Competition Tribunal Tribunal de la Concurrence

CT - 1989 / 003 – Doc # 463

IN THE MATTER OF an application by the Director of Investigation and Research under sections 92 and 105 of the *Competition Act*, R.S.C., 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by Imperial Oil Limited of the shares of Texaco Canada Inc.

B E T W E E N:

The Director of Investigation and Research
Applicant

and

Imperial Oil Limited
Respondent

and

Attorney General of Quebec
Beacon Hill Service (2000) Ltd.
Atlantic Refining and Marketing Employees Association and Atlantic Oilworkers Union, Local 1
Consumers' Association of Canada
Pioneer Petroleums
Claude Harnois Inc.
Barron Hunter Hargrave Strategic Resources Inc.
Attorney General of Newfoundland and Labrador
Pétroles Ronoco Inc.
The City of Victoria
Lyn-Den Distributors
Banff Bulk Fuels Ltd.
Texaco Retail Council, Halifax-Dartmouth Metropolitan Area
Cook's Oil Company Limited

Intervenors

REASONS FOR DECISION REGARDING JURISDICTION OVER UNDERTAKINGS
Date of Hearing:

November 4, 1994

Presiding Member:

The Honourable Mr. Justice Marshall E. Rothstein

Counsel for the Applicant:

The Director of Investigation and Research

Michael F. Donovan
David Wolinsky
François-Bernard Côté, Q.C.

Counsel for the Respondent:

Imperial Oil Limited

Robert J. Patton

Counsel for the Intervenor:

Atlantic Oilworkers Union, Local 1

Ronald A. Pink, Q.C.
David J. Roberts

COMPETITION TRIBUNAL

REASONS FOR DECISION REGARDING JURISDICTION OVER UNDERTAKINGS

The Director of Investigation and Research

v.

Imperial Oil Limited

This motion is brought by the Atlantic Oilworkers Union, Local 1 ("Union"). In essence, the motion requests that the Tribunal act to prevent the closure of, or to require the sale of, the Eastern Passage refinery in Dartmouth, Nova Scotia. At present the refinery is owned by Ultramar Canada Inc. ("Ultramar"), which is currently in the process of closing it down.

As part of a 1990 consent order made by the Tribunal in respect of the acquisition of Texaco Canada Inc. ("Texaco") by Imperial Oil Limited ("Imperial"), the Director of Investigation and Research ("Director") and Imperial agreed, and the Tribunal ordered, that certain Texaco assets in the Atlantic region, including the Eastern Passage refinery[1], be divested by Imperial. The consent order provided that the Director have the authority to approve a purchaser of the refinery in accordance with certain considerations set out in the order. In approving the purchase of the refinery by Ultramar, the Director obtained undertakings from Ultramar which, among other things, provided that Ultramar would operate the refinery for a minimum of seven years, barring a "material adverse change". Now, after only four years, Ultramar proposes to close the refinery. The Union says that closure at this time is inconsistent with the undertakings given by Ultramar and asks the Tribunal to either ensure that Ultramar continues to operate the refinery for the full seven-year period or that Ultramar sells the refinery to another purchaser who will keep it operating.

---

[1] Defined in the consent order as "the Texaco refinery in Dartmouth and the Dartmouth marine terminal": *infra*, note 2 at 6.

The Union and the Director agreed that a preliminary question was the Tribunal's jurisdiction to deal with this matter. Among the other relief requested, the Union asks the Tribunal to assume jurisdiction over "the issues raised by the closure of the Eastern Passage Refinery and the enforcement of the [Ultramar] undertakings made to the Director of Investigation and Research". It was only this jurisdictional question which was argued before me on November 4, 1994, and at the conclusion of argument by counsel for the Union, I ruled from the bench that the Tribunal did not have jurisdiction to hear and decide the merits of the motion. The following are the reasons for my decision.

Background

To place the matter in context, some further background details are necessary. On February 6, 1990, the Tribunal issued the consent order in the matter of the acquisition of Texaco by Imperial[2]. The purpose of the order is, as stated in paragraph 1, to ensure that the purchase of Texaco by Imperial "will not prevent or lessen, or be likely to prevent or lessen, competition substantially in the downstream sector of the Canadian petroleum industry."

The Director approved the purchase by Ultramar of the former Texaco assets in the Atlantic region in the fall of 1990. By letter dated September 24, 1990, Ultramar undertook to the Director that, with reference to the Eastern Passage refinery:

> Ultramar intends to continue to operate the Dartmouth Eastern Passage refinery. Specifically:
>
> A. The refinery shall be kept operating for a minimum of seven years from the date of the closing of the purchase of the Texaco Canada Assets barring a material adverse change.
>
> If a material adverse change occurs in this seven year period, Ultramar shall provide the director with a minimum 90 days' notice prior to taking any actions adversely affecting the continued operations of the refinery.
>
> B. Attached as Schedule "C" to these undertakings is a proposed investment programme for the Dartmouth refinery, which Ultramar will carry out in accordance therewith.

---

[2] *Director of Investigation and Research v. Imperial Oil Ltd.* (6 February 1990), CT8903/397, Consent Order, [1990] C.C.T.D. No. 3 (QL).

In the same document Ultramar agreed that its undertakings could, on application by the Director, be made part of a consent order of the Tribunal under section 105 of the *Competition Act*[3].

By letter dated October 25, 1993, Ultramar provided further undertakings to the Director in respect of its acquisition of the Texaco Atlantic assets. These later undertakings stated that:

> in the event that Ultramar Canada Inc., as required by the undertakings of September 24, 1990, provides notice to the Director respecting any action which will adversely affect the operation of the refinery, more particularly notifying the Director of its intention to cease operation of the refinery prior to the expiry of the seven year term provided for in the undertakings of September 24, 1990, Ultramar will, after having reviewed this matter with the Director, provide to the Director evidence establishing whether there is any reasonable, legitimate continuing interest on the part of a viable party in maintaining the refinery as an operating business in Canada. It will be sufficient to satisfy this undertaking if Ultramar establishes, to the Director's satisfaction, that it has publicly marketed the refinery, without unreasonable restriction on the price, and there is no legitimate expression of interest to purchase the refinery and continue its operation.

On May 10, 1994, Ultramar gave notice to the Director that it intended to take "adverse" action as set out in the 1993 undertakings. On May 16, 1994, Ultramar announced that, if a buyer was not found within 90 days, the refinery would be closed and converted into a marine terminal in the fall. At the same time, Ultramar put the refinery up for sale, but without the tankage and dock facilities, which it proposed to retain. To date the refinery has not been sold and the Union has been advised that most of the workforce will be laid off by November 18, 1994.

Reasons for Decision Regarding Jurisdiction

Counsel for the Union argues that the Tribunal has the jurisdiction to require the Director to enforce or to itself enforce the Ultramar undertakings in the manner in which those undertakings are interpreted by the Union. He submits that Ultramar has closed the refinery without complying with the undertakings because there has been no "material adverse change"; the investments in the refinery have not been made; and the refinery has

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

not been properly offered for sale. He further submits that the Director is unwilling to ensure compliance with the undertakings and that therefore the Tribunal must ensure compliance or order the Director to ensure compliance.

Counsel submits that the Tribunal has jurisdiction over this matter in two ways, pursuant to subsections 8(1) and 8(2) of the *Competition Tribunal Act*[4], and pursuant to paragraph 37 of the consent order. Section 8 reads:

> (1) The Tribunal has jurisdiction to hear and determine all applications made under Part VIII of the *Competition Act* and any matters related thereto.
>
> (2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.
>
> (3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.

Paragraph 37 of the consent order reads:

> The Tribunal shall retain jurisdiction in this matter for purposes of addressing any matters in this Order where specific reference is made to the Tribunal, for purposes of variation and for any other purposes provided for in the Act.

Counsel emphasizes that portion of paragraph 37 which states that the Tribunal retains jurisdiction "for any other purposes provided in the Act." He argues that one of the purposes of the Act is the maintenance of competition and therefore the Tribunal has continuing jurisdiction over the matters which arise from the consent order and which relate to that purpose.

I agree with counsel for the Union that the Tribunal has a continuing jurisdiction to enforce its orders pursuant to section 8 of the *Competition Tribunal Act*. This has been clearly set out in the decision of the Supreme Court of Canada in *Competition Tribunal v.*

---

[4] R.S.C. 1985 (2d Supp.), c. 19.

Chrysler Canada Ltd., which dealt in particular with the power to enforce orders by way of contempt[5]. In this regard, I should observe that it is not evident to me that the position taken by counsel for the Director in his filed memorandum of argument, to the effect that only the Director is authorized to bring an application for enforcement of an order, is the correct one. While I have concluded that the Tribunal does not have jurisdiction to do what is requested in this particular motion, this decision does not rely on the fact that the person bringing the motion for enforcement is someone other than the Director.

Although the Union's argument relating to paragraph 37 is stated somewhat more broadly, it is my view that both the argument respecting paragraph 37 and the argument relating to section 8 of the *Competition Tribunal Act* rest on the same foundation. The Tribunal's jurisdiction to do what is requested by the Union must stem from the terms of the consent order of February 6, 1990. The fundamental question is, therefore, what the consent order provides, since it is the provisions of the consent order which are subject to enforcement by the Tribunal.

The particular paragraph of the order that deals with the Eastern Passage refinery is paragraph 14. As mentioned above, all the divestitures set out in the consent order were subject to the prior approval of the Director. In addition to that general regime, paragraph 14 provides additional constraints on the divestiture by Imperial of its Atlantic assets:

> The divestiture of the assets in the Atlantic Region shall, to the extent reasonable and possible, be to a single purchaser who, in the Director's opinion, has the intention and the ability to become a vigorous and effective competitor in the
>
> Atlantic Region. In exercising his rights of approval under this Order and in accordance with the provisions of the Act, the Director, in addition to the considerations with respect to acquisitions provided for in the Act, will have regard for:
>
> (i) the financial soundness of the proposed purchaser of the assets and their continued operation;
>
> (ii) the business plans of the proposed purchaser for continued maintenance and operation of the assets; and
>
> (iii) the availability to the proposed purchaser of technical and marketing expertise to continue operation of the assets on an integrated basis.

---

[5] [1992] 2 S.C.R. 394.

Clearly there is no reference in paragraph 14 to undertakings as such. The Director did, however, require the September 24, 1990 undertakings as part of the process of granting his approval of the divestiture of the refinery to Ultramar. In a letter dated October 3, 1990, from counsel for the Director to the Tribunal, it was stated that "on the basis of the 1990 undertakings, the Director is satisfied that the terms of the Consent Order and of the *Competition Act* have been met."

Counsel for the Union acknowledges that the Director complied with the obligations explicitly placed upon him by paragraph 14 when he approved the Ultramar purchase with the September 24, 1990 undertakings. Nonetheless, counsel for the Union seeks to go further. He argues that the Director's actions in requiring the undertakings flowed directly from the consent order and that once the undertakings came into existence they were, in a sense, "incorporated by reference" into the consent order. A matter relating to compliance or non-compliance with those undertakings is therefore, he submits, within the jurisdiction of the Tribunal.

I agree that the undertakings obtained by the Director from Ultramar were the method by which he complied with the duties placed upon him by the Tribunal, as set out in paragraph 14. I cannot, however, agree that because the Director chose to carry out his obligations in this manner that the undertakings are themselves of the same nature and status as the actual words of paragraph 14 such that they should be treated as being incorporated by reference into paragraph 14. One of the problems with the Union's incorporation by reference argument is that had the Director chosen to fulfil his obligations under paragraph 14 of the consent order in a manner other than through the obtaining of undertakings, the words of paragraph 14 would not confer on the Tribunal the power to require him to obtain the undertakings that the Union is relying on here. Nothing in paragraph 14 suggests that undertakings are contemplated by the paragraph or that they automatically flow from the Director's obligations under the paragraph.

It is true that the Director did obtain the seven-year undertaking, among others. I recognize that the Director may have, by obtaining the undertakings, adopted certain continuing obligations and duties related to those undertakings. I do not, however, see

how it can be successfully argued that disputes arising from the interpretation of, or the compliance with, the undertakings are within the jurisdiction of the Tribunal to resolve or enforce. The Tribunal's jurisdiction must arise from paragraph 14 of the consent order. If the question before me was whether the Director, in granting his approval to Ultramar, did "have regard to" the conditions set forth in paragraph 14, then the Tribunal might well have jurisdiction. But counsel for the Union does not suggest that the Director has not complied with the express terms of paragraph 14. In my view, it requires an unwarranted stretch of the imagination to suggest that the wording of paragraph 14 extends the Tribunal's jurisdiction to the enforcement of undertakings that were given to the Director. Nothing in paragraph 14 expressly requires that the Director obtain undertakings, nor does it indicate that the Tribunal has a role to play in determining how the Director administers any undertakings that he obtains. If there is some complaint about how the Director is performing his duty as a public official in administering the undertakings, then recourse must lie elsewhere.

The structure of paragraph 14, as consented to by the parties and approved by the Tribunal, supports this view. Paragraph 14 sets out certain limits on the Director in approving a purchaser but within those limits he was given the discretion to approve the purchaser. It was open to the Tribunal to refuse to approve the consent order unless it contained a condition that any prospective purchaser of the refinery undertake to the Tribunal to operate the refinery for a specified length of time. Likewise, all matters pertaining to dealings with the refinery, such as closure, could have been made subject to prior Tribunal approval. Or the consent order could have stated that all such dealings would be subject to the approval of the Director *on condition that* he obtain specific undertakings regarding continued operation, which would have been reviewable by the Tribunal for noncompliance. None of these courses was followed.

Counsel for the Union argues that the Tribunal must intervene, in essence, to require the Director to enforce the undertakings. To not do so, he says, permits the Director to frustrate paragraph 14 of the consent order. The intent of paragraph 14, he argues, was that the Atlantic assets and, particularly the refinery, should continue to be operated in the interests of competition. He submits that the closing of the refinery and

the failure of Ultramar to offer the whole refinery for sale are inconsistent with the intent of the order.

I agree that, based on the history of the proceedings leading up to the issuance of the consent order, the Tribunal was concerned with the continued operation of the Atlantic assets in the interests of competition. This concern, however, does not convert the Ultramar undertakings to the Director into undertakings to the Tribunal or render the Director subject to the approval of the Tribunal in his handling of the undertakings. The Director is, after all, a public official with important responsibilities under the *Competition Act* for protecting competition in Canada. I must assume that the Tribunal dealt with its concerns about the operation of the Atlantic assets and competition in the Atlantic region to its satisfaction in paragraph 14 of the order. The Tribunal was apparently satisfied that the Director has the authority and the responsibility to decide, in the interests of competition, who could purchase the Atlantic assets and the conditions of that purchase, subject to the considerations specified in paragraph 14. As indicated above, it has not been suggested that there was non-compliance by the Director with the specified considerations. Outside of those considerations, the Director is not responsible to the Tribunal.

Further, it is necessary to keep in mind that I am here dealing with a consent order. The original application was brought before the Tribunal under section 105 of the *Competition Act*. The words of paragraph 14 were agreed upon between the parties. To suggest that the undertakings are incorporated by reference into paragraph 14 extends that provision beyond what was agreed upon. It is also relevant, in my view, that the undertakings are themselves consensual in nature. They represent an agreement between the Director and Ultramar. The only reference to the Tribunal occurs in the September 24, 1990 undertakings when Ultramar agrees that:

> the terms of these Undertakings may, on application by the Director, be made part of a consent order of the Competition Tribunal under Section 105 of the Competition Act. These Undertakings constitute Ultramar's irrevocable consent to the issuance of such an order.

The decision to bring an application to make the undertakings part of a consent order is that of the Director.

I am of the opinion that my conclusion is supported by an examination of what the Tribunal would be asked to do, should it assume jurisdiction as requested by the Union. Counsel for the Union indicated that were he successful on both the jurisdictional question and on the merits, he would ask the Tribunal to order the Director to enforce the undertakings or to order Ultramar to either continue operating the refinery or to offer the entire refinery for sale. In either case, the end result is a Tribunal order which would compel Ultramar to do certain things. Ultramar, however, is not and has never been a party to the proceedings before the Tribunal. I think that it would be quite extraordinary if the Tribunal could unilaterally assume jurisdiction to enforce, or to require the enforcement of, undertakings against a person who is not a party to proceedings before the Tribunal.

In the course of argument, counsel for the Union suggested that if the Tribunal refused to assume jurisdiction as he requested, it would be abdicating its responsibility for the maintenance of competition in Canada. I do not agree. The *Competition Act* does not confer open-ended jurisdiction on the Tribunal to deal with any and all competition issues. It is given specific powers which are set out in the *Competition Act* and in the *Competition Tribunal Act*. It may only act where it has been given the power to do so. The scheme of the *Competition Act*, as it pertains to civil reviewable matters, provides that both the Director and the Tribunal have a role to play in achieving its purposes. The most clear indication of this is that the Director has virtually complete discretion over whether to make an application to the Tribunal. There is nothing contradictory between the objectives of the *Competition Act* and an order of the Tribunal which leaves to the Director the responsibility and opportunity to exercise his discretion to achieve those objectives.

For these reasons, I am of the opinion that the Tribunal does not have jurisdiction to enforce or to require the Director to enforce the Ultramar undertakings. The motion of the Union was therefore dismissed on November 4, 1994.

DATED at Toronto, this 10th day of November, 1994.

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

(s) Marshall Rothstein
Marshall Rothstein