Competition Tribunal | Tribunal de la Concurrence

CT-1996/002 – Doc # 141a

IN THE MATTER OF an application by the Director of Investigation and Research for orders pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF the merger whereby CP Containers (Bermuda) Limited acquired certain assets held by The Cast Group Limited and of the acquisition by 3041123 Canada Inc. of all the shares of Cast North America Inc. by way of agreements entered into between or among Royal Bank of Canada, The Cast Group Limited, 3041123 Canada Inc., CP Containers (Bermuda) Limited and Canadian Pacific Limited.

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

Canadian Pacific Limited
Canada Maritime Limited
CP Containers (Bermuda) Limited
3041123 Canada Inc.
Cast North America Inc.
Royal Bank of Canada

Respondents

- and -

Montreal Port Corporation
Intervenor

REASONS AND ORDER SETTING PLACE OF HEARING

Date of Pre-hearing Conference:

June 19, 1997

Member:

McKeown J. (presiding)

Counsel for the Applicant:

Director of Investigation and Research

Robert S. Russell
Adam F. Fanaki

Counsel for the Respondents:

Canadian Pacific Limited
Canada Maritime Limited
CP Containers (Bermuda) Limited
3041123 Canada Inc.
Cast North America Inc.

Mark C. Katz
Rocco Di Pucchio
Tim Bermingham

Royal Bank of Canada

Peter L. Roy
David F. O'Connor

Counsel for the Intervenor:

Montreal Port Corporation

Luc Giroux
Pierre Grenier

COMPETITION TRIBUNAL

REASONS AND ORDER SETTING PLACE OF HEARING

The Director of Investigation and Research

v.

Canadian Pacific Limited et al.

The hearing in this matter is scheduled to commence on January 12, 1998. The parties, however, do not agree on the appropriate location for that hearing. The Director of Investigation and Research ("Director") says that the hearing should be held in the National Capital Region ("NCR"), in Ottawa, where the Tribunal has its Registry, offices and a hearing room. The respondents, and also the intervenor, say that the hearing should be held in Montreal in a courtroom of the Federal Court loaned for that purpose. This is the first time that the question of the proper venue for a hearing before the Tribunal has arisen as a disputed issue.

Section 15 of the *Competition Tribunal Act* states that the Tribunal "may sit at such times and at such places throughout Canada as it considers necessary or desirable for the proper conduct of its business". Section 20 of the *Competition Tribunal Rules* provides that the Chairman shall consult with the parties and issue an order setting a schedule for the disposition of the application, including a date and place for the hearing, within certain prescribed time limits.

The chronology of events in this particular matter is as follows. The Director filed the notice of application on December 20, 1996. In paragraph 133 of the application, the Director

requests that the hearing be held in Ottawa. The response of Canadian Pacific Limited et al. ("CP") is dated February 7, 1997. At paragraph 158, CP states that it "does not object" to the application being heard in Ottawa. Paragraph 130 of the response of the Royal Bank of Canada ("RBC") of the same date states likewise.

On February 10, 1997, the Montreal Port Corporation ("Port") filed a request for leave to intervene. In the request, the Port "suggested" that the Tribunal hold its hearings in Montreal. By letter dated February 11, 1997, counsel for CP advised the Registrar of the Tribunal that, contrary to paragraph 158 of its response, CP took the position that the Port was correct and that Montreal was the most appropriate place for the hearing. In her letter of February 13, 1997, counsel for RBC took the same position on behalf of her client.

Following a pre-hearing conference on March 13, 1997, the Port was granted leave to intervene, including a limited right to call evidence, on March 21, 1997. The venue of the hearing remained a matter of controversy; the scheduling order issued on April 3, 1997, sets only the date of the hearing, not the place, requires the parties to make detailed written submissions on the issue and sets the question of venue down for the June pre-hearing conference.

A preliminary question is the role of the Port, as an intervenor, in the choice of venue. Extensive argument was presented on the question at the pre-hearing conference on June 19, 1997, including detailed submissions from the Port. While the Tribunal took into account the able arguments of the Port's counsel in making its decision, the Tribunal's view is that the choice of venue is based on the balance of convenience of the parties.

In arguing this matter, the Director took the position that he, as applicant, has the right to select the venue for the hearing in the first instance, as is standard in civil matters in, for example, Ontario. The Director must, he says, consider his public interest mandate in choosing a location so that his choice is appropriate for the "proper conduct" of the Tribunal's business. The respondents must then displace the Director's choice by showing that another location is more convenient or that the original choice is not a proper location.

In contrast, the respondents and the intervenor say that nothing in the legislation or the rules of the Tribunal gives the Director the right to choose venue, leaving the respondents with the burden of displacing that choice. They point out that the Tribunal's rules differ from those in other jurisdictions which confer a right on a plaintiff. They argue that venue is in the discretion of the Tribunal to decide, after consulting with the parties; there is no "burden" on either side.

I do not need to decide which model for deciding venue, in case of dispute, governs in Tribunal proceedings generally. I am inclined to agree that the venue for the hearing is a decision largely in the discretion of the Tribunal. In the circumstances of this case, given the way the issue unfolded, the respondents do bear some burden of convincing the Tribunal that Montreal is the more convenient venue. I cannot ignore that they initially had no objection to a hearing in Ottawa, a position which only changed with the appearance of the intervenor. No matter where the burden lies, however, the exercise of weighing the balance of convenience of the parties is essentially the same in both scenarios. The factors argued by the parties include the national mandate of the Tribunal, rational connection between the place of hearing and the subject matter

of the application, location of the parties and their counsel, location of witnesses and documents, the possibility of a view, availability of facilities and relative costs.

It is clear that the Tribunal has a national mandate as it adjudicates matters arising under federal legislation with national scope. Each side seeks to alter the balance in its favour by emphasizing this indisputable fact. The Director argues that the Tribunal's national mandate favours holding the hearing in the NCR; the respondents argue that it means that hearings should readily be held outside Ottawa. Both sides have also attempted to rely on the fact that the Tribunal held the hearing in *Southam and Washington* in Vancouver, in *Laidlaw* in Victoria, and held hearings in numerous other cases in Ottawa, to support their respective preferred venue for this hearing. I am of the view that these arguments do not advance the issue in this case. In particular, I do not believe that much can be drawn from prior cases in terms of precedent as venue was not in dispute in any of them; the parties agreed on the appropriate venue. The most that can be said is, to echo the words of the statute that the Tribunal may sit, and has in fact sat, at different locations in Canada as it considers necessary or desirable for the proper conduct of its business.

The respondents argue that in this case there is a "clear and obvious" connection to Montreal which is much stronger than any connection to Ottawa. They point out that the Director alleges that the acquisition of Cast by CP has or is likely to result in a substantial lessening of competition in a market defined as the provision of intermodal non-refrigerated containerized shipping services through the Port of Montreal between northern continental Europe and the United Kingdom and Ontario and Quebec. Given that CP is in fact disputing that this is the relevant market, they also argue that there is no need to adopt the Director's relevant market to

recognize the Montreal connection as Cast and Canada Maritime have terminals and offices in Montreal and the Port is obviously situated there. They submit that the hearing will focus on evidence relating to CP's shipping services in and out of Montreal and the efficiencies generated by the acquisition and the resulting benefits to the Port. Considerable emphasis was placed, particularly by the intervenor, on the particular interest of this case to, and its potential effect on, the employees of the Port and the residents of Montreal on the grounds that the economic viability of the Port is somehow at stake in the proceeding. Reference was made to the fact that the National Transportation Agency, also a federal institution, held its ten-day public hearing into the acquisition in Montreal in December 1994, and that the NTA explicitly recognized in its decision that the Port is "a major contributor to the economic health of the Montréal region." [1]

It is undeniable that there is a connection between the subject matter of the application and Montreal. It is also understood that the Port is "directly affected" by the matters in issue in the application, else it would not have been granted intervenor status. It cannot be concluded, however, that Montreal is the only possible venue with a rational connection to the subject matter of the application or that it is the "most" connected and the employees of the Port and the residents of Montreal the "most" affected persons. The Tribunal adopts the position of the Director that "connection" must be established by looking at the competitive effects of the merger.[2] Those effects impact not just on Cast and Canada Maritime and the Port but also on the customers of the two companies and their competitors or alleged competitors. The Tribunal

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[1] *In the matter of the review by the National Transportation Agency of the proposed acquisition by CP Containers (Bermuda) Limited of certain assets of and shares held by The Cast Group Limited, etc.* (20 January 1995), No. 30-W-1995 (N.T.A.) at 13.

has no way of ranking the relative interests of the various persons who will be affected by its decision one way or another.

Further, it is extremely rare that the competitive effects of a merger would be confined to one city and in this case they are not. The narrowest relevant market that has been alleged is that of the Director and includes the provinces of Ontario and Quebec. The respondents have alleged a much broader relevant "trading area" which encompasses container cargo between northern Europe and the whole of the United States and Canada through North American eastern seaboard ports.

All that can be concluded is that, given the trans-provincial nature of the competitive effects of the merger, there is also a rational connection to the NCR as an appropriate venue. This type of analysis does not, despite the positions of the parties, result in a clear indication of one particular city as the only place that can be rationally considered as a possible venue. The question will fall to be decided on the various practical factors which enter into a determination of where the relative balance of convenience of the parties lies.

The decision of the NTA to hold its hearings in Montreal cannot enter into the Tribunal's decision in the way suggested. Not only is the question of the respective roles of the two tribunals and the deference that should be paid to the NTA's findings by the Tribunal an important issue in dispute on the merits, the mandate of the NTA requires it to take into account factors which are of dubious relevance to a competition case. For example, in a passage from the NTA decision cited by counsel for the Port, the NTA states:

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[2] This is to be distinguished from purely precedential value of a decision which is not particularly relevant to venue.

> . . . Thus, changes in the transportation sector that contribute to the economic viability of the port and assist in maintaining or encouraging growth in the level of economic activity at the port of Montréal are consistent with the policy objective contained in the NTA, 1987 that transportation is a key to regional economic development. [3]

In addition, as a practical matter, at the time of the public hearing the NTA had a regional office in Montreal.

Turning to the location of the parties and their counsel, the CP companies have their head offices in various locations, not including either Montreal or Ottawa. Their counsels are located in Toronto. While the head office of the RBC is in Montreal, it is clear that the matters related to the acquisition were handled out of Toronto; RBC is also using Toronto-based counsel. The Director's offices are in the NCR; outside counsel, however, are in Toronto. The location of the parties and their counsel, on its own, does not weigh in favour of either Montreal or Ottawa; it is essentially neutral.

The same is true with respect to the location of potential witnesses and documents. CP has indicated that it anticipates that it will be equally convenient for its witnesses to go to Montreal as to go to Ottawa and that many of them will come from abroad. RBC has indicated that its potential witnesses reside in Bermuda, Toronto, Mississauga and Burlington. Only the Port has said that the majority of its witnesses come from Montreal. As already noted, however, considerations relating only to the Port can play only a secondary role in the venue decision. The location of the documents is not a factor in choice of venue despite their large volume as the parties have opted to exchange images of the documents which are stored in a portable electronic medium. Once again, this factor does not tip the balance towards either suggested venue.

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[3] *Supra* note 1 at 13.

The respondents rely on the possibility of a view of the Port by the Tribunal as a factor which weighs in favour of Montreal as the venue for the hearing. They admit, however, that such a possibility can hardly be determinative. I agree that the possibility of a view cannot be determinative of venue. It is not for me to decide now that a view will be an appropriate form of evidence at the hearing. Therefore, we are speaking of a mere possibility of a view being taken. Further, a view would presumably be taken only once, not every day of the hearing. The Tribunal need not be hearing the matter in Montreal in order to take such a view.

The respondents, relying on affidavit evidence filed by the Port, submit that there is a Federal Court courtroom in Montreal available to the Tribunal for the hearing. The Director raised a number of questions about the suitability of that facility for the Tribunal's purposes. In argument, counsel clarified that the Director does not dispute that the Federal Court facility *could* accommodate the Tribunal but underlined that the real question was the cost of making any necessary changes, as opposed to using the Tribunal's hearing room in Ottawa. The costs referred to appear to be largely those of the Tribunal itself, e.g., wiring which may have to be left behind, simultaneous interpretation facilities, and, possibly, enhanced security, and therefore I am reluctant to place much, if any, weight on this factor by itself. If the balance of convenience of the parties means that the hearing should be held in Montreal, then the Tribunal will do what is necessary.

This brings me to the final factor of the relative costs to the parties of holding the hearing in Montreal or in Ottawa. The Director argues that the respondents have only expressed a preference for Montreal over Ottawa; they have not shown that it will be less costly to them to

conduct the hearing in Montreal than it would be in Ottawa. I agree. Both suggested venues require the respondents and their counsel to incur the costs of moving their centre of operations from Toronto to another city. Toronto, of course, was not proposed as a possible venue.

The Director, on the other hand, has argued that it will be more costly to him if the hearing is in Montreal and has provided some evidence in support. The evidence relates to the technological demands of the hearing, in particular the electronic presentation of documentary evidence which the Director proposed and to which the other parties have agreed. I should emphasize that I am not at this point adopting any particular "model" for the technological aspects of the hearing. Numerous issues, including procedural implications for the Tribunal itself, remain to be addressed. The Director submits that participating in this type of hearing will require him to have ongoing access to technical support and resources, often on short notice. These resources are located in the NCR in the Director's office. While relocating such resources to Montreal may not be impossible, as the Director's argument suggested, it would evidently be more costly than if the hearing were held in the NCR.

The parties do not agree on the extent of the technical difficulties likely to be encountered at the hearing or the support resources that will be necessary. The respondents downplay the possibility of any problems; the Director is far less optimistic. No one denies, however, that some degree of technical support will be necessary for the parties. In the circumstances, I am of the view that it is prudent to err on the side of caution. This will be the first such hearing before the Tribunal. It will also be the first such hearing in which the respective counsel representing the parties have participated directly. The parties have experienced significant technical difficulties during the documentary discovery phase, resulting in extensions of deadlines. No

blame attaches to a particular party, perhaps the problems were inevitable given that this is a new direction for all concerned.

As this is a first-time effort, and given the experience to date, I believe that the availability of and the cost of obtaining technical support during the hearing is a relevant consideration in deciding where this hearing should take place. Only the Director, however, has said that it will be more costly for him to have the hearing in Montreal. The respondents evidently will also need technical support but they have not said that it will be more expensive to obtain it in Ottawa than in Montreal. The indications are that the technical resources are associated with counsel and are actually located in Toronto.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT the hearing of the application shall be held in Ottawa.

DATED at Ottawa, this 27th day of June, 1997.

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

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