Competition Tribunal | Tribunal de la Concurrence

CT - 1996 / 001 – Doc # 224

IN THE MATTER of an application by the Director of Investigation and Research for orders pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER of the merger whereby Dennis Washington and K & K Enterprises acquired a significant interest in, and control of, Seaspan International Ltd.;

AND IN THE MATTER of the merger whereby Dennis Washington acquired Norsk Pacific Steamship Company, Limited;

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

Dennis Washington
K & K Enterprises
Seaspan International Ltd.
Genstar Capital Corporation
TD Capital Group Ltd.
Coal Island Ltd.
314873 B.C. Ltd.
C.H. Cates and Sons Ltd.
Management Shareholders
Preference Shareholders
Norsk Pacific Steamship Company, Limited

Respondents

REASONS FOR CONSENT ORDER DATED JANUARY 29, 1997

Date of Hearing:

January 29, 1997

Members:

McKeown J. (presiding)
Frank Roseman
Lorne R. Bolton

Counsel for the Applicant:

Director of Investigation and Research

William J. Miller
John S. Tyhurst
Elspeth A. Gullen

Counsel for the Respondents:

Dennis Washington
K & K Enterprises
C.H. Cates and Sons Ltd.
Norsk Pacific Steamship Company, Limited
Seaspan International Ltd.

Nils E. Daugulis
Douglas G. Morrison
Sharon Dos Remedios
George D. Burke

Genstar Capital Corporation

Calvin S. Goldman, Q.C.
Robyn M. Bell

TD Capital Group Ltd.

Kent E. Thomson
Linda S. Abrams
Bradley P. Martin

COMPETITION TRIBUNAL

REASONS FOR CONSENT ORDER DATED JANUARY 29, 1997

Director of Investigation and Research

v.

Dennis Washington et al.

On March 1, 1996, the Director of Investigation and Research (the "Director") filed an application (the "contested application") under section 92 of the Competition Act (the "Act") seeking an order to remedy an alleged substantial lessening of competition as a result of two mergers involving the respondents Dennis Washington, K & K Enterprises, Seaspan International Ltd. ("Seaspan"), C.H. Cates and Sons Ltd. ("Cates"), and Norsk Pacific Steamship Company, Ltd. ("Norsk") (referred to collectively as "Washington et al."). Also named as respondents in the contested application were TD Capital Group Ltd., Genstar Capital Corporation ("Genstar"), Coal Island Ltd., 314873 B.C. Ltd., Management Shareholders, Preference Shareholders, and Fletcher Challenge Limited ("FCL"). As a result of subsequent amendments to the contested application, FCL was removed as a respondent.

On January 13, 1997, the date on which the hearing of the contested application was scheduled to commence, the Director, as a result of an agreement with the respondents Washington et al., filed a notice of application for a consent order (the "consent application") pursuant to sections 92 and 105 of the Act. The hearing of the consent application was held by telephone

conference on January 29, 1997 at which time two amendments for the purposes of clarification were proposed by the Director and Washington et al.

Both the contested application and the consent application were brought in relation to two mergers involving the ship berthing and barging markets in British Columbia. The first is the "Seaspan merger". Seaspan is a large tug and barge company whose businesses include ship berthing and barging. In 1994, Dennis Washington, through K & K Enterprises, acquired a significant interest in Seaspan from Genstar, TD Capital Group Ltd., Coal Island Ltd., 314873 B.C. Ltd., and certain other parties. In June 1996, Dennis Washington acquired control of Seaspan. Washington et al. already owned Cates, a ship berthing company providing services in Burrard Inlet. The second merger at issue is the June 30, 1995 acquisition of control of Norsk from FCL by Dennis Washington (the "Norsk merger"). Norsk's operations include barging.

The Director alleges that the Seaspan merger results in a substantial lessening of competition in the ship berthing markets of Burrard Inlet and Roberts Bank and that the Norsk merger substantially lessens competition in the ship barging market in British Columbia. The Director submits that the terms of the consent order which require the sale of sufficient assets to permit the purchasers of the assets to become viable competitors in the relevant markets cure the alleged substantial lessening of competition.

Procedure Followed

The *Competition Tribunal Rules* ("Rules") provide a procedure to be followed for notices of application filed pursuant to section 105 of the Act. The rationale for this procedure is to

provide both an efficient and effective method for the resolution of matters brought on consent. The efficiency goal is met through a procedure which eliminates many of the steps which are required in a contested application, thereby shortening the period of time required to reach a final disposition of a consent application. The effectiveness of the procedure is ensured by the provision for public participation. The input of the public and, in particular, the views of the industry to which the application relates, is essential in an application for a consent order to ensure that the Tribunal is as informed as possible of the competitive impact of the proposed order.

Because of the somewhat unusual nature of this consent application, that is, having been converted from a contested application to a consent application, the Tribunal decided it was appropriate to deviate somewhat from the procedure provided in the Rules[1]. A paramount consideration of the Tribunal in making any changes to the procedure prescribed in the Rules was to ensure that all persons with an interest in this application were treated in accordance with the principles of fairness. The procedure selected also provided an opportunity for public input to the Tribunal. At the same time, the Tribunal wanted to ensure that this application would proceed as expeditiously as possible.

As was further elaborated in the Tribunal's reasons in this matter dated January 16, 1997[2], the subject matter of these proceedings has been public knowledge since the publication of notice of the contested application in March 1996. The Chairman was of the view that no purpose

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[1] See *Director of Investigation and Research v. Dennis Washington* (16 January 1997), CT9601/210, Reasons and Order Regarding Scheduling of Consent Order Application, [1997] C.C.T.D. No. 1 (QL).

would be served by requiring further publication of notice of the consent application as it was felt that those persons with an interest in these proceedings and who had the potential of offering assistance to the Tribunal in the evaluation of the consent order would already be fully aware of the status of the proceedings.

Much of the same reasoning which motivated the Tribunal to deviate from the publication rules also lead to the Tribunal's decision to abridge the length of time available to the public to participate in the consent application. An additional factor which was considered was the nature of the proposed resolution itself, as set out in the draft consent order, which was substantially the same, save for a difference in the volume of assets, as the remedy initially sought by the Director in the contested application. Furthermore, the Director indicated to the Tribunal that she had made some efforts to communicate the nature of the proposed consent order to participants in the British Columbia ship berthing and barging industries. The Tribunal was of the view that these considerations warranted less time for public participation than that prescribed in the Rules for a "normal" consent application.

Comments, Request for Leave to Intervene

This application generated a limited amount of public commentary which was not unexpected taking into account the relatively confined nature of the geographic market involved and the seemingly small number of industry participants. One comment was filed with the Tribunal in this proceeding. A law firm from Burnaby, British Columbia filed comments with the Tribunal on behalf of its unnamed client who was described as having "spent more than 35

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2 *Ibid*.

years in the tug and barge industry on the west coast". The Tribunal was informed that the client preferred to remain anonymous and to file his comments confidentially so as not to prejudice his position in the industry. Accordingly, the comments were submitted to the Tribunal under the name of the law firm only and were signed by a member of that firm.

The anonymous comments did not meet the requirements of the Rules (section 84) as they were not signed by the commentator nor did they include his name and address. Although the anonymous comments were not in conformity with the Rules, the Tribunal decided to allow the comments to be filed as it was considered important to address the substantive issues raised by the comments. However, the Tribunal takes the position that little weight should be accorded to anonymous comments in the event of a conflict with other input.

Both the Director and Washington et al. objected to the Tribunal's consideration of the anonymous comments as they were not in the proper form. Both parties argued that the confidential nature of the comments made it difficult for the Tribunal to determine their validity and the weight which should be accorded to them. Nonetheless, the Director and Washington et al. responded to the anonymous comments and the responses provided the Tribunal with a sworn factual correction in relation to an issue raised in the comments. The Tribunal is satisfied that those responses adequately addressed any competitive concerns raised by the comments.

In addition to the anonymous comments, a letter written to counsel for Washington et al. from Avenor Inc., a forest products company with contracts with Seaspan, was forwarded to the Tribunal. The parties were given notice of the letter. However, the letter was not filed as a comment and the parties were advised by the Tribunal that a reply to the issues raised in the letter

was not required. In any event, the Tribunal is of the view that the issues raised in the Avenor letter do not address whether the consent order is an adequate remedy to the alleged lessening of competition.

One request for leave to intervene was filed in relation to the consent application, which request was denied. The request was made by Fletcher Challenge Canada Limited ("FCCL"), a forest products company which uses barging services extensively through contractual arrangements with, *inter alia*, Seaspan and Norsk. FCCL did not provide the Tribunal with any reasons for its request to be accorded the status of intervenor rather than commentator and it did not make any request for leave to present evidence to the Tribunal. FCCL did not indicate to the Tribunal any competitive consequences which would arise as a result of the issues raised in its request for leave to intervene.

FCCL raised two specific objections to the draft consent order. The first was that the proposed order, in its view, interfered with FCCL's contractual rights. Although the Director disagreed with this interpretation, she proposed that a paragraph be included in the draft order for the purposes of clarification. Washington et al. did not object to the paragraph's inclusion. The Tribunal is satisfied that this additional paragraph alleviates any concerns which might exist.

FCCL's second objection was that a term of the draft consent order precludes FCCL from acquiring the assets which are required to be divested. It is the Tribunal's view that FCCL's proposal to remove the term from the proposed order would be contrary to the intent of the proposed order and counsel for FCCL was unable to satisfy the Tribunal that its deletion would be justified.

Test For Approval

The decision in *Director of Investigation and Research v. Air Canada* set out the test for assessing a proposed consent order in the context of a merger case. The Tribunal held:

> The Tribunal accepts the Director's argument that the role of the Tribunal is not to ask whether the consent order is the optimum solution to the anticompetitive effects which it is assumed would arise as a result of the merger. The Tribunal agrees that its role is to determine whether the consent order meets a minimum test. That test is whether the merger, as conditioned by the terms of the consent order, results in a situation where the substantial lessening of competition, which it is presumed will arise from the merger, has, in all likelihood, been eliminated.[3]

As the Air Canada decision makes clear, the Tribunal will not merely "rubber stamp" the terms of a consent order put before it by the Director; the Tribunal must be satisfied that the consent order cures the substantial lessening of competition alleged by the Director. The Tribunal must be satisfied that the proposed order is an adequate solution to the alleged substantial lessening of competition in the markets identified by the Director. Having considered the consent order, the consent order impact statement, the issues raised through the comments and request for intervention and the answers of the parties to the questions of the Tribunal, the Tribunal is satisfied that this consent order accomplishes what it is intended to accomplish, that is, cures the substantial lessening of competition which allegedly results from the Seaspan and Norsk mergers. At the conclusion of the hearing the Tribunal stated that the consent order is approved. The consent order issues simultaneously under separate cover.

DATED at Ottawa, this 29th day of January, 1997

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

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

[3] (1989), 44 B.L.R. 154 at 197-98, 27 C.P.R. (3d) 476, [1989] C.C.T.D. No. 29 (QL).