

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*, R.S. 1985, c.C-34, as amended, and the *Competition Tribunal Rules*, SOR/94-290, as amended (the "*Rules*");

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 Director for an order pursuant to s. 92 of the *Competition Act*.

AND IN THE MATTER OF an application pursuant to s 104 of the *Competition Act*.

B E T W E E N:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

-and-

SUPERIOR PROPANE INC., PETRO-CANADA INC., THE CHANCELLOR HOLDINGS CORPORATION and ICG PROPANE INC.

Respondents

AFFIDAVIT OF JOHN PECMAN

I, John Pecman, of the City of Nepean, in the Regional Municipality of Ottawa-Carleton, in the Province of Ontario, MAKE OATH AND SAY:

1. I am employed as a senior commerce officer with the Competition Bureau (the "Bureau") in the Department of Industry Canada, and I am the officer responsible for an inquiry (the "Inquiry") into the proposed acquisition (the "Merger") of ICG Propane Inc. ("ICG") by Superior Propane Inc. ("Superior") made under the authority of the Director of

Investigation and Research (the "Director") and pursuant to the provisions of paragraph 10(1)(b) of the *Competition Act* (the "Act"), and as such have personal knowledge of the matters deposed to in this Affidavit. Where such knowledge is based on information that I have received from others, I have indicated the source of this information and verily believe such information to be true.

2. This matter first came before the tribunal by way of an application for an order under s 100 of the Act to prohibit the closing of the Merger for a period of 21 days. The presiding judicial officer dismissed the Director's application by order made the 6th day of December, 1998. The parties closed the Merger on December 7, 1998, the same day that the Director filed an application under s 92 of the Act with the Tribunal.

3. The Director and Superior have conducted intensive discussions to provide structure under which ICG can operate pending the final resolution of the s 92 application and at the same time safeguard the Tribunal's remedies in the event that it makes an order requested by the Director. The parties have reached an agreed hold separate order which will permit the foregoing. Attached hereto and marked Exhibit A to this affidavit is a true copy of the said draft order which the Director submits to the Tribunal for approval and issuance.

Sworn before me at the City of Hull)
in the Province of Québec this 10th)
day of December, 1998.)

A Commissioner of Oaths in
and for Canada

John Pecman

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AND IN THE MATTER OF an application by the Director of Investigation and Research for an order pursuant to section 92 of the *Competition Act*.

AND IN THE MATTER OF an application pursuant to s 104 of the *Competition Act*.

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

SUPERIOR PROPANE INC., PETRO-CANADA INC., THE CHANCELLOR HOLDINGS CORPORATION and ICG PROPANE INC.

Respondents

ORDER

FURTHER TO an application by the Director of Investigation and Research (the "Director") pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c.C-34, as amended (the "Act");

AND FURTHER TO an application by the Director for an interim order pursuant to section 104 of the Act to preserve the ICG Enterprise (as hereinafter defined) as an independent, viable, ongoing and competitive business in order to preserve competition in the market and the Competition Tribunal's ability to order appropriate relief pending final disposition by the Competition Tribunal (the "Tribunal") of the application pursuant to section 92 of the Act;

AND FURTHER TO an application for an order abridging the time for the service of the said application;

AND ON HEARING the submissions of counsel for the parties on Friday, December 11, 1998;

AND ON CONSIDERING the consent of the parties to the draft interim order filed and an order abridging the time for service as aforesaid;

THE TRIBUNAL ORDERS THAT:

IV. Service

1. That the time for the service of the within application under s 104 is abridged.

II. Definitions

2. For the purposes of this interim order, the following definitions shall apply:

- (a) "Acquisition" means the acquisition by Superior Propane Inc. of all of the issued and outstanding shares of ICG Propane Inc. held by The Chancellor Holdings Corporation, pursuant to the terms of a purchase and sale agreement dated July 20, 1998 (the "Acquisition Agreement");
- (b) "Closing Date" means December 7, 1998;
- (c) "confidential information" means competitively sensitive or proprietary information of ICG Propane Inc. or Superior Propane Inc. but, in the case of information respecting ICG Propane Inc., does not include public information or information known to or obtained by Superior Propane Inc. from sources other than ICG Propane Inc. and, in the case of information respecting Superior Propane Inc., does not include public information or information known to or obtained by ICG Propane Inc. from sources other than Superior Propane Inc.;
- (d) "divest" means to sell, transfer, assign, grant an option for the purpose of, pledge or otherwise dispose of or encumber;
- (e) "interim period" means the period of time commencing on the date of this interim order and ending on such date as agreed upon between the Director and Superior Propane Inc. or as ordered by the Tribunal;
- (f) "ICG" means ICG Propane Inc.;
- (g) "Non-overlapping Locations" means those ICG locations, listed on Schedule "A" hereto, that are situated in areas where Superior Propane Inc. has no market presence;

- (h) "person" means any natural person, corporation, association, firm, partnership or other business or legal entity; and
- (i) "Superior" means Superior Propane Inc.

3. All other terms defined in this interim order, including but not limited to "Interim Managers", "New Directors" and "ICG Enterprise", have the meanings established elsewhere in this interim order.

III. Closing of Acquisition

4. It is recognized that Superior acquired all of the issued and outstanding shares of ICG held by The Chancellor Holdings Corporation, pursuant to the terms of the Acquisition Agreement, on the Closing Date. Nothing in this interim order shall prevent Superior from recapitalizing ICG and adopting a policy providing for the periodic distribution of free cash flow (after satisfaction of expenses, obligations and maintenance capital requirements).

5. Following the Closing Date and for the interim period, Superior shall not, without the consent of the Director or the Tribunal, directly or indirectly divest its interest in ICG.

6. Subject to the terms of this interim order, neither Superior nor ICG shall, without the consent of the Director or the Tribunal, during the interim period, issue, or cause to be issued, any additional equity securities, rights or options to acquire additional equity securities, of ICG, amend the articles, by-laws, memoranda or other constating documents of ICG, or do any other act which may alter the ownership structure of ICG from that which existed immediately following closing, except for effecting those issuances, amendments, redemptions or other acts in connection with the Acquisition as provided in the Acquisition Agreement.

7. ICG, excluding the Non-overlapping Locations, shall hereinafter be referred to as the "ICG Enterprise".

IV. Maintain the ICG Enterprise as a Separate and Independent Business

Generally

8. Superior, to the extent permitted by this interim order, and the ICG Enterprise shall, during the interim period:

- (a) take all steps necessary to ensure that the ICG Enterprise is maintained as a separate and independent business and, in particular, shall not dispose of material assets or close down locations except in the ordinary course of business or having regard to market conditions;
- (b) not take any steps toward integrating the assets, management, operations or books and records of the ICG Enterprise with those of Superior or any other person; and
- (c) maintain, in accordance with generally accepted accounting principles, separate and complete financial ledger books and records of material financial information for Superior and the ICG Enterprise.

9. Subject to the terms of this interim order, Superior shall not, during the interim period, exert or attempt to exert any influence, direction or control over the operations of the ICG Enterprise, including with respect to all operational, sales, distribution and marketing decisions (except as necessary to ensure compliance with this interim order).

10. Notwithstanding paragraph 9 herein, the Superior board of directors shall be entitled

to make decisions regarding material financing and credit arrangements, material capital investments, material disbursements, material asset sales, the repayment of any material loans other than pursuant to their terms, and the settlement of any material litigation contemplated by the ICG Enterprise which are not in the ordinary course of business, provided that Superior's exercise of such power does not adversely affect the ability of the ICG Enterprise to operate as an effective, competitive business. For the purposes of this paragraph 10, "material" shall refer to consideration in excess of \$250,000 in respect of any single transaction and \$500,000 in aggregate in respect of any series of such transactions.

Appointment of Interim Managers

11. Superior may nominate two managers (the "Interim Managers"), to be appointed in accordance with this interim order, to assume complete managerial responsibility over the operations of the ICG Enterprise during the interim period, generally on the conditions outlined in paragraph 17 herein, and in accordance with the terms of this interim order. The Interim Managers may be, *inter alia*, Geoff Mackey and Peter Jones, who were members of Superior's senior management team, on condition that they, prior to their appointment as Interim Managers of the ICG Enterprise, sever all employment ties with Superior. For greater certainty, but without limiting the generality of the foregoing, no legally enforceable guarantee shall be given to such Interim Managers of re-employment by Superior upon expiration of the interim period. Furthermore, in no event shall the Interim Managers be entitled to return to Superior's employ earlier than one year following termination of employment from the ICG Enterprise, without the prior consent of the Director or the Tribunal. The Interim Managers shall enter into employment agreements with ICG on terms and conditions substantially the same as those that were in place for former executive ICG management, including a substantially similar performance bonus and severance arrangement. During the interim period, the Interim Managers shall not be involved in any way in the operations or management of Superior or the Non-overlapping

Locations, except as required to effect the transfer of the Non-overlapping Locations to Superior.

12. Subject to the terms of this interim order and, in particular, paragraph 15 herein, the Interim Managers shall be prohibited from disclosing confidential information relating to the ICG Enterprise to any person not directly involved in the management or operations of the ICG Enterprise and, in particular, shall be prohibited from disclosing such confidential information to Superior or the Non-overlapping Locations. The Interim Managers shall execute confidentiality agreements reflecting the foregoing confidentiality commitments.

Confidential Information

13. Subject to paragraphs 14, 15 and 16 herein, Superior will not directly or indirectly receive, have access to, or use any confidential information relating to the ICG Enterprise during the interim period, except as is necessary to comply with the terms of this interim order, and except for confidential financial information required by Superior's financial officers and its accountants to prepare standard financial reports or to comply with statutory reporting, credit or other filing obligations.

14. Notwithstanding paragraph 13 herein, the ICG Enterprise is required, during the interim period, to provide monthly financial and operating reports ("Periodic Performance Reports") to Grant Billing, Chairman and Chief Executive Officer of Superior. Copies of such Periodic Financial Reports shall be provided by the ICG Enterprise to the Director coincidentally with delivery to Grant Billing. Grant Billing shall not disclose such Periodic Performance Reports to any other person (other than Superior's accountants, Superior's Chief Financial Officer, independent financial advisors and legal counsel, all of whom shall be subject to confidentiality agreements).

15. Further, notwithstanding paragraph 13 herein, in the event that Mr. Billing, acting

reasonably, becomes concerned about the financial and/or operational well-being of the ICG Enterprise, as a result of his review of the Periodic Performance Reports or otherwise, nothing shall prohibit Mr. Billing from communicating and discussing his concerns, and making recommendations as he considers appropriate, to the management and/or the board of directors of the ICG Enterprise.

16. Further to paragraph 10 herein, and notwithstanding paragraph 13 herein, the ICG Enterprise will further provide such information, confidential and otherwise, necessary for the Superior board of directors to make the assessments and decisions provided for in paragraph 10 herein.

V. Maintain Independent Viability of the ICG Enterprise

17. Superior, to the extent permitted by this interim order, will cause the ICG Enterprise to, and the ICG Enterprise will, during the interim period:

- (a) carry on its business in the ordinary course of business in accordance with generally prevailing industry standards;
- (b) use best efforts to preserve and enhance the goodwill of the ICG Enterprise;
- (c) use best efforts to maintain the ICG Enterprise at least to the same level of competition as existed prior to the Closing Date;
- (d) use best efforts to enhance the competitiveness of the ICG Enterprise without regard to whether its competitor is Superior;
- (e) not knowingly take any action that will adversely affect the competitiveness, assets, operations or financial status of the ICG Enterprise; and

- (f) use best efforts to take any other actions which are consistent with improving the value and competitiveness of the business of the ICG Enterprise.

18. In particular, but without limiting the generality of paragraph 17 herein, Superior will not cause the ICG Enterprise to, and the ICG Enterprise will not, other than in the ordinary course of business, or having regard to market conditions, or as necessary to comply with this interim order,

- (a) without prior notice to the Director, enter into or withdraw from any material contracts or arrangements in regard to the business of the ICG Enterprise, make any material changes to its operations, or enter into any material agreement to lease any assets or real property of the business to any other person, that would have the effect of materially inhibiting or unreasonably delaying the divestiture of the ICG Enterprise or materially reducing its value; or
- (b) without prior notice to the Director, curtail material marketing, sales, promotional or other activities of the ICG Enterprise in connection with the solicitation of its existing or prospective customers; or
- (c) without prior notice to the Director, and excepting three executives known to the Director, terminate or materially alter any current employment, salary or benefit agreements for any executives, managerial, sales or marketing personnel of the ICG Enterprise.

VI. Board of Directors

19. On closing of the Acquisition Agreement, Superior shall reconstitute the board of directors of the ICG Enterprise. Superior shall use all reasonable efforts to appoint to the new board of directors of the ICG Enterprise, three previous independent directors of ICG. To complete the five-member ICG Enterprise board of directors, Superior shall cause Jim MacDonald and Geoff Mackey to be appointed as directors for the interim period (the "New Directors"), who shall, coincident with their appointment as New Directors, resign their Superior directorships. Subject to paragraphs 10, 13, 14, 15 and 16 herein, the New Directors shall be prohibited from disclosing confidential information relating to the ICG Enterprise to any person not directly involved in the management or operations of the ICG Enterprise and, in particular, shall be prohibited from disclosing such confidential information to Superior or the Non-overlapping Locations. The New Directors shall execute confidentiality agreements reflecting the foregoing confidentiality commitments. Should any member of the ICG Enterprise board of directors, including but not limited to the New Directors, be unable to continue under his or her appointment, Superior shall appoint a replacement, which appointment shall be subject to the approval of the Director.

20. In the event that Mr. Billing, acting reasonably, is of the view that there is a material deterioration, or a reasonable prospect of a material deterioration, of the business of the ICG Enterprise, and upon prior notice being provided to the Director, the Superior board of directors may appoint Mr. Billing as a member of the board of directors of the ICG Enterprise.

VII. Monitor

21. Superior shall nominate a Superior employee or other nominee of its choosing within twenty days hereof, subject to the approval of the Director or the Tribunal, to be appointed to act as a monitor for the business of the ICG Enterprise. The monitor shall be

responsible for monitoring the business of the ICG Enterprise as is necessary to ensure compliance with this interim order.

22. In the event that the monitor (or any replacement) is unable to perform his or her duties under the terms of this interim order, Superior shall appoint, subject to the Director's or the Tribunal's approval, a new monitor (who may be an employee of Superior) for the business of the ICG Enterprise within fifteen business days. Should a new monitor not be so appointed, the Tribunal, upon application of the Director, may appoint a new monitor.

23. If, in the Director's reasonable opinion, a monitor is not fulfilling the obligations of the monitor pursuant to this interim order, the Director may request that Superior appoint a new monitor who shall be subject to the Director's approval, which approval shall not be unreasonably withheld. If a new monitor has not been appointed within twenty business days of the Director's request, the Director may apply to the Tribunal for such an appointment.

24. All remuneration and expenses of the monitor shall be paid by Superior, provided the monitor is an employee and/or appointee of Superior. In the event that the Tribunal appoints a person who is not an employee or appointee of Superior, all remuneration and expenses of such monitor will be paid by the Director.

25. The monitor shall be permitted to perform his or her regular employment duties in addition to his or her duties as monitor to the extent permitted in this interim order, provided such monitor is an employee of Superior.

26. The ICG Enterprise shall give the monitor unlimited access to:

- (a) its premises and its business;

- (b) any information relating to its operations, assets and business;
- (c) meetings of its management; and
- (d) minutes of its board of directors' meetings;

as is required by the monitor to fulfil his or her obligations pursuant to the terms of this interim order.

27. Neither Superior nor the ICG Enterprise shall exert or attempt to exert any influence, direction or control over the monitor which has or could have the effect of adversely affecting the discharge of his or her duties under the terms of this interim order.

28. Superior shall direct the monitor to discharge his or her responsibilities on the following terms:

- (a) in the event that the monitor determines, in his or her reasonable opinion, that Superior or the ICG Enterprise is in default of any of the terms of this interim order, the monitor shall notify the Director and Superior of such breach;
- (b) the monitor shall not consult with Superior except as is necessary to ensure compliance with this interim order;
- (c) the monitor shall not communicate confidential information about the ICG Enterprise to any person except to the extent required by the terms of this interim order;
- (d) the Director shall have the right to request from the monitor from time to

time, and forthwith upon such request the monitor shall provide to the Director and to Superior, a written report (together with such underlying reports as are appropriate, if so requested by the Director) relating to the ICG Enterprise's compliance with the terms of this interim order; and

- (e) the monitor shall not be subject to personal liability for any breach by him or her or by the ICG Enterprise or Superior of any of the terms of this interim order.

VIII. Other

29. Superior and the ICG Enterprise, respectively, shall provide a copy of this interim order to their boards of directors and senior managers, with a direction to comply with the terms hereof.

30. This interim order in no way shall be taken as a waiver of any of the respondents' rights or defences under the Act or otherwise, or as an admission of any facts or law.

31. This interim order is effective on the date hereof and ceases to have effect on the date ordered by the Tribunal.

32. Notices, reports or other communications required or permitted by this interim order shall be in writing and shall be given by personal delivery to the party to whom such notice is to be given or by registered mail or by facsimile to the address or facsimile number below:

For the Director:

Director of Investigation and Research
Competition Bureau
Industry Canada
Place du Portage, Phase 1
50 Victoria Street
Hull, Quebec
K1A 0C9

Facsimile No.: (613) 953-6169

For Superior:

Superior Propane Inc.
Fifth Avenue Place
425 - 1st Street S.W.
P.O. Box 595, Station "M"
Calgary, Alberta
T2P 4Y4

Facsimile No.: (403) 231-0868

For the ICG Enterprise:

Suite 1601
101-6th Avenue SW
Calgary, Alberta
T2P 3P4

Facsimile No.: (403) 508-4105

33. Where the Director's consent is requested pursuant to this interim order, the Director shall provide his response to any such request within seven days of the later of the day that the request was received by the Director and the day any necessary supporting information was received.

34. Nothing in this interim order shall prevent the exchange of confidential information among counsel for the respondents in connection with their defence to any application

made by the Director under the Act or any matters at issue by reason of this interim order.

Dated at Ottawa, this _____ day of December, 1998

Schedule "A"

List of ICG Non-Overlap Locations

1. Jonquiere, Quebec
(including related storage facilities in St. Prime and Arvida, Quebec)
2. Rouyn, Quebec
3. Val d'Or, Quebec
4. Mont Laurier, Quebec
5. Portage La Prairie, Manitoba
6. Morden, Manitoba
7. Dauphin, Manitoba
8. Swan River, Manitoba
9. The Pas, Manitoba
10. Hay River, North West Territories
11. Sechelt, British Columbia
12. Powell River, British Columbia

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BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

SUPERIOR PROPANE INC., PETRO-CANADA INC., THE CHANCELLOR HOLDINGS CORPORATION and ICG PROPANE INC.

Respondents

MEMORANDUM

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