

ONTARIO COURTS OF JUSTICE (PROVINCIAL DIVISION)

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HER MAJESTY THE QUEEN

against

ULTRAMAR CANADA (c.o.b. DIXON FUELS) AND
PERRY FUELS INC.

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PROCEEDINGS ON PLEA OF GUILTY

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BEFORE HIS HONOUR JUDGE B. MCPHEE
on May 30, 1991, at OTTAWA, Ontario

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CHARGE: Section 61(1)(a) Competition Act

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APPEARANCES:

J. Tyhurst, Esq.	Counsel for the Crown
D. Hainey, Esq.	Counsel for the Accused (Ultramar)
R. J. Rolls, Esq.	Counsel for the Accused (Perry Fuels)

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T A B L E O F C O N T E N T S

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	Exam.	Cr-	Re-
<u>WITNESSES:</u>	<u>In-chief.</u>	<u>Exam.</u>	<u>Exam.</u>

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E X H I B I T S

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Transcript Ordered: May 29, 1991
 Transcript Completed: September 2, 1991
 Counsel Notified: September 3, 1991

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Wednesday,
May 30, 1991

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MR. D. STEWART: Your Honour, there are matters on Your Honour's list to do with a Federal prosecution under the Competition Act. My friend's and the prosecutor are here. I believe the matter could proceed at this time, if Your Honour wishes.

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CLERK OF THE COURT: This is an addition to the docket, Your Honour.

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THE COURT: All right.

MR. TYHURST: Your Honour...

THE COURT: Good morning.

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MR. TYHURST: Good morning. John Tyhurst, appearing for the Federal Crown. This is a first appearance in a matter under Section 61 of the Competition Act. The parties are corporations, Ultramar Canada and Perry Fuels, and they are prepared to make pleas and we have to deal with arraignment and elections and pleas, et cetera.

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CLERK OF THE COURT: Could I see the information, please? Perry Fuels.

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MR. ROLLS: I am appearing on behalf of

Perry Fuels, Your Honour. R. J. Rolls. R-O-L-L-S.

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THE COURT: Mr. Rolls. And who is appearing on behalf of Ultramar?

MR. HAINEY: Your Honour, I appear as counsel and agent on behalf of Ultramar.

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Hainey. H-A-I-N-E-Y, initial G.

THE COURT: Mr. Hainey. Are these straight summary matters under the Act or is there an election?

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MR. HAINEY: There will have to be an election, Your Honour. They are indictable offences.

THE COURT: If they could be arraigned, please, Jane.

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CLERK OF THE COURT: Ultramar Canada Inc., carrying on business as Dixon Fuels, 313 Albert Street, Oshawa, Ontario, being a person engaged in the business of producing or supplying a product within the meaning of Section 61(1) of the Competition Act, are charged between the 1st day of July, 1986 and the 1st day of August, 1988 unlawfully did, in the Regional Municipalities of Durham and

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5 Metropolitan Toronto, in the Province of
Ontario, by agreement, attempt to influence
upward or discourage the reduction of, the
price at which Perry Fuels Inc., being a
person engaged in business in Canada, supplied
or offered to supply or advertised a product,
10 to wit: home heating oil, contrary to Section
61(1)(a) of the said Act and did thereby
commit an offence for which the penalty is
provided by Section 61(9) of the said Act.

15 Perry Fuels Inc., 285 Bloor Street West,
Oshawa, Ontario, being a person engaged in
the business of producing or supplying a
product within the meaning of Section 61(1) of
20 the Competition Act, 1985, c. C-34., did
between the 1st day of June, 1986 and the 1st
day of August, 1988 unlawfully did, in the
Regional Municipality of Durham, in the
25 Province of Ontario, by agreement and threat,
attempt to influence upward or discourage the
reduction of, the price at which Ultramar
Canada Inc., carrying on business as Dixon
30 Fuels, being a person engaged in the business

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in Canada, supplied or offered to supply or
advertised a product, to wit: home heating
oil, contrary to Section 61(1)(a) of the said
Act and did thereby commit an offence for
which the penalty is provided by Subsection
61(9) of the said Act.

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Crown election?

MR. TYHURST: It's a straight indictable.

CLERK OF THE COURT: Do you waive reading
of the election?

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MR. TYHURST: Yes.

CLERK OF THE COURT: How do you elect to be
tried?

MR. HAINEY: To be tried in this court,
Your Honour.

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MR. ROLLS: To be tried in this court by
His Honour.

CLERK OF THE COURT: And your pleas to each
charge?

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MR. HAINEY: Your Honour, on behalf of
Ultramar, I am instructed to enter a plea of
guilty to the charge.

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MR. ROLLS: On behalf of Perry Fuels Inc.,
I, too, am instructed to enter a plea of

guilty to the charge.

THE COURT: Thank you.

CLERK OF THE COURT: Thank you.

THE COURT: Could I have the facts, please?

MR. TYHURST: Your Honour, as I mentioned, these are charges pursuant to Section 61 of the Competition Act. Because it is perhaps a section that Your Honour does not deal with daily, I will just pass up a copy of the section.

THE COURT: Yes.

MR. TYHURST: The basic offence, as stated in Section 61(1)(a) of the Act, is, to by agreement, threat, promise or any like means, attempt to influence upward or to discourage the reduction of the price of which, and any other person engaged in business in Canada supplies or offers to supply or advertises a product.

The product in question in this case is home heating fuel. Both companies are in the business of supplying home heating fuel in the Oshawa area.

There is an agreed Statement of Fact,

which is identical to both companies. I will pass copies of both of those up.

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THE COURT: Mr. Hainey, Mr. Rolls, are the facts in those statements agreed to by the defence?

MR. HAINEY: Yes, they are, Your Honour.

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MR. ROLLS: They are, Your Honour.

MR. TYHURST: Just to summarize the basic facts, it involves threats by officials and Perry Fuels to cut the prices of home heating fuel unless Dixon Fuels, a division of Ultramar, terminated a telemarketing campaign in which discounts were being offered to customers. These threats lead to an agreement between Perry and Dixon not to solicit each others customers, which covered a period of approximately two years.

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The accuseds admit the corporate status of the two corporations. Ultramar Canada admits that it operated at relevant times as Dixon Fuels.

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In the years 1986 to 1989, Perry was largest and Dixon the second largest retailer of home heating fuel in the Oshawa market in

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terms of volume.

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In June, 1986, the general manager of Dixon, Mr. William F. Webb, organized a telemarketing campaign offering free furnace cleaning and 100 litres of heating oil to new customers signing contracts with that company. This campaign was successful in increasing Dixon's business.

In June and July of 1986, Mr. Webb received several telephone calls from Mr. Jack Perry, President of Perry Fuels, requesting that Mr. Webb stop soliciting the business of Perry Fuels customers, stating that if the telemarketing continued he would drop the price of oil.

Perry Fuels was partly owned by Petro Canada Inc. at the time and had a supply relationship with that company and its own bulk storage facilities. As a result, Mr. Webb took these statements as threats.

Mr. Webb, however, subsequently did not comply and continued the telemarketing campaign. As a result, Mr. Perry contacted Mr. Bob Campbell, the general manager for home

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heat for Ultramar in Toronto, and stated there would be a price war if Dixon continued the telemarketing campaign. As a result of these communications, Mr. Webb advised Mr. Perry by telephone that the discounting would not continue. However, Mr. Webb was uncomfortable with his decision and subsequently continued offering incentives and discounts.

In response, Mr. Perry complained again to Ultramar concerning this solicitation of customers and discounting. Mr. Webb was, as a result, instructed by Mr. Campbell of Ultramar to meet with Mr. Perry.

In compliance with these instructions of late September and October 1986, Mr. Webb met with Mr. Perry and Mr. Bill Salter, also of Perry Fuels at the Magic Car Restaurant in Oshawa. The parties agreed that Dixon and Perry Fuels would not solicit each others' customers or offer discounts on the sale of home heating oil.

Following this meeting, Dixon dismantled its telemarketing campaign and Perry Fuels did not solicit or offer discounts

to Dixon's customers.

5 The foregoing agreement was still in place on August 1988 when Mr. Webb left the employment of Dixon.

10 The accused admit that this course of conduct constitutes conduct contrary to Section 61(1)(a) of the Competition Act, in that the accused, by agreement, threat, promise or like means attempted to influence upward or discourage the reduction of the price of which another person engaged in business in Canada supplied or offered to supply a product in Canada.

15 THE COURT: Yes, those facts are agreed to pursuant to the agreed Statement of Facts, Mr. Hainey and Mr. Rolls?

20 MR. HAINEY: Yes.

MR. ROLLS: Yes, Your Honour.

25 THE COURT: There will be a finding of guilt with respect to both of these counts. Yes?

30SUBMISSIONS ON SENTENCE BY MR. TYHURST.

....SUBMISSIONS ON SENTENCE BY MR. ROLLS.

....SUBMISSIONS ON SENTENCE BY MR. HAINEY.

S E N T E N C E

5 MCPHEE, B., O.C.J. (P.D.): (Orally):

10 In this particular circumstance, Perry Fuels
 Inc. and Ultramar Canada Inc., have entered
 pleas of guilty to an offence under Section
 61 of the Competition Act.

15 There has been filed on the plea of
 guilty, with the agreement of counsel, an
 agreed Statement of Facts setting out the
 circumstances of the offence itself. In this
 particular case it is clear that there was a
 concerted effort during the time frame on the
 information to lessen competition in this
 particular industry. Of course, any penalty
20 to be imposed must be reflective of society's
 need and perhaps desire to have competition as
 keen as possible in a very sensitive industry.

25 I am satisfied, taking into
 consideration the submissions of counsel
 before the court, the pleas of guilty in
 particular and what has been said about
 similar offences in the past. It is my view
30 that the proposed disposition is appropriate.

5 In the circumstances, the only question I have
is whether or not the victim fine surcharge is
applicable to this particular situation. I do
not know.

MR. TYHURST: That is not a question that I
am able to answer, Your Honour.

10 THE COURT: That is not something that has
been canvassed. All right.

15 In the circumstances, therefore, with
respect to Perry Fuels Inc., there will be a
monetary penalty of forty thousand dollars
(\$40,000) and with respect to Ultramar Canada
Inc. there will be a penalty of one hundred
and fifty thousand dollars (\$150,000), and
indeed if the provisions of the victim fine
20 surcharge legislation apply, they do not apply
in this particular case.

25 MR. HAINEY: I wonder, Your Honour, if
Ultramar could have, say, 30 days in which to
pay the fine?

THE COURT: Yes.

MR. HAINEY: I don't have cheque with me.

30 MR. ROLLS: The same in the case of Perry
Fuels. I don't have a cheque with me, Your

Honour.

THE COURT: Yes. Is there anything
5 further, gentlemen?

MR. TYHURST: No, Your Honour. Thank you.

THE COURT: Thank you.

MR. HAINEY: Thank you, Your Honour.

10 MR. ROLLS: Thank you, Your Honour.

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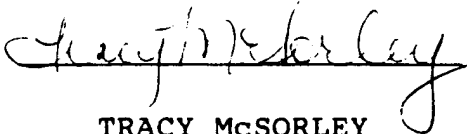
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CERTIFICATION:

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THIS IS TO CERTIFY THAT
THE FOREGOING IS A TRUE
AND ACCURATE TRANSCRIPT
OF MY RECORDINGS TO THE
BEST OF MY SKILL AND
ABILITY.

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TRACY MCSORLEY
CERTIFIED VERBATIM REPORTER

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