVERY ISSUES, CLARIFICATION OF THE ORDER REGARDING
SCHEDULING AND AMENDMENT OF RESPONSE**

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
Russell Cohen
David Stevens

**Petro-Canada
The Chancellor Holdings Corporation**

Randal T. Hughes

COMPETITION TRIBUNAL

ORDER ARISING FROM PRE-HEARING CONFERENCE ON MAY 25 AND 26, 1999: DISCOVERY ISSUES, CLARIFICATION OF THE ORDER REGARDING SCHEDULING AND AMENDMENT OF RESPONSE

The Commissioner of Competition

v.

Superior Propane Inc. et al.

FURTHER TO the motion brought by the Commissioner of Competition (“Commissioner”) for an order requiring that the designated representatives of ICG Propane Inc. (“ICG”), Geoff Mackey and Andrea Cherkas, re-attend for examination for discovery and give answers or undertake to make inquiries to determine the information of Superior Propane Inc. (“Superior”) with respect to the various questions put to them or undertakings requested at their examination for discovery;

AND FURTHER TO the motion by the Commissioner for an order requiring that the designated representative of Superior, Mark Schweitzer, re-attend for examination for discovery and give answers to questions or undertake to make inquiries to determine the information of Superior with respect to the various questions put to him or undertakings requested at his examination for discovery;

AND FURTHER TO the motion by the Commissioner for an order providing clarification and direction regarding the scope of the reference to pro-forma affidavits in paragraph 2 of the Order Regarding Scheduling dated February 16, 1999;

AND FURTHER TO the motion brought by Superior and ICG seeking leave to file an amended response to the application of the Commissioner in the form attached to their notice of motion as schedule "A";

AND ON READING the notice of motion and the memorandum of argument of the Commissioner, the affidavit of John Pecman dated May 18, 1999, the memorandum of argument of Superior and ICG, the affidavits of Patricia Nykamp and Mark Schweitzer dated May 20, 1999 in response;

AND ON READING the notice of motion and the memorandum of argument of Superior and ICG, the affidavit of Melanie L. Aitken dated May 17, 1999, the affidavit of Rachel Urman dated May 18, 1999, and the memorandum of argument of the Commissioner in response;

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

AND FOR THE REASONS to follow shortly with respect to the motion of the Commissioner described above regarding the scope of the reference to pro-forma affidavits in paragraph 2 of the Order Regarding Scheduling dated February 16, 1999;

THE TRIBUNAL ORDERS THAT:

Questions objected to and undertakings refused during the examination for discovery of Geoff Mackey and Andrea Cherkas

1. The designated representatives of ICG, Geoff Mackey and Andrea Cherkas, shall re-attend for examination for discovery and give answers to questions or undertake to make inquiries to determine the information of Superior with respect to the following questions put to them or undertakings requested at their examination for discovery or otherwise provide the information as set out below:

(a) to make inquiries and provide the information requested, to the extent that it is available, in the letter of William Miller to Melanie Aitken, dated April 12, 1999, exhibit D-3 to Mark Schweitzer's examination for discovery and addressed in the letter of Ms. Aitken to Mr. Miller, dated April 28, 1999, exhibit D-4 to Mr. Schweitzer's examination for discovery, and at pages 176 to 188 of the transcript of the examination for discovery of Geoff Mackey and Andrea Cherkas. The information available shall be produced by June 2, 1999. If the information is insufficient, a telephone conference shall be scheduled to finalize the content of this order with respect to this request;

(b) to undertake to use their best efforts to provide the financial statements pre-filed and discussed at conference calls for the last two years;

(c) to inform the Commissioner as to whether ICG had any plans as of May 25, 1999 on seeking any other sources of propane supply outside of Petro-Canada;

(d) to advise the Commissioner whether ICG has any insight as to the reasons why the one or two accounts did not come over from Petro-Canada to ICG;

(e) to advise the Commissioner as to the number of DDEU customers prior to the merger, and the ongoing service and maintenance services provided by ICG to those customers. In addition, ICG shall make the inquiries of the five regional managers regarding whether the tankage for the DDEU customers was ICG tankage;

(f) to advise whether or not ICG was at any disadvantage in the marketplace by not being involved in hedging since early 1998;

(g) in the event that keep-dry arrangements entered into by Petro-Canada on ICG's behalf, or by ICG, exist, to advise the Commissioner accordingly so that he may move to demand further details on this issue;

(h) to advise whether the prices of alternative fuels, fuel oil or electricity, are used in any of the pricing formulas for ICG's propane arrangements; whether the presence or absence of alternative fuels is a factor in the posted price, and, if so to advise of any weight to be given and how it is factored in precisely, if within ICG's knowledge;

(i) with respect to Ms. Cherkas, to advise of any information she has on the efficiencies and improvements, if any, with respect to the business transformation process of ICG prior to the merger;

(j) to undertake to find out through the one voice in charge of Quebec and the one voice in charge of British Columbia, whether or not, in ICG's experience, pricing is the predominant factor in the propane cylinder business in trying to attract customers from competition;

(k) in lieu of questions in (u) and (w) of paragraph 9 of the Commissioner's motion, ICG shall provide any internal instructions given by the head of marketing as described from time to time to the sales force in terms of differentiation strategy in order to get higher growth potential;

(l) in lieu of (v) and (x) of paragraph 9 of the Commissioner's motion, ICG shall provide through the head of marketing, other than the example found at page 422 of volume II of the transcript of examination for discovery, the names of any other competitors in a given market who does or fails to do a certain thing that ICG does that ICG was able to advise its people internally or cause the customers to be told about how ICG does that certain thing better than a specific competitor.

Questions objected to and undertakings refused in the course of the examination for discovery of Mark Schweitzer:

2. The designated representative of Superior, Mark Schweitzer, shall re-attend for examination for discovery and give answers to questions or undertake to make inquiries to determine the information of Superior with respect to the following questions put to him or undertakings requested at his examination for discovery or otherwise provide the information as set out below:

(a) to make inquiries and provide the information requested, to the extent that it is available, in the letter of William Miller to Melanie Aitken, dated April 12, 1999, exhibit D-3 to Mark Schweitzer's examination for discovery and addressed in the letter of Ms. Aitken to Mr. Miller, dated April 28, 1999, exhibit D-4 to Mr. Schweitzer's examination for discovery, and at pages 176 to 188 of the transcript of the examination for discovery of Geoff Mackey and Andrea Cherkas. The information available shall be produced by June 2, 1999. If the information is insufficient, a telephone conference shall be scheduled to finalize the content of the order with respect to this request;

(b) Superior shall comply with its undertaking to produce all the documents, successful and unsuccessful tender bids, within the possession of the eastern and western national accounts managers who coordinated such tender bids over a period of two years;

(c) Superior shall provide an answer by August 16, 1999 as to any documents for which it will argue they are not within its possession for purposes of section 69 of the *Competition Act*;

(d) Superior shall undertake to provide any responsive documents in its possession about the cost structures of its competitors in the category of independent retail propane retailers. In addition, Mr. Schweitzer shall provide the documents on which he relies in accordance to the allegation in paragraph 9 of Superior and ICG's response to the application of the Commissioner;

(e) Superior shall provide information as agreed between the parties as to whether Superior's branches have any computer programs to assist them in their route design.

Requested deadlines for responses to undertakings

3. Superior and ICG, on consent, shall advise which of the matters taken under advisement they will recognize as undertakings by June 2, 1999 and they shall respond to both the undertakings given by them and those taken under advisement and considered as undertakings by June 14, 1999;

4. With respect to the undertakings referred in paragraph 3 of this order, which may be of some greater complexity, the Commissioner and Superior and ICG, agreed that they shall be fulfilled by June 21, 1999.

Clarification regarding the scope of the reference to pro-forma affidavits in paragraph 2 of the Order Regarding Scheduling dated February 16, 1999

5. With respect to the clarification regarding the scope of the reference to pro-forma affidavits of witness evidence in paragraph 2 of the Order Regarding Scheduling dated February 16, 1999, the reference to pro-forma affidavits shall be read in the context of paragraph 3 of the

Order Regarding Scheduling, as meaning a short summary in affidavit form of the witnesses' evidence provided under oath.

6. The Commissioner shall serve on the respondents the Commissioner's pro-forma affidavits of witnesses evidence under oath, by August 23, 1999.

Amendment of response of Superior and ICG

7. Superior and ICG are granted leave to amend their response, on the basis that further examinations can be conducted by the Commissioner. The response attached as schedule "A" to the notice of motion of Superior and ICG shall then be filed on the record.

DATED at Ottawa, this 26th day of May, 1999.

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

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