Competition Tribunal | Tribunal de la Concurrence

CT - 1996 / 001 – Doc # 89

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 Dennis Washington and K & K Enterprises acquired a significant interest in, and propose to acquire 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
Fletcher Challenge Limited

Respondents

REASONS AND ORDER TO AMEND PLEADINGS
REGARDING FLETCHER CHALLENGE LIMITED

Date of Pre-hearing Conference

July 4, 1996

Members:

Rothstein, J. (presiding)
Dr. Frank Roseman

Counsel for the Applicant:

Director of Investigation and Research

Michael L. Phelan
M. Lynn Starchuk
William J. Miller

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

Genstar Capital Corporation

Robyn M. Bell

TD Capital Group Ltd.

Linda S. Abrams

Coal Island Ltd.
314873 B.C. Ltd.
Management Shareholders
Preference Shareholders

Not represented

Fletcher Challenge Limited

COMPETITION TRIBUNAL

REASONS AND ORDER TO AMEND PLEADINGS REGARDING FLECTHER CHALLENGE LIMITED

The Director of Investigation and Research

v.

Dennis Washington et al.

Fletcher Challenge Limited ("Fletcher") brings a motion to have the application of the Director of Investigation and Research ("Director") against it dismissed or stayed because it alleges that the application does not disclose a cause of action against it and because there is no order sought to be made against it, as required by paragraphs 3(2)(c) and 3(2)(d) of the *Competition Tribunal Rules*[1]. Fletcher argues that in proceedings under the *Competition Act* [2] ("Act), the time and expense involved are significant for parties and, in view of the absence of a cause of action and a specific order sought against it, it would be prejudicial to force Fletcher to remain involved in these proceedings, especially since it is not clear how Fletcher may be affected or how it could be at risk.

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[1] SOR/94-290. Subsection 3(2) states:

> A notice of application shall be signed by the Director and shall set out, ...
>
> (*c*) a concise statement of the grounds for the application and of the material facts on which the Director relies;
> (*d*) the particulars of the order sought;

[2] R.S.C. 1985, c. C-34.

The Director's notice of application contains a section commencing at paragraph 127 entitled "Nature of the Application - Effect of Norsk Merger" and a section commencing at paragraph 132 entitled "Statutory Factors - Section 93 of the Act - Norsk Merger". Without repeating what appears in the paragraphs *verbatim*, the Director submits that, as a result of the Norsk merger in which Fletcher was a vendor, the dominant barging services provider in the market has effectively acquired the third largest provider and that the Norsk merger results in a further concentration of what was already a highly concentrated market and can only serve to heighten the ability of a merged Seaspan and Norsk to exercise market power. The Director concludes by stating:

> . . . the Norsk Merger prevents or lessens, or is likely to prevent or lessen, competition substantially in the B.C. barging market.[3]

The Director indicates that it is not his primary objective to seek the dissolution of the Norsk merger; the primary relief that he seeks is the dissolution of the Seaspan merger. Indeed, in the notice of application, there is no express mention made of what the Director seeks in respect of the Norsk merger.

In the view of the Tribunal, the paragraphs of the notice of application to which I have referred, specifically paragraphs 127 to 138, comply with paragraph 3(2)(c) of the Rules in respect of the Norsk merger and Fletcher's involvement and do provide a concise statement of the grounds for the application and the material facts on which the Director relies in arguing that the Norsk merger prevents or lessens competition in the British Columbia barging market. In that sense, I am satisfied that a cause of action is disclosed in the notice of application and that

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[3] Notice of application at para. 131.

Fletcher has not met the high standard required in a motion to dismiss for failure to disclose a reasonable cause of action. [4]

However, in respect of the Norsk merger and Fletcher in particular, I am not satisfied that the notice of application satisfies paragraph 3(2)(d) of the Rules. The notice of application does contain what has been referred to by counsel as a "basket clause", which provides that the Director seeks:

> such further or other order as the Tribunal deems advisable pursuant to section 92, and in particular section 92(1)(f), of the Act. [5]

However, I think that a respondent is entitled to stricter compliance with paragraph 3(2)(d) by the Director and, specifically, to know the precise order sought against that party. It does not seem to me to be consistent with fairness to name a party but not indicate the precise relief sought against it. A party must be given the opportunity to know the case it has to meet and this means that a notice of application must set forth not only a cause of action in the form of the grounds of the application and the material facts, but also the order sought against the party.

It may well be that relief in respect of the Norsk merger is sought in the alternative and, if that is the case, the pleadings should so indicate. Nonetheless, Fletcher should be aware from the notice of application of the relief that is sought against it. I have no doubt that in the course of discovery this would be an appropriate line of questioning for a respondent and that this kind of

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[4] See, for example, *Attorney General of Canada* v. *Inuit Tapirisat of Canada* (1980) 2 R.C.S. 735 at 740, per Estey J.:

> On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.* [Footnote omitted].

[5] *Supra.*, note 3 at para. 139(4).

information would have to be provided by the Director. Therefore, it does not seem to me to be unreasonable to expect that the notice of application should contain the specific order sought against each of the parties named as respondents in the proceedings.

The Director submits that if the Tribunal finds the notice of application deficient in this respect, the Tribunal should order the Director, within two weeks, to amend his pleadings to provide for the particulars of the order sought against Fletcher in respect of the Norsk merger. The Tribunal is satisfied that at this stage of the proceedings it is not prejudicial for such an amendment to be made and, indeed, the amendment will help to clarify the position of the Director in respect of specific respondents.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

1. The Director may amend his pleadings in the manner indicated. The amendments to the pleadings shall be served and filed by the Director by July 18, 1996 and they should be sufficiently particular to satisfy paragraph 3(2)(d) of the Rules. Provided the pleadings are so amended, and the amendments served and filed, the Tribunal will dismiss the motion of Fletcher.

2. If the amendments to the pleadings are not made, and served and filed, as required herein, the motion of Fletcher shall be granted.

DATED at Ottawa, this 4th day of July, 1996.

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

(s) Marshall Rothstein
Marshall Rothstein