

Record

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
CT-98/02	
DEC 3 1998	
REGISTERAR	REGISTRAIRE
OTTAWA, ONT. # 12(6)	

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 of Investigation and Research for an interim order pursuant to section 100 of the *Competition Act*

**AFFIDAVIT OF ANDREW STEPHENS  
IN ANTICIPATION OF APPLICATION FOR  
INTERIM RELIEF BEFORE THE COMPETITION TRIBUNAL**

I, ANDREW STEPHENS, of Calgary, Alberta, MAKE OATH AND SAY AS FOLLOWS:

1. I am Vice-President, Supply Logistics and Refining of Petro-Canada. I am a chemical engineer and have been employed by Petro-Canada in a variety of positions since 1979. In the fall of 1997, I was assigned a special project to assist with Petro-Canada's plans to dispose of ICG Propane Inc. ("ICG"), which is a wholly-owned subsidiary of Petro-Canada. As such, I have personal knowledge of the matters deposed to in this Affidavit, except where stated to be on information and belief, and in all such cases, I believe the information to be true.

**Decision to dispose of ICG**

2. Petro-Canada acquired ICG in 1990. In 1996 after a strategic review, Petro-Canada determined that ICG was not a core business and made a decision to dispose of it. Petro-Canada considered a number of alternatives and concluded that a public offering by way of an income fund trust ("IFT") would be the most advantageous course, and in late 1996, Petro-Canada began work to prepare ICG for disposition by way of an IFT.

3. After Petro-Canada announced its intention to dispose of ICG, a number of parties, including Superior Propane Inc. ("Superior") expressed interest in purchasing ICG. Information concerning the identity of these third parties has been provided to staff of the Competition Bureau (the "Bureau").

4. Petro-Canada, however, determined that its best alternative was to proceed with a public offering and began work to complete a disposition by way of an IFT. In order to facilitate the disposition, steps were taken to ensure that ICG would be able to operate on its own, independent from Petro-Canada. This included ensuring that ICG had its own separate board of directors and management team and having its offices move out of the Petro-Canada building in Calgary, Alberta.

5. In June, 1998, Petro-Canada was in the final stages of its IFT. Superior again approached Petro-Canada and expressed a serious interest in acquiring ICG. Superior's proposal was more attractive in economic terms to Petro-Canada than the IFT. Superior believed that the transaction would not ultimately be found to result in a substantial lessening of competition, but stated it was also willing to take on the risks relating to any possible proceedings under the *Competition Act*. At the time that Superior approached Petro-Canada, orders had been received for approximately 55% of the IFT units, whereas Petro-Canada wished to dispose of all of its interest in ICG. For these reasons, Petro-Canada entered into serious discussions with Superior for the sale of all of its interests in ICG.

#### Dealings with the Competition Bureau

6. I am advised by our legal counsel, Barry Zalmanowitz of Fraser Milner, that on June 19, 1998, he and counsel for Superior spoke by telephone with senior officials of the Bureau, and without disclosing the names of the parties they represented, sought the comments of the Bureau on a share acquisition structured such that a vendor could avoid the risk of ultimately being required in proceedings under the *Competition Act* (the "Act") to take back the shares. The Bureau

representatives indicated that something similar had been done before, but prior to making any further commitment, specific details about the transaction, including the identity of the parties, would be required. Counsel advised the Bureau representatives that they would seek instructions, but did indicate to them that it was a transaction that the Bureau would likely examine very closely because the purchaser was a competitor of the intended acquiree, and the acquisition would result in the purchaser having a significant percentage of sales of the business in Canada.

7. I am advised by Barry Zalmanowitz that on June 22, 1998, he and Mr. Barutciski of Davies Ward & Beck, competition law counsel to Superior, spoke on the telephone with Mr. Bocking and Mr. Sullivan of the Bureau, and advised them that the transaction was one in which Superior was proposing to acquire all of the shares of ICG. During that conversation, Mr. Barutciski explained that Superior wished to give the Bureau full co-operation and the time that was reasonably necessary to review the transaction, but Petro-Canada required assurances very quickly that it could sell its interest in ICG to Superior and, if ultimately an application by the Director to the Competition Tribunal (the "Tribunal") under section 92 of the Act was successful, Petro-Canada would not be obliged to take back the shares. Mr. Barutciski and Mr. Zalmanowitz explained to Mr. Bocking that Superior had approached Petro-Canada shortly before the IFT was to be completed and, due to the market conditions, Petro-Canada had to make a decision quickly whether to abandon the IFT and pursue an agreement with Superior. Mr. Bocking indicated that such an arrangement was something the Bureau would consider and suggested that one approach may be to request an advisory opinion with respect to the interim aspects of the transaction, and that the Bureau and its legal counsel would consider it, but their concern would be to ensure that any interim arrangements were satisfactory to preserve the Bureau's rights to fully review the substantive transaction and seek an appropriate remedy.

8. A meeting with Bureau representatives was held on Friday, June 26, 1998. I am advised by Barry Zalmanowitz and Alf Peneycad, General Counsel of Petro-Canada, both of whom attended the June 26, 1998 meeting with Bureau representatives, that Mr. Pecman, on behalf of the Bureau, indicated that he was not in a position at that time to advise whether the Bureau would be

inclined to accommodate Petro-Canada, but indicated that his initial reaction was neither negative nor positive and wanted to consider it over the weekend and discuss it with Mr. Bocking and others on Monday morning and would get back to the parties at that time.

9. I am informed by our legal counsel, Barry Zalmanowitz, that on June 29, 1998, he had some further discussions with representatives of the Bureau pursuant to which those representatives indicated that they were generally comfortable with what the parties were proposing, but that there were two areas in which they requested some further information. The first was whether Petro-Canada would be prepared to agree to continue to provide information after closing in the event of proceedings before the Tribunal, and the second was the identity of other potential purchasers of ICG. Petro-Canada advised that it would be prepared to enter into any arrangement, even after a closing, to permit it to be subject to discovery in the event that there were proceedings before the Tribunal. Petro-Canada also agreed to provide the Bureau with information concerning other potential purchasers.

10. On the morning of Monday, June 29, 1998, Petro-Canada, based in part on the apparent willingness of the Bureau to be flexible and accommodate its concerns, decided to withdraw the IFT. Although a conference call with Bureau representatives was scheduled for 2:00 p.m. that afternoon, it was delayed at the Competition Bureau's request until 3:15 p.m.

11. I am advised by Barry Zalmanowitz that at approximately 3:15 p.m. on June 29, 1998, a telephone conference call was held with Bureau representatives, and during the conversation, Petro-Canada advised that it had already made the decision to withdraw the public offering of ICG. Francine Matte, on behalf of the Bureau, advised that the Bureau had considered what the parties were proposing and had many concerns because of the high market share that Superior would have after the proposed transaction and that the Director would not be prepared to provide a favourable advisory opinion concerning an interim arrangement before completing a review of the proposed transaction.

12. The foregoing paragraphs are not intended as criticism of the Bureau or any of its representatives, but are provided only by way of background.

13. The parties completed a Share Purchase Agreement and notified the Director pursuant to Part IX of the Act. Attached as Exhibit "A" to this Affidavit is a letter dated July 21, 1998 from the Pre-Notification Unit of the Competition Bureau confirming that the filing has been verified as being complete, and that the waiting period would end on July 27, 1998.

14. The parties initially proposed to complete and close the transaction on October 30, 1998 but agreed to postpone the closing because of the Bureau's advice that it would issue its preliminary views on the proposed transaction on October 30, 1998 and its final views on November 30, 1998. The parties also undertook in August, 1998 to give the Bureau 3 weeks' notice of the intended closing date which was to be by December 15, 1998 as provided in the Share Purchase Agreement. On November 16, 1998, the parties advised the Bureau that they intended to close the transaction on December 7, 1998.

15. In addition to the material provided in the Part IX filing, the parties on a voluntary basis also provided information that the Bureau requested for the purposes of reviewing the competitive effects of the proposed transaction and complied with all additional follow-up requests in a timely manner.

16. On September 14, 1998, the Director applied for and obtained an Order under section 11 of the Act requiring ICG and Superior to provide a great volume of information and records within 21 days of service. The Order also required Mr. Wiswell, the President of ICG, to appear before a presiding officer on October 19, 1998 to be examined on matters relevant to the inquiry.

17. On October 8 and 9, 1998, Superior and ICG delivered a large volume of materials to the Bureau in answer to the section 11 order, and during the week of October 19, 1998, Mr.

Wiswell attended to be examined by the Director's representatives and, on a voluntary basis, I also attended to be examined by such representatives.

18. In a memorandum dated October 28, 1998 to the Bureau, Petro-Canada requested that the Director at the earliest opportunity explore with the parties an arrangement that would permit the transaction to close into a reasonable hold separate arrangement. Attached as Exhibit "B" is a true copy of the October 28, 1998 memorandum. The Director has stated he is not prepared to consent to such an arrangement.

**Effect of a hold separate arrangement on the Tribunal's ability to grant effective remedy**

19. I am aware of the Affidavit of Mark Schweitzer filed on behalf of Superior and I believe that the terms of the hold separate arrangement, that Superior has indicated it would be prepared to enter into, would maintain ICG as a separate and viable competitive business pending the determination of any application by the Director to the Tribunal under section 92 of the Act, and would not substantially impair the Tribunal's ability to grant an effective remedy at the conclusion of such proceeding in the event that the Tribunal ultimately found that a remedial order was required.

20. From the outset, Superior and Petro-Canada had indicated a willingness to the Director's representatives to enter into arrangements with the Director that would permit the sale of ICG to Superior under reasonable hold separate arrangements which would accomplish the following:

- (a) Permit a full review, by the Director, of the proposed merger;
- (b) Preserve ICG as a separate and viable competitive entity pending completion by the Director of a review under the merger provisions of the Act; and

- (c) Permit Petro-Canada to dispose of its shares in ICG without the material risk that the Director would seek a remedy from the Tribunal requiring Petro-Canada to take back the shares and return the purchase price ("Rescission of the Agreement").

**Benefits of order permitting the transaction to close into a hold separate arrangement**

21. Petro-Canada is obliged during the time period between the execution and the closing of the Share Purchase Agreement to maintain ICG as a viable business. Although Petro-Canada and ICG have made diligent efforts to do this, the risks of the value of ICG deteriorating increase with the length of time that ICG customers, suppliers and employees are subject to uncertainty.

22. Superior and Petro-Canada believe that it is in the best interests of their respective shareholders to pursue this transaction. I also believe that the transaction will not result in a substantial lessening of competition, and that it will generate great efficiencies in the propane distribution and supply business and in that regard, I agree with the statements of Superior. There is a public interest in the Tribunal granting an order permitting the transaction to close under the hold separate arrangement proposed by Superior because this preserves the opportunity for this transaction to be ultimately completed.

23. Although Superior and ICG have taken steps to ensure that ICG is preserved as a viable competitor in the interim, an order incorporating reasonable hold separate arrangements would give the Director the opportunity to ensure that ICG is sustained as a viable competitor pending the outcome of any application to the Tribunal. In that regard, Petro-Canada and Superior established strict rules and procedures to ensure that competitively sensitive information was not exchanged and commercially sensitive information was restricted and not used for any anti-competitive purpose during the time period between execution and closing of the Share Purchase Agreement. To my knowledge, these rules and procedures have been followed and similar provisions could be incorporated into an order permitting the Share Purchase Agreement to close under a hold separate arrangement.


24. The following circumstances justify the Tribunal issuing an order permitting the transaction to close under reasonable hold separate arrangements:


- (a) Petro-Canada intends to dispose of ICG in any event;
- (b) Superior has indicated a willingness to consent to an order with reasonable hold separate provisions; and
- (c) If the Tribunal ultimately finds the acquisition requires a remedial order, such as an order requiring Superior to dispose of all or part of ICG to a third party, in order to remedy any substantial lessening of competition, that would have substantially the same effect as an order prohibiting the parties from completing the transaction because Petro-Canada will dispose of ICG in any event.

As such, the transaction closing under a hold separate arrangement would not substantially impair the ability of the Tribunal to remedy the effect of the proposed acquisition on competition.

25. I make this Affidavit in opposition to an application brought by the Director under section 100 of the *Competition Act*.

SWORN before me at the City of Toronto )  
in the Province of Ontario )  
this 3<sup>rd</sup> day of December, 1998. )

  
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A Notary Public in and for the  
Province of Ontario

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Andrew Stephens

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