CT - 96 / 1

IN THE MATTER OF an application by Dennis Washington et al., for an order pursuant to section 106 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.

B E T W E E N :

Dennis Washington
K & K Enterprises
Seaspan International Ltd.
C.H. Cates and Sons, Ltd.

Applicants

- and -

The Director of Investigation and Research

Respondent

- and -

Smit International (Americas) Inc.

Applicant for Leave to Intervene

REASONS FOR ORDER DENYING INTERVENTION

Date of Pre-hearing Conference Call:

February 3, 1998

Member:

McKeown J. (presiding)

Counsel for the Applicants:

Dennis Washington
K & K Enterprises
Seaspan International Ltd.
C.H. Cates and Sons, Ltd.

Nils E. Daugulis
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Counsel for the Respondent:

Director of Investigation and Research

William J. Miller

Counsel for the Applicant for Leave to Intervene:

Smit International (Americas) Inc.

H. Peter Swanson

COMPETITION TRIBUNAL

REASONS FOR ORDER DENYING INTERVENTION

Dennis Washington et aL

v.

Director of Investigation and Research

At the pre-hearing conference call in this matter on February 3, 1998 the Tribunal heard the request for leave to intervene of Smit International (Americas) Ltd. ("Smit"). The Tribunal denied the request for leave to intervene and indicated that reasons would follow. These are the reasons for that decision.

I. BACKGROUND

By notice of application filed December 1, 1997, Dennis Washington, K & K Enterprises, Seaspan International Ltd. ("Seaspan") and C. H. Cates and Sons, Ltd. ("Cates") (collectively "Washington et al.") seek to have the Tribunal's January 29, 1997 Consent Order ("Consent Order")[1]

[1] *Director of Investigation and Research* v. *Dennis Washington* (29 January 1997), CT9601/223, Consent Order, [1997] C.C.T.D. No. 3 (QL) (Comp. Trib.).

varied pursuant to section 106 of the *Competition Act* ("Act").[2] The Consent Order arose out of an application brought in 1996 by the Director of Investigation and Research ("Director") as a result of Dennis Washington's 1992 acquisition of Cates, a ship berthing business operating in Burrard Inlet, and his 1994 acquisition of Seaspan ("Seaspan merger"), a company which provides ship berthing services in Burrard Inlet and in Roberts Bank. The Director alleged that the Seaspan merger resulted in a substantial lessening of competition in the market for ship berthing services in Burrard Inlet and Roberts Bank. Seaspan entered the ship berthing market in Burrard Inlet in 1992, a market in which Cates had formerly been the sole provider of ship berthing services. The Seaspan merger resulted in the common ownership of the only two providers of ship berthing services in Burrard Inlet. Seaspan has historically been the sole provider of ship berthing services in Roberts Bank. The Seaspan merger removed Cates as a credible, potential entrant into the Roberts Bank market for ship berthing services.[3]

The Consent Order required Washington et al. to divest themselves of certain ship berthing assets ("divestiture package") to remedy the substantial lessening of competition. The proposed variation to the Consent Order, which would eliminate the requirement that Washington et al. sell the divestiture package, was brought as a result of the entrance of a new competitor into the market for ship berthing services in Burrard Inlet. In October 1997, Tiger Tugz Inc. ("Tiger Tugz"), an affiliate of Rivtow Marine Ltd. and Rivtow Straits Limited (together "Rivtow"), commenced ship berthing

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

[3] **The Director's application also alleged a substantial lessening of competition in the market for ship barging services. The Consent Order required the divestiture of certain barging assets. That divestiture has been completed and is not relevant to the present proceedings.**

operations in Burrard Inlet. It is alleged in the application to vary that the entry of Tiger Tugz restores an effective competitor to the market for ship berthing services in Burrard Inlet and creates a credible, potential entrant in Roberts Bank such that it is no longer necessary that Washington et al. sell the divestiture package.

Smit filed its request for leave to intervene on January 12, 1998. By notice of motion filed January 28, 1998, Washington et al. and the Director together sought an order amending the December 1, 1997 application to vary the Consent Order to reflect the Director's consent to the proposed variation. The amendment, which was granted at the pre-hearing conference on February 3, 1998, converted the contested application to vary into an application to vary on consent ("consent variation application"). After concluding that there would be no prejudice to his client's position, counsel for Smit did not object to arguing the request for leave to intervene in the context of the amended application and did not seek an adjournment to file any further material.

H. TEST FOR GRANTING LEAVE TO INTERVENE

The test for granting intervenor status is set out in subsection 9(3) of the *Competition Tribunal Act:*

> Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal to make representations relevant to those proceedings in respect of any matter that affects that person.[4]

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

The word "affects" has been interpreted by the Tribunal to mean "directly affects".[5] Leave to intervene will only be granted where the Tribunal is convinced that the representations which will be made by the intervenor will be relevant and will assist the Tribunal in deciding the issues before it. Additionally, an intervenor must bring to the Tribunal a unique or distinct perspective of the subject matter in dispute.

m. SMIT'S REQUEST FOR LEAVE TO INTERVENE

Smit is in the business of providing marine related services to companies in various parts of the world and has extensive experience in providing ship berthing services. Smit does not currently provide ship berthing services in the Port of Vancouver, although it has an interest in doing so. It was in pursuing this interest that Smit investigated and ultimately tendered a bid for the divestiture package. Washington et al. oppose Smit's request for leave to intervene. The Director takes no position.

A. DIRECTLY AFFECTED

Smit advances what are essentially two bases for asserting that it is directly affected by the issues raised in the consent variation application. First, Smit argues that it is a potential competitor

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[5] ***Director of Investigation and Research*** **v.** ***Air Canada*** **(1992), 46 C.P.R. (3d) 184 at 187, [1992] C.C.T.D. No. 24 (QL) (Comp. Trib.).**

in the ship berthing market in the Port of Vancouver. As a bidder for the divestiture package, it has "entered into arrangements as a result of the Consent Order". If the Consent Order is varied in the manner proposed by the parties in the consent variation application the divestiture package will be removed from the market, nullifying Smit's attempt to purchase the divestiture package. Therefore, it is argued, Smit's proposed acquisition of the divestiture package, and consequently its position as a potential competitor, is entirely dependent on the outcome of the consent variation application.

In arguing that Smit is not directly affected by the consent variation application, Washington et al. assert that as one of five bidders for the divestiture package, Smit has less than a contingent interest in the divestiture package itself, let alone in these proceedings. Washington et al. place considerable emphasis on the fact that Smit, apart from having bid on the divestiture package, appears to have no other connection to the relevant market as, for example, a consumer or supplier of services. Washington et al. argue that Smit is in no different position than any other "operator from outside the market" who has indicated some interest in the divestiture package. At best, it is submitted, Smit is a potential competitor in the market for ship berthing assets and that alone is not enough to warrant being made an intervenor in these proceedings.

In *Air Canada* the Tribunal acknowledged that third parties who enter into arrangements based on an order of the Tribunal could be directly affected by a variation to that order:

> I think it would be a legitimate concern of the tribunal, if it were satisfied that the relief sought by the Director would result in the destruction of Gemini, that any remedy framed should avoid as much as possible harming third parties who may be able to show that they entered into arrangements with Gemini on the strength of

the tribunal's order of 1989.[6]

[6] *Supra* note 5 at 189.

This statement in ***Air Canada***, although factually very different, raises an interesting consideration in this case in that third parties have relied on the Tribunal's Consent Order. I am not unmindful that in the present proceedings Smit has not entered into any formal arrangements with Washington et al. for the purchase of the divestiture package. Nor is it certain, assuming the consent variation application fails and the Consent Order is folly implemented, that Smit would ultimately be the purchaser of the divestiture package. However, it is clear that Smit has, presumably at some expense, investigated the possibility of competing in the relevant market by purchasing the divestiture package and has tendered a bid for the divestiture package.

The Tribunal cannot overlook the fact that Smit has taken the course of action it has in reliance, at least in part, on the divestiture required by the Tribunal through the Consent Order. Indeed, it was clearly the intention of the parties to the Consent Order in drafting the remedy they did that third parties would rely on the provisions of the Consent Order. The success of the remedy which the parties submitted to the Tribunal in January 1997 as being necessary to eliminate the substantial lessening of competition is dependent on the willingness of third parties to come forward, to investigate the viability of the divestiture package and to bid on that package. This is precisely what Smit has done.

The parties now come before the Tribunal with the consent variation application submitting that it is no longer necessary that Washington et al. sell the divestiture package and that the Consent Order should be varied to eliminate this requirement. Such an outcome is contemplated by section 106 of the Act. This does not, however, alter the fact that bidders such as Smit have acted in reliance

on the strength of an existing Tribunal order. The Tribunal can simply not take the position that although it intends that third parties take a particular course of action on the strength of its orders, if those orders are subject to changes such that course of conduct would have been taken in vain, those third parties are not directly affected by those changes. Such a position would only compromise the effectiveness of ordering divestiture of assets as third parties would be less willing to come forward as potential purchasers.

For these reasons I am satisfied that Smit's position as a potential competitor and its reliance in taking the course of action it did on the Tribunal's Consent Order are sufficient to ground a finding that Smit is directly affected by the consent variation application. This is not to say that Smit should be granted leave to intervene in this proceeding simply to argue that because it has bid on the divestiture package the consent variation application should fail. Rather, Smit must demonstrate that it has unique and helpful submissions to make on a relevant issue before the Tribunal before it will be made an intervenor.

In light of this conclusion, it is not necessary for me to deal with Smit's second argument that it is directly affected by the consent variation application because there are business and legal obstacles which would prevent it from entering the market otherwise than by acquiring the divestiture package.

B. SMIT'S PROPOSED AREAS OF INTERVENTION

On a preliminary reading of the pleadings the consent variation application appears to raise one relatively narrow issue: does the entry of Tiger Tugz in Burrard Inlet eliminate the substantial lessening of competition caused by the Seaspan merger such that divestiture is no longer required? At a minimum, the areas on relation to which Smit proposes to focus its intervention must be relevant to this question and Smit's proposed representations must offer a unique perspective which is of some assistance to the Tribunal.

As a general proposition, Smit argues that given the Director's consent to the proposed variation it is obvious that only Smit, as an intervenor, would put before the Tribunal evidence that differs from that contained in the consent variation application. In this sense, it is argued, Smit's representations would assist the Tribunal and would advance a unique perspective on the matters in issue.

More specifically, Smit argues that as a potential entrant into the market there are three areas in relation to which it will provide relevant and unique representations to assist the Tribunal. First, Smit asserts that the consent variation application raises the issue of the impact of Tiger Tugz's entry into Burrard Inlet on the substantial lessening of competition caused by the Seaspan merger. In particular, Smit refers to the question of whether Tiger Tugz's entry into Burrard Inlet restores the pre-merger competitive situation in that market. This position is based on Smit's assertion that prior to the Seaspan merger Rivtow was a potential entrant in Burrard Inlet as it carried on operations in

neighboring ports, including New Westminister. The argument seems to be that Rivtow's entrance in Burrard Inlet through Tiger Tugz means that there is no longer a *potential* entrant into Burrard Inlet and that this raises competitive concerns.

The impact of Tiger Tugz's entry on the level of competition in the relevant market is precisely the issue before the Tribunal. There is no question, therefore, as to the relevance of this aspect of Smit's proposed intervention. What Smit is unable to satisfy the Tribunal of, though, is that it is uniquely positioned to provide evidence or representations which will assist the Tribunal in determining this issue.

In arguing Smit's request, counsel asserted that the facts upon which the parties rely to demonstrate the strength of Tiger Tugz's entry are not particularly persuasive of the position that the substantial lessening of competition has been eliminated. He further argued that the implication of the Director's consent to the proposed variation is that the only evidence which will be placed before the Tribunal on the question of Tiger Tugz's impact on the relevant market is that which the parties have already put before the Tribunal. The basis for Smit's proposed intervention on this point appears to be that the effect of Tiger Tugz's entry into the market is a question of fact that will have to be determined by investigation and that as an intervenor in these proceedings, Smit would undertake that investigation and would put before the Tribunal evidence and perhaps expert opinions which differ from what the parties have submitted.

The difficulty with Smit's position is that it is essentially asking the Tribunal for leave to replicate the investigation into this matter which has already been undertaken by the Director. The mere fact of the Director's consent to a proposed variation does not in itself create an evidentiary void which must be filled by an intervenor. It is the Director's responsibility as a representative of the public interest to investigate the proposed variation and to determine whether or not it should be opposed. The Director has used the authority given to him under the Act to investigate the impact of Tiger Tugz's entry and he has concluded that the variation will not compromise the level of competition in the relevant market. This should not be taken as an indication that the Tribunal will accept without question the Director's conclusions. That is far from the case. If a potential intervenor were to come forward and satisfy the Tribunal that it had some unique knowledge of the matters at issue which would provide the Tribunal with a perspective different than the Director's, the Tribunal would be most interested. However, in this case Smit has not satisfied the Tribunal that it has any unique perspective nor any facts of assistance on the question of the impact of Tiger Tugz's entry in Burrard Inlet. There is no basis to allow the intervention on this point.

Particular attention must be paid to one argument advanced by Smit. Relying on subsection 27(1) of the *Competition Tribunal Rules* counsel for Smit argued that an applicant for leave to intervene is not required to file all the evidence on which it intends to rely if leave is granted:

> **A request pursuant to subsection 9(3) of the *Competition Tribunal Act* for leave to intervene shall be made by**
>
> **(a) serving on each of the parties a request for leave to intervene and an affidavit setting out the facts on which the request is based...**

I agree with counsel for Smit that that is not the intention of paragraph 27(1)(a). However, it is not sufficient for an applicant for leave to intervene to merely come before the Tribunal indicating that it believes that there are certain areas in relation to which it expects to be able to make representations and that it expects that through an investigation it will uncover the facts which will support those representations. At the very least a proposed intervenor has to satisfy the Tribunal that it is in a unique position to make those representations and that it has some facts to present without conducting a fishing expedition. Smit has not done so.

The second issue in relation to which Smit asserts it will provide relevant and unique representations and evidence is on the impact that Tiger Tugz's entry will have in Roberts Bank. Smit argues that there is presently no competition for ship berthing services in Roberts Bank and that this lack of competition will persist if the consent variation application is successful. Additionally, Smit seeks to intervene to address the competitive impact of the expansion of Roberts Bank with the construction of Delta Port, a new container facility. Smit argues that this issue is essentially "ignored" in the consent variation application.

The impact of the Seaspan merger on the existence of competition in Roberts Bank was certainly relevant to the Consent Order. Paragraph 10 of the Consent Order Impact Statement filed in support of the Consent Order clearly stated that the Seaspan merger removed competition in Roberts Bank. However, the elimination of competition in Roberts Bank as a result of the Seaspan merger was not the elimination of *actual* competition in that market. It is clear from paragraph 38 of

the Agreed Statement of Facts filed in the original proceedings that Seaspan is the sole competitor for ship berthing services in Roberts Bank:

> A development subsequent to the Seaspan Merger has altered the nature of possible entry into the Roberts Bank ship berthing market. In the Fall of 1995, a coalition of interested parties, including the Vancouver Port Corporation, issued a request for proposals regarding the provision of ship berthing services in Roberts Bank. The objective was to award one ship berthing company with a lease on the only tug basin at Roberts Bank, effectively, to designate one ship berthing company as the exclusive provider of ship berthing services at Roberts Bank for five years. The initiative was undertaken as a result of a desire on the part of the coalition to facilitate the application of competitive forces on the provision of ship berthing services at Roberts Bank. The request for proposals went to five specific companies only, Cates, Crowley Maritime, Foss Maritime, Rivtow and Seaspan. Cates and Seaspan responded to the request for proposals, Seaspan was the successful bidder.

In light of this situation, the Consent Order was not intended to eliminate Seaspan's position as exclusive provider of ship berthing services in Roberts Bank. However, as a result of the Seaspan merger, Cates was removed as a *potential* future competitor to Seaspan in that market. It was the elimination of this potential future competitor which the Consent Order was intended to remedy by creating a situation where the purchaser of the divestiture package would be a credible competitor for future business in Roberts Bank as is clear from paragraph 29 of the Consent Order Impact Statement. The relevant issue in the context of the consent variation application is whether Tiger Tugz represents a credible potential competitor for future business in Roberts Bank. Smit has provided the Tribunal with no indication that it has any useful evidence or unique representations to make on this issue.

The third area in relation to which Smit proposes to intervene is on the issue of the barriers to entry which would prevent it from entering the relevant market otherwise than by purchasing the divestiture package. This proposed area of intervention is simply not relevant to the issue before the Tribunal, namely, whether the entry of Tiger Tugz eliminates the substantial lessening of competition caused by the Seaspan merger. I agree with counsel for Washington et al. who argued that the real question in relation to barriers to entry is whether Tiger Tugz has been able to overcome existing barriers so as to become an effective and vigorous competitor in the relevant market. The significant barriers to entry involved in the relevant product and geographic markets were identified by the parties in paragraphs 15 and 16 of the Consent Order Impact Statement filed in support of the Consent Order. In the consent variation application the parties have addressed the issue of whether Tiger Tugz has overcome those barriers. Smit has not demonstrated that it has any relevant or unique representations to make on that question.

For these reasons, Smit's request for leave to intervene is denied. In accordance with subsection 82(2) of the Rules, the issues raised by Smit in its request will remain on the record and will be considered by the Tribunal in its assessment of the consent variation application.

DATED at Toronto, this 9th day of February, 1998.

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

(s) W.P. McKeown

W.P. McKeown