Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Ultramar Ltd.*, 2000 Comp. Trib.4
File no.: CT2000001
Registry document no.: 21a

IN THE MATTER OF an application by the Commissioner of Competition for a consent order pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF the proposed acquisition by Ultramar Ltd. of a petroleum product terminal facility and wholesale supply business located in Ottawa currently owned by Coastal Canada Petroleum, Inc.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Ultramar Ltd.
(respondent)

Dates of hearing: 20000403 and 20000407
Members: McKeown J.(presiding),
C. Lloyd, L.P. Schwartz
Date of order: 20000426
Order signed by: McKeown J.

REASONS AND ORDER

Introduction

[1] On February 16, 2000, the Commissioner of Competition ("Commissioner") filed a notice of application under sections 92 and 105 of the *Competition Act,* R.S.C., 1985, c. C-34 (the "Act"). At paragraph 1 of the statement of grounds and material facts, the Commissioner alleges that the acquisition by Ultramar Ltd. ("Ultramar") of the petroleum product terminal facility and the wholesale supply business of Coastal Canada Petroleum, Inc. ("Coastal") would likely lead to a substantial lessening of competition in Ottawa. It is alleged that this will occur in the markets for the provision of terminal facilities and for the wholesale supply of refined petroleum products in the Ottawa region.

[2] In order to eliminate the substantial lessening of competition, the Commissioner requests that the Tribunal issue the draft consent order ("DCO") filed on February 16, 2000. According to the Commissioner at paragraph 2 of the impact statement, the DCO requires that Ultramar

> . . . (1) continue to offer wholesale supply of refined petroleum product to the independent marketers, during the period of the DCO, (all as defined in paragraph 2 of the SGMF) at commercially reasonable prices, (2) maintain the use of the facility (as defined in the DCO) thereby keeping it in the market, and (3) ensure suitable terminal capacity and loading facilities available for the supply of product to independent marketers.

[3] Following the hearing, the parties made very minor changes to the DCO which have been dealt with in our reasons.

[4] The issue before the Tribunal is to decide whether the DCO will eliminate in all likelihood the substantial lessening of competition. In coming to this conclusion, the Tribunal must be satisfied that the measures proposed in the DCO are sufficiently well defined to be effective and enforceable and that the proposed remedy meets the objectives of the Act.

The Merger and Its Competitive Impact

[5] On July 29, 1999, Ultramar announced that it had signed an agreement to purchase the terminal assets and wholesale supply business of Coastal in Ottawa. The assets to be purchased by Ultramar at the closing of the proposed transaction include the land, the terminal facility, the customer list and the refined petroleum product inventories. In addition, Ultramar would assume an existing supply agreement and all of the environmental liabilities associated with the terminal.

[6] According to paragraph 6 of the impact statement, Ultramar is a subsidiary of Ultramar Diamond Shamrock Corporation which operates refineries, distribution networks (including terminal facilities and bulk plants), retail gas stations, pipelines and retail home heating operations in Canada and the United States. Paragraph 7 of the impact statement states that, in Canada, Ultramar owns a refinery located in St-Romuald, Quebec, and petroleum product storage and distribution facilities located in the Atlantic Provinces, Quebec, and Ontario. Ultramar also sells gasoline and diesel fuel in these provinces through a network of branches and provides heating oil to households and wholesale, industrial and commercial customers.

[7] According to paragraph 8 of the impact statement, in the Ottawa region, Ultramar also owns an inactive refined petroleum product terminal (the "Ultramar facility") located in Nepean near the Coastal facility. The Ultramar facility which was built in 1972 was linked with the Trans-Northern Pipeline (the "TNPL"). Ultramar discontinued the operation of this facility in 1995.

[8] Coastal is a wholly-owned subsidiary of Cosbel Petroleum Corporation ("Cosbel") which is owned by The Coastal Corporation ("Coastal Corp."). Paragraph 13 of the statement of grounds and material facts states that Cosbel and Coastal Corp. are both incorporated in the state of Delaware, United States. Coastal is a corporation incorporated under the laws of the province of New Brunswick, with operations in Canada in the terminal business, crude oil and refined product marketing and petrochemical production. The Coastal facility, which was built in 1952 by Texaco Canada Inc. is Coastal's only operational terminal in Canada. Coastal purchased this facility in 1991 from Imperial Oil as a result of a Consent Order dated January 29, 1990, issued by the Competition Tribunal. Coastal does not own a refinery or a retail network in Canada.

[9] The Coastal facility has a product storage capacity of 240,000 barrels (38.2 ML) of refined petroleum product as well as support marketing operations and a card-activated fuelling facility for commercial trucking fleets. At the Coastal facility, refined petroleum product is loaded for shipment by tank truck at three bottom loading racks and one top loading rack. Coastal's racks are equipped with three loading arms for distillates, ten bottom loading arms for gasoline and distillates, and two bottom loading arms dedicated to the blending of fuel grade ethanol and gasoline. Paragraph 17 of the statement of grounds and material facts also states that the top loading arms are important to some independent marketers which currently operate tank trucks.

[10] At paragraph 22 of the statement of grounds and material facts, the Commissioner indicates that Coastal is the only Ottawa-based wholesale supplier which provides the equipment and blend stock necessary to blend fuel grade ethanol with gasoline to the independent marketers. Also, at paragraph 23, he adds that Coastal is the only non-integrated terminal operator that has been engaged in storage arrangements with the independent marketers.

[11] For the purpose of assessing the impact on competition of the proposed transaction, the Tribunal accepts the two relevant product markets as well as the geographic market defined by the Commissioner. The two product markets consist of: (1) the provision of terminal facilities for persons who want to store refined petroleum product and/or the wholesale refined petroleum product without operating a terminal themselves, and (2) the wholesale supply of refined petroleum product to independent third party purchasers ("independent marketers"). The geographic market defined by the Commissioner is the Ottawa region which refers to the area surrounding the city of Ottawa southeast to Hawksbury and Cornwall, south to Kingston and west and north to Pembroke and Maniwaki (the "Ottawa region").

[12] In the terminal facilities market, the Commissioner states in the statement of grounds and material facts, at paragraph 51, that

> . . . the proposed transaction would replace the only non-integrated operator in the Ottawa region with an integrated operator in the provision of a scarce and valuable refined petroleum product storage facility.

[13] Further, the Commissioner states at paragraph 52 that

> . . . Ultramar has an incentive to close the Coastal facility and operate only its currently mothballed facility.

[14] Finally, the Commissioner concludes at paragraph 53 that

> Removal of the Coastal terminal from the market would also substantially reduce or eliminate the availability of equipment required to service some of the trucks of the independent marketers....

[15] At paragraphs 54 to 56 of the statement of grounds and material facts, in the wholesale supply markets, the Commissioner states that if the merger were to proceed "the independent marketers will lose their principal supplier", that the presence of Coastal "provides the independent marketers with a significant source of supply as an alternative to integrated wholesalers" and that Ultramar, in order to lower its costs, "could close both terminals and enter into a throughput agreement with a third party".

[16] The Commissioner indicates that competition is likely to be substantially lessened or prevented as a result of this acquisition in the markets for the provision of terminal facilities and the wholesale supply of refined petroleum product in the Ottawa region. Coastal is presently the only Ottawa-based wholesale supplier of gasoline and other petroleum products to independent marketers in the Ottawa region. In addition, if the acquisition were to proceed, the only terminal facilities will be owned by Imperial Oil, Petro-Canada and Shell. According to the Commissioner at paragraph 62 of the statement of grounds and material facts, "none of these integrated terminal operators has engaged in storage arrangements with independent marketers ".

[17] In summary, the Commissioner's position, set out in the statement of grounds and material facts, at paragraph 73, is

> The proposed transaction would remove the only non-integrated terminal operator and the largest non-integrated wholesale supplier of refined petroleum product in the Ottawa region. It will remove Coastal's pro-competitive impact on the relevant markets and prevent the pro-competitive effects which would have stemmed from Coastal's sale to a non-integrated purchaser.

The Evidence Submitted

[18] In considering the DCO, the Tribunal had before it the affidavit of Michael Dilauro dated February 15, 2000, Commerce Officer with the Mergers Branch of the Competition Bureau, who has been associated with the examination of the transaction. The Tribunal also considered the oral evidence of Mr. Dilauro, Ross R. Bayus, General Manager, Wholesale and Industrial Sales for Ultramar, and Louis Bergeron, Director of Planning and Business Development for Ultramar in Montreal.

The Draft Consent Order

[19] The DCO contains *behavioural obligations* designed to ensure that Ultramar continues to offer supply to independent marketers at commercially reasonable prices. As set out at paragraph 43 of the impact statement, specifically, the DCO which the parties now wish the Tribunal to approve, would ensure

> . . . that Ultramar refurbishes and re-opens its terminal and that the Coastal facility is preserved in a viable (as described in the DCO) condition for three years. Additionally, the DCO would ensure that the land and the TNPL connection are preserved for five years. Finally, the DCO would ensure that an offer of competitive supply of a minimum volume of product to the independent marketers will be maintained for up to seven years.

[20] At paragraph 44, the impact statement states that the DCO requires Ultramar to offer the Coastal terminal in Ottawa for sale at fair market value if it fails to abide by the terms of the order. It reads as follows:

> If, within the five years after the date of the order, Ultramar does not utilize sufficient terminalling capacity at the Coastal facility or if Ultramar does not offer to supply a minimum volume to the independent marketers at commercially reasonable prices, Ultramar would be required to offer to sell the facility...

[21] Finally, according to the Commissioner and Ultramar, the DCO ensures that the independent marketers would not be put at a competitive disadvantage as a result of the proposed transaction, by requiring Ultramar to offer to supply a minimum volume of product at a price no greater than the monthly average of the domestic refiners's posted Montreal rack prices for refined petroleum product plus 0.5 cpl. The DCO stipulates in clause 5(f) that during the term of the consent order or until the sale of the facility, Ultramar shall

> *in good faith,* subject to force majeure, offer to supply refined petroleum product, other than fuel ethanol, to independent marketers, at wholesale prices to be negotiated, which shall not exceed the monthly average of the domestic refiners' posted Montreal rack prices plus 0.5 cpl; provided that Ultramar shall not be required to offer to supply any independent marketer which is in default as a result of non-payment under any supply arrangement with Ultramar. (emphasis added)

[22] The DCO also stipulates in clause 5(g) that during the term of the consent order or until the sale of the facility, Ultramar shall "in good faith, subject to force majeure, offer to supply fuel ethanol to independent marketers at wholesale prices to be negotiated" (emphasis added).

[23] The DCO also contains clauses that provide protection to Ultramar. For instance, clause 2(b) of the DCO reads as follows:

> "ceases to operate" means that Ultramar is not using, at a minimum, tankage at the facility with a nominal capacity of 67,900 barrels (10.8 ML) to forty per cent (40%) capacity on a yearly average; *Ultramar will be deemed not to have ceased to operate the facility if Ultramar can show, to the reasonable satisfaction of the Commissioner, that levels have fallen below those specified in this definition due to force majeure, normal maintenance requirements, rearrangements of the tankage at the facility and at the Ultramar terminal in accordance with Schedule "A" hereto,* ***underliftings or other similar circumstances****.* (emphasis added)

[24] Further, clause 5(d) of the DCO provides that during the term of the order or until the sale of the facility, Ultramar shall,

> subject to force majeure and any federal and provincial laws and regulations and municipal and regional by-laws, maintain at the facility or at the refurbished Ultramar facility, a minimum of two (2) loadings arms dedicated to the blending of fuel ethanol and gasoline throughout the entire year and, in the summer months, the proper blendstock (i.e. low vapour pressure gasoline), *as long as the sales of such product remains at or better than fifty percent (50%) of the average annual volume of fuel ethanol sold by Coastal in each year from 1997 to 1999, being 2.5 ML.* (emphasis added)

[25] With respect to the minimum volume of refined petroleum products required to be offered to independent marketers, the DCO stipulates in clause 6(b) that

> Ultramar shall not be in breach of this order if in any supply year its actual sales to independent marketers fall short of the volume of refined petroleum products required to be offered pursuant to this order, if Ultramar can establish to the reasonable satisfaction of the Commissioner that the shortfall in the actual sales is attributable to force majeure, normal maintenance requirements, rearrangement of the tankage at the facility and at Ultramar terminal in accordance with Schedule "A", underliftings or other similar circumstances. (emphasis added)

The Public Comment Process

[26] Paragraph 65(2)(f) of the *Competition Tribunal Rules* (SOR/96-307) (the "Rules") provides that, when a notice is published by the Registrar in the *Canada Gazette* and the newspapers consequent upon the filing of an application for a consent order, the notice shall state the date on or before which comments or a request for leave to intervene must be filed, which date shall be 21 days after the date of publication of the notice in the *Canada Gazette.*

[27] Subsection 84(3) of the Rules ensures that copies of any comments are provided to the parties after the comments are filed. Subsection 85(1) of the Rules states that the Director shall and each other party may, serve a reply on the person who filed the comments, within seven days after the expiration of the period for filing comments.

[28] In this case, three comments have been filed with the Tribunal: Mr. Joseph Myatt, MacEwen Petroleum Inc. and Democracy Watch Inc. Replies to the comments submitted to the Tribunal pursuant to its Rules were filed by the Commissioner and the respondent.

[29] The Tribunal welcomed these written comments. No requests for leave to intervene have been filed. However, it was useful to the Tribunal to have the benefit of receiving such comments and to seek the Commissioner's explanation of his replies to some of the comments. The Tribunal suggested that Mr. MacEwen might be asked if he wished to appear but the parties were of the view that this might delay the proceedings. Accordingly, no request was made.

The Applicable Legal Test

[30] As stated in *Director of Investigation and Research v. Imperial Oil Limited* (26 January 1990), CT8903/390, Reasons and Decision at 14 [1990] C.C.T.D. No. 1 (QL):

> . . . the burden of proof in a consent order application is on the parties and particularly on the Director. That burden requires the parties to prove that the order which they seek is one which will in all likelihood eliminate the substantial lessening of competition, which they have agreed (by way of presumption) will arise from the merger.

[31] As was also mentioned in *Director of Investigation and Research v. Air Canada* (1989), 27 C.P.R. (3d) 476 at 512, [1989] C.C.T.D. No. 29 (QL):

> It is clear that the Tribunal's constituent legislation does not contemplate that the Tribunal will be a mere rubber stamp. The legislation, for example, does not provide for the automatic filing by the Director of settlements which he reaches with respondents so they automatically become orders of the Tribunal. This type of procedure is found, for example, in the *Canadian Human Rights Act;* the filing of an order of a Human Rights Tribunal in the Registry of the Federal Court constitutes it an order of that court for the purpose of enforcement. The Tribunal is composed of judicial members and of non-judicial members who have expertise in areas relevant to the work of the Tribunal. It is required to sit in panels of three, even for the purpose of granting consent orders. It is clear that Parliament intended the Tribunal to exercise an independent judgment with respect to such orders.
>
> At the same time, the legislation sends a very clear message to the Tribunal that it is not anticipated that the Tribunal should take a detailed role in the crafting of consent orders. (reference omitted)

[32] In *Director of Investigation and Research v. Asea Brown Boveri Inc.* (6 September 1989), CT8901/101, Reasons for Consent Order Dated June 15, 1989 at 22, [1989] C.C.T.D. No. 35 (QL), the Tribunal stated that

> [t]he Tribunal believes that the measures proposed are adequate to meet the objectives of the Competition Act and that they are well within the range of reasonableness. The Tribunal is not, however, making a finding that these are the best possible remedies to solve the problem. Such a finding would be outside of its role.

[33] It is important to note that the Tribunal must be satisfied "that the measures proposed in the consent order are *sufficiently well defined to be effective and to be enforceable"* (emphasis added) (*Asea Brown Boveri*, cited above in § [32], at 21) and that the proposed remedy meets the objectives of the Act. The Tribunal is only determining if the measures proposed are adequate to eliminate the substantial lessening of competition that would otherwise arise from the merger. The Tribunal is not determining whether other remedies might be more likely to achieve the elimination of the substantial lessening of competition.

The Analysis of the Proposed Order

[34] Counsel for the Commissioner argues that the substantial lessening of competition from the Ultramar acquisition of this terminal would result from Ultramar's highest economic use of the assets acquired: closing Coastal's terminal; not reopening its own terminal; and entering into a throughput agreement with another party who operates a terminal in Ottawa which has excess capacity (transcript at 2:123 (7 April 2000)). Counsel submits that the DCO prevents this outcome from happening.

[35] With respect to the price to which Ultramar will be required to sell refined petroleum product and fuel ethanol, counsel for the Commissioner argues that clauses 5(f) and 5(g) of the DCO provide sufficient guarantee that Ultramar will negotiate in accordance with standard practices in the market (which is to offer discounts on the posted rack price) and that setting a maximum price for refined petroleum product as in clause 5(f) of the DCO is sufficient. On the same subject, counsel for the respondent also argues that the terms are sufficiently effective and enforceable to remedy the substantial lessening of competition and that the "economics of the transaction", that is the fact that Ultramar had to invest a large amount of money to purchase the assets, provide a strong incentive for Ultramar to sell the petroleum product at a competitive price to recoup its investment. More specifically, counsel for the respondent submits that if Ultramar were to impose the maximum price, it would lose the business of the independents.

[36] Counsel for the Commissioner conceded that it is theoretically possible for Ultramar to extricate itself from its obligation to supply the product to the independent marketers at reasonable commercial prices but that this was not supported by any rational economic theory.

> . . . It is theoretically possible ... for Ultramar to fill those tanks and to offer to supply on terms which would mean nobody would ever pick it up.

> They could do that for the three years that would be necessary for them to extricate themselves from their obligation to offer supply. Because, of course, if they didn't supply to anybody, the volume of their throughput would diminish, the average three year rolling average that they are required to supply would go down, and three years from now Ultramar's average might be zero litres per year.
>
> But we say that there is no rational economic theory that would apply to Ultramar that could justify that strategy.
>
> Transcript at 2:127-28 (7 April 2000).

[37] Further, counsel for the Commissioner added that what the Commissioner is seeking to achieve is

> . . . the obligation to maintain a facility, an obligation which involves the maintenance of expensive, excess capacity, an obligation to have product for sale, a limitation on the maximum posted price and that maximum is lower than the average over the last seven years in Ottawa, and in addition an obligation we say to negotiate....
>
> Transcript at 2:128 (7 April 2000).

[38] The Tribunal is concerned that the terms used in clauses 5(f) and 5(g) of the DCO "at a price to be negotiated" would lead to no enforceable obligation on Ultramar regarding prices at which it would have to sell to the independents. Furthermore, there is no requirement to negotiate other terms of a contract such as credit terms or delivery terms.

[39] Counsel for the Commissioner persistently argues that the terms of the DCO embrace the practice of the trade in the industry which is to negotiate discounts and therefore submits that the DCO obligates Ultramar to continue to do so. The Tribunal requested counsel for the Commissioner to provide any case demonstrating that "price to be negotiated" includes anything other than price alone. Counsel reiterated that the only obligation imposed on Ultramar is to negotiate a price at which a minimum volume must be offered for sale, but that if Ultramar were to refuse to negotiate anything other than the maximum price this would constitute a breach of the order. There is no law which supports counsel for the Commissioner's interpretation and his interpretation is contrary to existing law.

[40] Counsel for the respondent presented various decisions to the Tribunal: *Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd.* (No 3) (1991), 106 N.S.R. (2d) and 288 A.P.R. 180, *Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd. (No 3)* (1992), 112 N.S.R. (2d) and 307 A.P.R. 180, *Mason v. Freedman*, [1958] S.C.R. 483, and Dynamic Transport Ltd. v. O.K. Detailing Ltd. (1978), 85 D.L.R. (3d) 19 (S.C.C.), in support of the argument that the words "in good faith" when read with the expression "at wholesale prices to be negotiated" constitute an enforceable obligation to negotiate in good faith which excludes the imposition of the maximum price stated in clause 5(f) of the DCO. While these cases clearly state the principle that parties to a contract must exercise their rights under the agreement honestly, fairly and in good faith and not in a capricious or arbitrary manner, it appears that these cases have a limited relevance to the question of enforceability of the DCO.

Indeed, these cases were all dealing with situations where an enforceable obligation was part of the contract. In the DCO suggested by the parties, the Tribunal is of the opinion that clauses 5(f) and 5(g) do not set any obligation other than the obligation to negotiate in good faith. As stated in *Walford v. Miles* [1992] 2 A.C. at 128, the obligation to negotiate in good faith is unenforceable. As stated in *Chitty on Contracts* (H.G. Beale et al., 28th ed. (London: Sweet & Maxwell Limited, 1999)), which cites numerous cases at note 87 at page 145,

> ... it has been held that a mere agreement to negotiate is not a contract "because it is too uncertain to have any binding force "

Further, at page 147, the authors state:

> *A promise to negotiate in good faith*, on the other hand, would oblige a party not to take unreasonable or exorbitant positions during the negotiations; and *it is difficult of giving precise content to this obligation, while maintaining each party's freedom to pursue his own interests, that makes such a promise too uncertain to be enforced.* (emphasis added)

The labour law jurisprudence is not applicable because the cases are premised on statutory requirements which do not exist in the circumstances of the application before the Tribunal.

[41] In light of the evidence and of the representations by counsel, it appears that clauses 5(f) and 5(g) of the DCO are not effective nor enforceable. Indeed, there is nothing justiciable in these clauses other that the obligation for Ultramar to offer to sell at the monthly average of the domestic refiners' posted Montreal rack price plus 0.5 cpl. Even if the terms "in good faith" used in the aforementioned clauses were applicable, as submitted by counsel, to the expression "wholesale prices to be negotiated" and not only to "offer to supply", the proposal in the revised order to add "in good faith, subject to force majeure, to offer to supply..." still does not address the concern of the Tribunal with respect to an enforceable price obligation. Indeed, once Ultramar has petroleum products available for sale to the independent marketers and the maximum price is offered, Ultramar would be considered as having complied with the order. Nothing else in the order would then force Ultramar to offer discounts, reasonable credit terms and delivery terms or any other terms which could be construed as reasonable commercial terms. The Tribunal does not suggest that the use of the words "reasonable commercial terms" is the only solution to this DCO. However, the Tribunal has used "reasonable commercial terms" to highlight the lack of justiciability in the DCO.

[42] With respect to clause 5(g) of the DCO, the Tribunal acknowledges that by contrast with refined petroleum product, there is no public posting of prices for fuel ethanol. No independent court, Tribunal, or arbiter can determine the price under clause 5(g) of the DCO or the reasonable commercial terms. There is no enforceable obligation.

[43] The Tribunal has the same concerns as it did in Imperial Oil with respect to the DCO. As in Imperial Oil (cited above in § [30], at 70-71), the Commissioner and Ultramar

> ... assumed a likely substantial lessening of competition as the basis of the order they seek and then adduced evidence aimed at refuting that assumption. This evidence sought to demonstrate that the merger raised no competitive concerns because there would be excess capacity for a number of years....

As was also stated in *Imperial Oil* at page 82:

> The focus of the Tribunal's attention in this case was on the effectiveness and enforceability of the particular supply provisions which are proposed. In simple terms: will the provisions operate so as to achieve the results which the Director says they are designed to achieve? Will they ensure competitive supply to the independent retail segment of the market to at least the same extent as it existed pre-merger?

The Tribunal also agrees with the concerns expressed in *Imperial Oil* at pages 85-86:

> Despite the changes made to the DCO by the Director and Imperial before the end of the hearing, the Tribunal remained concerned. The Tribunal was concerned that an obligation to "make available" or offer for sale, in the absence of any provisions or mechanism for determining a competitive price, would not be an effective supply provision. While the Tribunal recognized that a price clause could be anti-competitive (in establishing a focal point around which a minimum price for the industry would stabilize), without some mechanism (even ex post facto) for determining price or some alternative scheme guaranteeing supply, a requirement that a certain volume of gasoline "be made available" seemed both unenforceable and ineffective. As was noted, when the position of the supplier on both the supply axis and the price axis in indeterminate one does not have much of a guarantee of supply.

[44] The Tribunal is not prepared to revisit *Imperial Oil* with respect to the requirement of enforceability of the supply assurance provisions. While the Tribunal is in agreement that the remedy proposed in *Imperial Oil* is not the only solution to the supply problem, the parties must come to the Tribunal with a DCO which is effective and enforceable.

[45] Counsel for the respondent and for the Commissioner submit that they are concerned that the use of the words "reasonable commercial terms" or other similar terms would provide an incentive to independent marketers for constant negotiations with the Commissioner or hearings before the Tribunal. While the Tribunal appreciates that Ultramar does not want to be subject to ongoing negotiations and/or litigation, the independent marketers are entitled to rely on clear and precise terms in the DCO. Clarity and precision are essential in order to ensure that independent marketers know what conditions stated in the DCO will be governing Ultramar in the future after the acquisition of Coastal has closed. Moreover, the cognizance of the terms in the DCO by those who may be affected by it may contribute to the implementation and the enforcement of the DCO by the Commissioner. As mentioned in *Air Canada* (cited above in § [31], at 516), behavioral remedies unlike structural remedies will require monitoring by the Commissioner. In that case, the Tribunal accepted that,

> ...implementation of some of the terms of the consent orders will require the *diligent and continual surveillance* of the Director. *It is clear* that changed conditions or effective enforcement of the order may require a return to the Tribunal for either *changes to or interpretations of the order.* (emphasis added)

The Tribunal is not opposed to behavioural remedies but they must be effective and enforceable.

[46] Counsel for the Commissioner argues that this order leads to a minimal interference in the market, with the clear incentives of Ultramar to comply with the order to sell refined petroleum product and fuel ethanol in the Ottawa market. Counsel for the Commissioner also argues that until there is an actual problem that is directed to a reduction in the competitive position of the independent marketers, the Tribunal should not be speculating with a view to adjusting this order to require further, more detailed commitments.

[47] Both counsel for the Commissioner and for the respondent submit that the economic incentive of the transaction would impose a discipline on Ultramar to comply with the order and, specifically, to offer competitive prices to the independents. However, the Tribunal's role in the context of consent orders is not to enforce or embrace economic theory. Rather, the Tribunal's role is to be satisfied that the order is effective and legally enforceable, which requires that the terms used in the order are clear and justiciable and the remedy proposed meets the objectives of the Act.

Conclusion

[48] The Tribunal is of the opinion that clauses 5(f) and 5(g) of the DCO which establish obligations on Ultramar with respect to the price at which it has to offer the petroleum products are not legally enforceable as the terms only establish a maximum price (in the case of clause 5(f) of the DCO) and an obligation to negotiate in good faith. There is no reference to price formulae, fair market value or any other justiciable guideline to determine prices. The absence of terms similar to "reasonable commercial terms" does not provide any legal obligation for Ultramar to negotiate in accordance with any standard practices of the market. It may be that Ultramar has economic incentives to truly negotiate prices with the independent marketers. However, the Tribunal cannot rely on casual economic theory alone to satisfy the requirement of enforceability of the order.

[49] In the Tribunal's view, the novel approach submitted by both counsel for the Commissioner and for the respondent "that the consent order can rely on the market for its effectiveness" cannot be endorsed in the absence of clear legal terms. The circumstances giving rise to the consent order, and more specifically, to the behavioural obligations, are of interest but are not compelling in the context of considering whether to approve the proposed consent order. If the market could alleviate the concerns raised by a likely substantial lessening of competition without enforcing an obligation on the respondent, then the parties would have no reason to seek the approval of a DCO from the Tribunal. It is the parties not the Tribunal that stated that if the merger were to proceed, the independent marketers would lose their principal supplier. The Tribunal's role in consent matters is to ensure that an order can meet the test of being effective, enforceable and meets the objectives of the Act.

[50] Under the present circumstances, the Tribunal is not satisfied that the terms used in clauses 5(f) and 5(g) of the DCO, which deal with the crucial issues of prices and terms of sale, are sufficiently clear to be enforceable and justiciable in order to provide an effective remedy that meets the objectives of the Act.

[51] Although the Tribunal takes no issue in principle with having clauses in the DCO that provide protection to Ultramar, it is notable that no such similar protection is offered to the independent marketers. The Tribunal is concerned that the protection established in clauses 2(b) and 6(b) of the DCO may go further than necessary and provide Ultramar with the possibility to remove itself from its obligations in various circumstances, which include "underliftings or other similar circumstances".

[52] The Tribunal is also concerned that, pursuant to clause 2(b) of the DCO, Ultramar is not deemed to "cease to operate" by reason of underlifting. Such underlifting could occur because Ultramar's offered price is higher than the price offered by competitors. Since underlifting results in a reduction of the minimum volume of refined petroleum products required to be offered pursuant to clause 6 of the DCO, Ultramar would be able to reduce its obligation under the DCO and still avoid breach. The Tribunal's only concern with the underlifting exemption is that it includes underliftings caused by Ultramar's own actions.

[53] FOR THESE REASONS, the Tribunal orders that the application for a consent order is dismissed.

DATED at Ottawa, this 26th day of April, 2000.

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

(s) W.P. McKeown

APPEARANCES:

For the applicant:

The Commissioner of Competition

D. Martin Low, Q.C.
Donna Blois

For the respondent:

Ultramar Ltd.

Bruce M. Graham
Jennifer M.C. Overend