

Competition Tribunal



Tribunal de la Concurrence

CT - 98 / 2 – doc # 64

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 CLARIFICATION OF THE ORDER  
REGARDING SCHEDULING**

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**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

### REASONS FOR ORDER REGARDING CLARIFICATION OF THE ORDER REGARDING SCHEDULING

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*The Commissioner of Competition*

v.

*Superior Propane Inc. et al.*

At the pre-hearing conference held on May 25 and 26, 1999, the Tribunal heard the motion brought by the Commissioner of Competition (“Commissioner”) requesting clarification and direction regarding the scope of the reference to pro-forma affidavits made in paragraph 2 of the Order Regarding Scheduling (the “Scheduling Order”) dated February 16, 1999. On May 26, 1999, the Tribunal issued an order requiring that the Commissioner serve on the respondents the Commissioner’s pro-forma affidavits of witnesses evidence under oath by August 23, 1999. The following are the reasons for the order.

The Commissioner moves for an order providing clarification and direction regarding the scope of the reference to pro-forma affidavits in paragraph 2 of the Scheduling Order and that such pro-forma affidavits represent summaries of the evidence of the witnesses of the Commissioner as known at the time the summaries were delivered.

As a result of discussions between counsel for the Commissioner and counsel for Superior Propane Inc. and ICG Propane Inc. (“ Superior and ICG”) following the last pre-hearing

conference in this matter, the Commissioner has decided not to proceed by introducing some or all of his direct evidence through affidavit form as contemplated in paragraph 3 of the Scheduling Order. As a result, counsel requests clarification of the nature of the expression *pro-forma affidavits* referred to in the Scheduling Order. In that regard, he argues that the expression means unsworn factual summaries of the evidence of the witnesses who are likely to be called at the hearing by the Commissioner, as known at the time the summaries were delivered. He bases his submission, in part, on the fact that past proceedings before the Tribunal involved the use of such factual summaries.

In addition, counsel for the Commissioner also submits that the purpose of delivering these summaries is to provide proper notice to counsel for the respondents of the witnesses who are likely to be called at the hearing by the Commissioner so they can proceed with the preparation of their case and further submits that there would be no prejudice caused to the respondents resulting from the Commissioner delivering summaries instead of sworn affidavits.

Finally, to the extent that the Tribunal might take the position that the Commissioner shall serve the pro-forma affidavits of the complete evidence of the witnesses under oath, spelled out in the language to be used and, available for cross-examination, counsel for the Commissioner asks the Tribunal to be relieved of such obligation on the basis that it would put an onerous burden on the Commissioner who would have to generate such affidavits. Counsel submits that there is no need for such affidavits when the Commissioner's witnesses will testify at the Tribunal hearings.

Counsel for Superior and ICG responds that the Scheduling Order was issued with the consent of the parties after considerable negotiation and that it was the Commissioner who insisted on the inclusion of the reference to pro-forma affidavits of witnesses evidence. Counsel for the respondents suggests that the expression *pro-forma* should be read in the context of paragraph 3 of the Scheduling Order , which was inserted at the request of the Commissioner.

Paragraph 3 of the Scheduling Order reads as follows:

The parties understand that the Director intends that all of the Director's witnesses' evidence will be disclosed in *affidavit form* to the respondents prior to the hearing in accordance with the Tribunal schedule set out above. However, the Director retains the discretion whether or not to call witnesses in chief and in that case may not file the *affidavit* of such witnesses' evidence with the Tribunal, but will in all events disclose it to the respondents. It is further understood that, in exigent circumstances, witnesses identified just prior to or during the hearing may be called by the Director without *affidavits* of their evidence having been provided in accordance with the above Tribunal schedule; however, in such circumstances, the Director will endeavour to provide a *summary* of the witnesses' evidence as far in advance of their appearance as is reasonably possible....

Counsel submits that since the Commissioner has indicated that all of the Commissioner's witnesses' evidence will be disclosed in affidavit form to the respondents prior to the hearing in accordance with the Tribunal's schedule, it is not unreasonable for the respondents to expect to receive affidavits of this evidence.

Further, he submits that there were would be a prejudice caused to the respondents if the Commissioner were to deliver factual summary instead of affidavits under oath. He suggests that signed affidavits by witnesses under oath constitute stronger statements of the evidence to be delivered at the hearing than would factual summaries prepared by the Commissioner of the evidence that witnesses are anticipated to provide.

Finally, counsel for the respondents submits that there is a clear distinction contemplated between the terms *affidavit* and *summary* in paragraph 3 of the Scheduling Order. He suggests that the term *affidavits* refers to the documents that the respondents are entitled to receive by August 23, 1999 while the term *summaries* refers to the documents containing the witnesses' evidence which will be produced in the exigent circumstances described in that paragraph.

In light of the consent given by the parties, the circumstances surrounding the preparation of the draft scheduling order and the clear distinction contemplated between the terms *affidavit* and *summary* in paragraph 3 of the Scheduling Order, the Tribunal is of the opinion that it is not possible to accept the interpretation of the expression *pro-forma affidavits* of witness evidence referred to in paragraph 2 of the Order, as submitted by counsel for the Commissioner.

The Scheduling Order was issued on consent after negotiations between the parties and moreover, it was counsel for the Commissioner who insisted on the inclusion of the references to *pro-forma affidavits* and *affidavit form* of the required disclosure.

Therefore, the expression *pro-forma affidavits* shall be read in the context of paragraph 3 of the Scheduling Order as meaning a short summary of the witnesses' evidence by way of a sworn affidavit. The Commissioner shall serve on the respondents the Commissioner's affidavits of witnesses by August 23, 1999.

DATED at Ottawa, this 9<sup>th</sup> day of June, 1999.

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

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