



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2013-052

Montreal Gateway
Terminals Partnership

v.

Minister of National Revenue

*Decision and reasons issued
Wednesday, February 18, 2015*

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DECISION 11

IN THE MATTER OF an appeal heard on October 20 and 21, 2014, pursuant to section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15;

AND IN THE MATTER OF a decision of the Minister of National Revenue, dated September 13, 2013, with respect to a notice of objection pursuant to section 81.17 of the *Excise Tax Act*.

BETWEEN

MONTREAL GATEWAY TERMINALS PARTNERSHIP

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION

The appeal is dismissed.

Daniel Petit
Daniel Petit
Presiding Member

Jason W. Downey
Jason W. Downey
Member

Jean Bédard
Jean Bédard
Member

Place of Hearing: Ottawa, Ontario
Dates of Hearing: October 20 and 21, 2014
Tribunal Members: Daniel Petit, Presiding Member
Jason W. Downey, Member
Jean Bédard, Member
Counsel for the Tribunal: Georges Bujold
Registrar Officer: Alexis Chénier

PARTICIPANTS:**Appellant**

Montreal Gateway Terminals Partnership

Counsel/RepresentativesNathalie Goyette
Laurie Beausoleil**Respondent**

Minister of National Revenue

Counsel/Representative

George Boyd Aitken

WITNESSES:Pat O'Leary
Managing Director
Liebherr Container Cranes Ltd.Daniel Boyer
Vice-President, Maintenance and Engineering
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Montreal Gateway Terminals Partnership (MGTP) pursuant to section 81.19 of the *Excise Tax Act*¹ from a decision of the Minister of National Revenue (the Minister) dated September 13, 2013, with respect to a notice of objection served pursuant to section 81.17 of the *Act*.
2. The issue is whether MGTP is entitled to a refund of the excise tax paid during the period from January 1 to December 31, 2010, in respect of the purchase of diesel fuel used to generate electricity to operate the electric motors of the rubber-tyred gantry cranes it uses in its truck or train loading and unloading operations at the Port of Montreal.

PROCEDURAL HISTORY

3. On January 24, 2011, MGTP filed with the Canada Revenue Agency, pursuant to paragraphs 23(8)(c) and 68.01(1)(b) of the *Act*, an application for a refund of the excise tax paid during the period from January 1 to December 31, 2010, in respect of diesel fuel. These provisions provide that diesel fuel for use in the generation of electricity is exempted from the excise tax that is generally payable on the purchase of diesel fuel, except where the electricity so generated is used primarily in the operation of a vehicle.
4. On March 30, 2011, the Canada Revenue Agency issued a notice of determination, pursuant to subsection 72(4) of the *Act*, rejecting the application for a refund in its entirety.
5. On June 28, 2011, MGTP served a notice of objection on the Minister, pursuant to section 81.17 of the *Act*. MGTP alleged that it was entitled to a payment equal to the amount of the tax it had paid in respect of the diesel fuel in question because it had been used to generate electricity which, pursuant to the *Act*, had not been used in the operation of a vehicle.
6. On September 13, 2013, the Minister issued a notice of decision rejecting the objection and confirming the refusal of the application for a refund in its entirety. The reasons in support of the decision specified that MGTP was not entitled to the refund claimed because the diesel fuel it had acquired during the period in question had been used in the generation of electricity, which had been used primarily in the operation of vehicles. According to the Minister, the diesel fuel purchased by MGTP had been used in the generation of electricity for the purpose of operating rubber-tyred gantry cranes, which, in fact, are vehicles within the meaning of the *Act*. Therefore, the Minister determined that the diesel fuel in question was not covered by the excise tax exemption provided in paragraph 23(8)(c) of the *Act*.
7. On December 6, 2013, MGTP appealed this decision to the Tribunal, pursuant to section 81.19 of the *Act*. The Tribunal held a public hearing in Ottawa, Ontario, on October 20 and 21, 2014, and heard the testimony of Mr. Pat O'Leary, Managing Director of Liebherr Container Cranes Ltd., by way of videoconference from Ireland, and Mr. Daniel Boyer, Vice-President, Maintenance and Engineering, at MGTP.

1. R.S.C., 1985, c. E-15 [*Act*].

STATUTORY FRAMEWORK

8. Subsection 23(1) of the *Act*, which provides for the imposition of an excise tax in certain circumstances, reads as follows:

23.(1) Subject to subsections (6) to (8), whenever goods mentioned in Schedule I are imported or are manufactured or produced in Canada and delivered to a purchaser of those goods, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this or any other law, an excise tax in respect of the goods at the applicable rate set out in the applicable section of that Schedule	23.(1) Sous réserve des paragraphes (6) à (8), lorsque les marchandises énumérées à l'annexe I sont importées au Canada, ou y sont fabriquées ou produites, puis livrées à leur acheteur, il est imposé, prélevé et perçu, outre les autres droits et taxes exigibles en vertu de la présente loi ou de toute autre loi, une taxe d'accise sur ces marchandises, calculée selon le taux applicable figurant à l'article concerné de cette annexe. [...]
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9. Section 9.1 of Schedule I of the *Act* mentions diesel fuel and provides the applicable tax rate.

10. Subsection 2(1) of the *Act* defines the term “diesel fuel” as follows:

“diesel fuel” includes any fuel oil that is suitable for use in internal combustion engines of the compression-ignition type, other than any such fuel oil that is intended for use and is actually used as heating oil.	« combustible diesel » S'entend notamment de toute huile combustible qui peut être utilisée dans les moteurs à combustion interne de type allumage par compression, à l'exception de toute huile combustible destinée à être utilisée et utilisée de fait comme huile à chauffage.
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11. Notwithstanding subsection 23(1) of the *Act*, paragraph 23(8)(c) indicates that the excise tax is not payable in certain cases. It provides as follows:

(8) The tax imposed under subsection (1) is not payable in the case of ... (c) diesel fuel for use in the generation of electricity, except where the electricity so generated is used primarily in the operation of a vehicle.	(8) La taxe imposée en vertu du paragraphe (1) n'est pas exigible : [...] c) dans le cas de diesel fuel devant servir à la production d'électricité, sauf lorsque l'électricité ainsi produite est principalement utilisée pour faire fonctionner un véhicule.
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[Emphasis added]

12. According to section 68.01 of the *Act*, some persons, purchasers and vendors, may apply for refunds of taxes already paid. However, certain conditions must be met in order for the payment to be made.

13. Paragraph 68.01(1)(b) of the *Act* indicates that if the excise tax has been paid in respect of diesel fuel, the Minister may pay an amount equal to the amount of the excise tax paid to a purchaser who uses the diesel fuel to generate electricity, except if the electricity so generated is used primarily in the operation of a vehicle. Paragraph 68.01(1)(b) reads as follows:

68.01(1) If tax under this Act has been paid in respect of diesel fuel, the Minister may pay an amount equal to the amount of that tax

(a) in the case where a vendor delivers the diesel fuel to a purchaser

(i) to the vendor, if the vendor applies for the payment, the purchaser certifies that the diesel fuel is for use exclusively as heating oil and the vendor reasonably believes that the purchaser will use it exclusively as heating oil,

(ii) to the purchaser, if the purchaser applies for the payment, the purchaser uses the diesel fuel as heating oil and no application in respect of the diesel fuel can be made by the vendor under subparagraph (i); or

(b) to a purchaser who applies for the payment and who uses the diesel fuel to generate electricity, except if the electricity so generated is used primarily in the operation of a vehicle.

68.01(1) Le ministre peut verser aux personnes ci-après qui en font la demande une somme égale au montant de toute taxe prévue par la présente loi qui a été payée relativement à du combustible diesel:

a) dans le cas où le combustible est livré à l'acheteur par le vendeur :

(i) le vendeur, si l'acheteur atteste que le combustible est destiné à être utilisé exclusivement comme huile de chauffage et si le vendeur est fondé à croire que l'acheteur l'utilisera exclusivement à ce titre,

(ii) l'acheteur, s'il utilise le combustible comme huile de chauffage et qu'aucune demande relative au combustible ne peut être faite par le vendeur visé au sous-alinéa (i);

b) dans le cas où le combustible est utilisé par l'acheteur pour produire de l'électricité, cet acheteur, sauf si l'électricité ainsi produite est principalement utilisée pour faire fonctionner un véhicule.

[Emphasis added]

14. Paragraph 68.01(3)(b) of the *Act* deals with the relevant deadlines to apply for such payments. It provides as follows:

(3) No payment shall be made under this section unless

...

(b) the purchaser described in subparagraph (1)(a)(ii), paragraph (1)(b) or subsection (2) applies for it within *two years* after the purchase.

(3) Les versements prévus au présent article ne sont effectués que si, selon le cas :

[...]

b) l'acheteur visé au sous-alinéa (1)a)(ii), à l'alinéa (1)b) ou au paragraphe (2) en fait la demande dans les *deux ans* suivant l'achat.

[Emphasis added]

15. Moreover, subsection 68.01(4) of the *Act* states that the Minister must be satisfied that all the conditions for the payment have been met before making a payment. It provides as follows:

(4) The Minister is not required to make a payment under this section unless the Minister is satisfied that all the conditions for the payment have been met.

(4) Le ministre n'est pas tenu de faire un versement prévu au présent article tant qu'il n'est pas convaincu que les conditions du versement sont réunies.

16. In this case, the Tribunal must determine whether, pursuant to these provisions, MGTP is entitled to the "payment" (i.e. a refund) of an amount equal to the excise tax amounts it has already paid in respect of the diesel fuel purchased between January 1 and December 31, 2010, and used to generate electricity to supply the gantry cranes in question, or if the Minister correctly decided to collect the excise tax on this diesel fuel.

TRIBUNAL'S ANALYSIS

17. The parties do not contest the fact that MGTP's application for a refund pertains to the excise tax it paid in respect of "diesel fuel", within the meaning of subsection 2(1) of the *Act*, and that this was done by the "purchaser" within *two years* after the purchase of this fuel. The parties also agree that the diesel fuel purchased by MGTP was used to supply the generator built into each of the gantry cranes in question that generates the electricity necessary to operate the electric motors, which themselves are an integral part of the gantry cranes.² In his testimony, Mr. Boyer confirmed that the diesel fuel in question is indeed used to generate electricity to run the gantry cranes that MGTP uses in the operation of its business.³

18. Therefore, it is not contested that the diesel fuel in question was used by MGTP to generate electricity and that this electricity was used in closed circuit for the sole purpose of operating the gantry cranes in question.

19. The only issue that remains is, therefore, whether a rubber-tyred gantry crane, such as those used by MGTP in its truck or train loading and unloading activities at the Port of Montreal (hereinafter called Gantry), is a "vehicle" within the meaning of paragraph 23(8)(c) of the *Act*.

20. Indeed, the *Act* provides that diesel fuel is subject to the excise tax, except if it is used to generate electricity. However, this exemption does not apply if the electricity generated by the diesel fuel is used primarily in the operation of a vehicle. Given that the parties admit that the other conditions for the application of paragraph 23(8)(c) of the *Act* are met, the Tribunal's decision on the nature of the Gantry will thus determine whether the diesel fuel in question is tax-exempt and, therefore, whether MGTP is entitled to a "payment" pursuant to subsection 68.01(1).

21. If the Gantry is a vehicle, as the Minister determined, MGTP will not be entitled to benefit from the excise tax exemption for diesel used in the generation of electricity. Should the Tribunal, however, find that the Gantry is not a vehicle within the meaning of the *Act*, then MGTP will be entitled to the excise tax exemption on the diesel fuel used in the generation of electricity for purposes *other than* primarily to operate a vehicle. In this case the excise tax collected on this diesel fuel would not be payable pursuant to paragraph 23(8)(c) of the *Act*.

22. Before settling this sole issue, which was the subject matter of a debate in this appeal, it is appropriate to summarize the arguments of the parties regarding the nature of the Gantry.

Positions of the Parties

23. MGTP submitted that the Gantry is not a vehicle for the following reasons:

- The Federal Court determined in *Canada (Minister of National Revenue) v. Cast Terminals Inc.*⁴ that the question of what constitutes a vehicle within the meaning of paragraph 28(3)(c) of the *Act* must be resolved according to the ordinary meaning ascribed by dictionary definitions to the words "vehicle" and "objective criteria" (such as the manufacturer's technical specifications).

2. Exhibit AP-2013-052-04A at para. 16, Vol. 1A; Exhibit AP-2013-052-06A at para. 18, Vol. 1A.

3. *Transcript of Public Hearing*, Vol. 2, 21 October 2014, at 156-59.

4. 2003 FCT 535 (CanLII) [*Cast Terminals*].

- In light of the definitions (taken from the 2014 edition of *Le Petit Robert* dictionary) of the words “véhicule” (vehicle), “transporter” (to transport), “transport” (transport), “portique” (Gantry), “appareil” (apparatus) and “grue” (crane), the Gantry is not a vehicle but rather a handling apparatus or machine, because:
 - The only function of the Gantry is to lift containers vertically. Although it has wheels, they are only used to position the Gantry so that it can perform lifting tasks and not for the transportation of persons or goods;
 - The Gantry does not exhibit any of the characteristics of vehicles given as examples in *Le Petit Robert* (it has no transmission, no steering wheel or brake or accelerator pedals, and only has limited mobility).
- The consideration of objective criteria confirms that the Gantry cannot be perceived as a vehicle. In this regard, contrary to the machines at issue in *Cast Terminals*, the Gantry can be used only for lifting and lowering containers. The operating manual supplied by the manufacturer indicates that the Gantry is designed exclusively for vertical lifting and that the manufacturer accepts no responsibility for any use of the Gantry for other purposes, e.g. to pull and move loads. Moreover, due to its size and structure, the Gantry has very little mobility. It would be counterproductive, and at the operator’s risk, to use it for purposes other than straightforward handling.
- The jurisprudence also recognizes that the expression “means of transportation” means a vehicle that not only is capable of moving from point to point, but is also designed to transport goods or passengers during this same action.⁵ According to this logic, the verb “to transport” used in the definition of the term “vehicle” means more than the mere capacity for a machine to lift an object with a spreader beam and move it a “very short distance” to put this object down.

24. The Minister submitted that the application of the interpretation of the term “vehicle” by the Federal Court in *Cast Terminals* to the facts of this appeal supports the conclusion that the Gantry is indeed a vehicle within the meaning of paragraph 23(8)(c) of the *Act*. According to the Minister, the Gantry is similar to the machines involved in *Cast Terminals*, namely, a “LeTro-porter” front-end loader, due to the fact that it is also used to transport or move containers from place to place.

25. Moreover, the Federal Court indicated that, in order to determine whether or not a device is a vehicle, it is necessary to examine the objective criteria in question and not the use that may be made of it. In this case, in the Minister’s opinion, the examination of the design features and the functionality of the Gantry confirms that it is a vehicle, for all intents and purposes:

- The Gantry has wheels that can move forward, move in reverse and turn as desired, even when it is lifting a container. The evidence from the manufacturer, Liebherr Container Cranes Ltd., indicates that the Gantry can travel at a speed of 130 m/min (7.8 km/h) without a load and 70 m/min (4.2 km/h) with a load, that it is designed to move with or without a load, that it can change direction, that it is very stable when it moves a load, and that it is operated by a driver.⁶

5. In support of this argument, MGTP referred to *Seaspan International Ltd. v. Canada*, [1994] 1 FC 524 (F.C.) [*Seaspan*]; *General Supply Co. of Canada Ltd. v. M.N.R.* [1954] Ex. C.R. 340; *Magnatrim Equipment Ltd. v. M.N.R. (Customs and Excise)*, 18 C.E.R. 13.

6. Exhibit AP-2013-052-06A, Tab 4, Vol. 1A; Exhibit AP-2013-052-11A, Tab 9, Vol. 1A.

- Contrary to MGTP's allegations, the operating manual in no way specifies that the Gantry cannot move with a load and that its function is limited to vertical lifting of containers. This manual also indicates that the Gantry is designed for gantry travel (i.e. movement of the entire structure) with a maximum load of 40.6 tonnes.⁷
- In any event, the mere movement of lifting or lowering a container, which by MGTP's admission is the main function of the Gantry, is inherently a way of "transporting" goods, and this is sufficient to qualify the Gantry as a vehicle. Moreover, the Federal Court indicated in *Cast Terminals* that any distinction between lifting and lowering a container, on the one hand, and transporting a container, on the other hand, is artificial.
- The presence of elements such as a transmission, a steering wheel and brake or accelerator pedals are not essential for a device to be considered a vehicle. Therefore, these criteria are not conclusive in the analysis of the issue.⁸

26. Finally, the Minister submitted that the jurisprudence clearly establish that the term "vehicle" must be interpreted broadly within the context of paragraph 23(8)(c) of the *Act* and that the ordinary meaning of the term does not impose a minimum speed or travelling distance threshold.

Tribunal's Assessment

27. MGTP submitted that the Gantry is not a vehicle within the meaning of the *Act* and acknowledged that it bears the burden of proof in this instance.⁹ Indeed, MGTP acknowledged that in order to obtain the benefit of the exemption provided in the *Act*, it must prove, on a balance of probabilities, that the Gantry is not a vehicle, considering the jurisprudence of higher courts, which effectively binds the Tribunal. Indeed, the application of the *stare decisis* principle requires the Tribunal to follow the interpretation already given by the Federal Court to the term "vehicle" in the context of paragraph 23(8)(c) of the *Act*.

28. In this regard, what emerges from the Federal Court decision in *Cast Terminals*, the most recent decision regarding the interpretation of the term "vehicle" for the purposes of the *Act*, is that the concept of transportation of persons or goods is central to determining what is a "vehicle". In other words, a vehicle is characterized by its ability to transport or move something from place to place.

29. To determine whether the Gantry is a vehicle according to the interpretation given in *Cast Terminals*, the Tribunal must examine its design features and some objective criteria regarding its functionality and determine whether it is designed to transport containers from place to place. In this regard, the Tribunal notes that, in this decision, the Federal Court extended the concept of transport to the unique function of lifting or lowering an object.¹⁰ It therefore arises from this decision that if the evidence on record reveals that the Gantry is designed for transportation and that it is used for transportation within the meaning given to that term by the Federal Court, the Tribunal must then conclude that it is a vehicle within the meaning of paragraph 23(8)(c) of the *Act*.

7. Exhibit AP-2013-052-11A, Tab 9 at 7, Vol. 1.

8. In support of this argument, in addition to *Cast Terminals*, the Minister referred to *Seaspan and Westar Mining Ltd. v. Canada*, [1990] 2 CTC 547 [*Westar*] (affirmed by the Federal Court of Appeal, *Westar Mining Ltd. v. Canada*, 1991 CarswellNat 489, [1991] 2 CTC 70 No. 1).

9. *Transcript of Public Hearing*, Vol. 1, 20 October 2014, at 7.

10. *Cast Terminals* at para. 92.

30. MGTP described the Gantry used in its terminals as a high rectangular structure that can be positioned above containers stored in stacks. It is composed primarily of four long vertical steel beams, joined at the base of each side by shorter beams, and at the top by long longitudinal beams. A lifting device composed of cables and a spreader beam, to which the containers are hooked, is fastened to the longitudinal beams.

31. The movements of this device are restricted to the vertical and longitudinal axes of the Gantry. However, the Gantry is equipped with wheels, allowing its entire structure to be moved for correct positioning above the desired stack of containers. The wheels also allow a container to be aligned perfectly with the platform of a truck before lifting or lowering it by means of the lifting device.¹¹

32. MGTP filed photographs of the Gantry and a video showing how it is used, which corroborate this description.¹² The evidence, including the testimony of Mr. Pat O’Leary and Mr. Daniel Boyer, also suggests that the Gantry can move in a straight line while loaded with a container, all along a reinforced concrete runway up to 400 metres long, at the centre of which several stacks of containers may be aligned in a row.¹³ A stack of containers is described as a block with a maximum width of six containers and a maximum height of five containers.

33. Therefore, the Gantry is designed to be able to transport or move a container from a given stack to another location further up or down on the same runway or along a row of stacks. In this regard, Mr. Boyer even confirmed that the Gantry has the ability to move over a certain distance and at a reduced speed with a load to set this load “aside” [translation] on the same runway, which he described as a “riser” [translation] or a “storage area” [translation].¹⁴ Although Mr. Boyer indicated that it would not be practical to move a container from one stack of containers to another located at the other end of the runway, because this would take an enormous amount of time, the evidence shows that the Gantry nonetheless is able to perform this operation.

34. Moreover, the Gantry is certainly used to move containers a short distance to deposit them, at least temporarily, next to a given stack of containers or on another stack. In this regard, Mr. Boyer explained that sometimes they must access a container stored at the bottom of a stack to load it on a truck. Also according to Mr. Boyer, the Gantry is then used to lift containers stored on top of the desired container and move them, one at a time, on top of another stack located within the same runway or on the ground.¹⁵ Consequently, the fact that the Gantry has the ability and is actually used to transport or move containers from place to place in a given storage area has been clearly demonstrated.

35. Moreover, the two witnesses stated that the Gantry can change direction, if necessary, and that its wheels can be turned at a 90-degree angle. It can thus leave the runway on which it is located and move in the port area to position itself on a new runway, as required.¹⁶ It can also move outside the runways to get to

11. Exhibit AP-2013-052-04A at paras. 5-13, Vol. 1A.

12. Exhibit AP-2013-052-04A, Tab 1, Vol. 1A; Exhibit AP-2013-052-25A, Tabs 16, 17, Vol. 1A; Exhibit AP-2013-052-A-01.

13. *Transcript of Public Hearing*, Vol. 1, 20 October 2014, at 35-38, 45-46, 96; Vol. 2, 21 October 2014, at 139-40, 161-64.

14. *Transcript of Public Hearing*, Vol. 2, 21 October 2014, at 196-97.

15. *Ibid.* at 163-64.

16. *Transcript of Public Hearing*, Vol. 1, 20 October 2014, at 47-51, 98-99, 108-10; Vol. 2, 21 October 2014, at 142-46, 160-61.

a workshop or maintenance area, if major repairs must be performed.¹⁷ Although the displacement of the Gantry for these purposes must be made without a load, it nonetheless proves that the Gantry is indeed a mobile unit.

36. MGTP submitted that the functions of the Gantry are clearly limited to the role of lifting and lowering containers. It insists on the fact that the Gantry is used, first and foremost, to lift and lower containers vertically in order to store them in stacks or load them onto a truck. According to MGTP, stacking or piling containers is the primary function of the Gantry, and not their transportation; it cannot be considered a vehicle.¹⁸

37. However, as discussed above, the Federal Court has considered the action of lifting and lowering to be the same as moving an object, namely, a way of transporting it. Moreover, in this case, the Gantry is also used to move or transport containers from place to place in a storage area. Therefore, there is no doubt that the Gantry is also designed to transport objects from one place to another and has the ability to do so.

38. Although the Gantry cannot do so over as long a distance as the “LeTro-porter” at issue in *Cast Terminals*, it nonetheless remains that its functionalities and design features include the transportation or movement of containers not only from top to bottom, but horizontally or longitudinally. In the Tribunal’s opinion, the mobility of the Gantry and its ability to transport containers from place to place are important features of this equipment, which strongly suggest that it is a vehicle within the meaning of paragraph 23(8)(c) of the *Act*, as previously determined by the Federal Court.

39. Moreover, the jurisprudence does not indicate that, to determine whether a device is a vehicle for the purposes of the *Act*, its primary function must be examined. That the Gantry is designed primarily to perform container stacking or piling operations, as MGTP submitted, does not preclude a design that also allows it to transport or move them from place to place, if necessary. In this regard, the Tribunal accepts the Minister’s argument that neither the ordinary meaning of the word “vehicle” nor the applicable jurisprudence imposes a minimum distance or travelling speed threshold for a device to be considered a vehicle. It is instead its ability to move from place to place with a load, and thus transport an object, that is important.

40. Therefore, the arguments of MGTP and Mr. Boyer’s testimony, in an attempt to limit the mobility of the Gantry to matters of positioning and occasional or exceptional situations,¹⁹ are insufficient to convince the Tribunal that the Gantry is not a vehicle under paragraph 23(8)(c) of the *Act*. Indeed, they confirm that the Gantry is designed for gantry travel, albeit slowly, from one point to another, with a load, and that one of its functions is, therefore, to transport goods over short distances.

41. Moreover, MGTP acknowledged that the Gantry is equipped with wheels so that it can be moved both at the operator’s will and as needed according to the circumstances at hand as well as for the purpose of being positioned correctly before lifting or lowering a container.²⁰ In oral argument, counsel for MGTP even indicated that “. . . sometimes a container will be *transported* [by the Gantry] over a very, very short

17. *Transcript of Public Hearing*, Vol. 1, 20 October 2014, at 52; Vol. 2, 21 October 2014, at 160-61, 200-201.

18. Exhibit AP-2013-052-04A at paras. 8-9, Vol. 1A; *Transcript of Public Hearing*, Vol. 2, 21 October 2014, at 253-58.

19. Exhibit AP-2013-052-04A at paras. 10-12, Vol. 1A; *Transcript of Public Hearing*, Vol. 2, 21 October 2014, at 162-64, 256-58.

20. Exhibit AP-2013-052-04A at paras. 11-12, Vol. 1A; *Transcript of Public Hearing*, Vol. 2, 21 October 2014, at 253, 257-59.

distance . . .” [emphasis added, translation].²¹ No matter how minimal or infrequent these movements may be, there is certainly an admission by MGTP of the transportation ability of the Gantry and its effective use to move or transport containers along a given runway.

42. Furthermore, according to documents from the design company filed as evidence by the Minister and not contradicted by MGTP, the Gantry can move, in gantry travel, at a certain speed, whether loaded or unloaded, at varying speeds depending on the situation.²² It is certainly conceivable that a Gantry of this size cannot move very quickly within the restricted area of a port terminal. However, the fact remains that it is able to move at a certain speed with a load.²³ The speed of travel, although relatively low, has no impact here, because it is in the very nature of the Gantry (a 130-tonne mammoth over 23 metres high²⁴) to be unable to transport or move containers at very high speed. The determining factor is rather that the Gantry is designed to move and to transport containers, either in a precise way to position them above a stack, or over a wider area around the stack, or to go elsewhere in the port terminal to perform similar work.

43. In his testimony, Mr. Pat O’Leary explained that the Gantry also has other features specific to vehicles. For example, it is equipped with a GPS,²⁵ which makes it possible to control its movements and to ensure that it stays on a given runway. Moreover, the Gantry is equipped with flashing lights and a sound system that emits an alarm during gantry travel.²⁶ These safety devices would not be necessary were the Gantry not designed to travel or transport containers over a certain distance.

44. MGTP also submitted that the Gantry is like a machine with no operator, because it has no transmission, steering wheel, brake pedal or accelerator pedal. Yet the documents produced by the designer and filed as evidence by the Minister, as well as the Gantry operating manual, contradict this assertion.²⁷

45. These documents demonstrate clearly that there is indeed a driver aboard and that this driver controls the movements of the Gantry by means of a system of joysticks, or control levers, and push buttons.

46. The witnesses also explained that the driver can turn the wheels of the Gantry to move it in order to change runways, and that the driver can set it to manual mode so that its movements are not controlled by the GPS.²⁸

47. Therefore, the Tribunal concludes that the action of the electric motors, which are powered by the generator by means of diesel fuel, is controlled by a driver, who can move the wheels of the Gantry forward and in reverse, turn and stop them, and also, of course, lift containers. In addition, the Tribunal notes that the driver’s presence must not be viewed as an essential factor in the definition of a vehicle, as determined by the Federal Court.

21. *Transcript of Public Hearing*, Vol. 2, 21 October 2014, at 260.

22. Exhibit AP-2013-052-06A at 25, Vol. 1A.

23. *Transcript of Public Hearing*, Vol. 2, 21 October 2014, at 152.

24. *Transcript of Public Hearing*, Vol. 1, 20 October 2014, at 34.

25. *Ibid.* at 72-73, 93.

26. *Ibid.* at 74.

27. Exhibit AP-2013-052-06A, Tab 4 at 17-18, Tab 9 at 58-59, Vol. 1A; Exhibit AP-2013-052-11A, Tab 9 at 37-43, Vol. 1A.

28. *Transcript of Public Hearing*, Vol. 1, 20 October 2014, at 71-72; *Transcript of Public Hearing*, Vol. 2, 21 October 2014, at 174-75.

48. To summarize, the fact that the Gantry does not move much is merely an operational decision, in view of the constraints due to its size and the location where it is used, but this does not prevent the Gantry from moving or from having been designed for this purpose.

49. Moreover, the presence of reinforced runways at the terminals indicates, without a doubt, that these facilities enable the Gantry to travel with a load over a certain distance.²⁹ If the Gantry did not transport containers from place to place, it would not be necessary to reinforce the ground with concrete so as to avoid the risk of the ground caving in. The evidence also indicates that the Gantry could actually move anywhere if the ground of the terminal were reinforced throughout or able to support it.³⁰

50. MGTP also submitted that the Gantry can be distinguished from the “LeTro-porter” at issue in *Cast Terminals* by the distance that these two machines can travel. According to MGTP, the Gantry is undeniably a much less mobile piece of equipment than the “LeTro-porter” and cannot transport containers over a similar long distance. However, the travelling distance is not a determining factor in itself and, in any case, it must be considered in relation to the type of machine in question. In the Tribunal’s opinion, the Gantry can travel over a relatively long distance, taking into consideration its enormous size and the locations where it is used.

51. Noting that the definition of the term “vehicle” primarily refers to the transportation of goods, MGTP also further alleged that it is not a transportation business but a handling business, meaning that it does not transport goods in the course of its activities.

52. The French term “*manutention*” (handling) is defined as follows: “Manipulation, manual or mechanical movement of goods, for the purpose of storage, shipping and sale” [translation].³¹ The Tribunal notes that this definition includes the concept of mechanical movement of goods. As such, it overlaps with the concept of transportation of goods held by the Federal Court in *Cast Terminals* as the primary factor that makes a device a vehicle. The operation of a handling business does not inherently exclude the transportation of goods from handling activities.

53. Furthermore, nothing in the decision in *Cast Terminals* indicates that the plaintiff company operated a transportation business.³² This did not prevent the Federal Court from concluding that the “LeTro-porter” that company used in the Port of Montreal is a vehicle within the meaning of paragraph 23(8)(c) of the *Act*. In this instance, the fact that MGTP operates a handling business does not, in the Tribunal’s view, prevent it from concluding that the Gantry is a vehicle.

54. In conclusion, the fundamental issue is whether the Gantry can move with a load or transport goods from one place to another. The Tribunal concludes that the answer to this question is clearly yes.³³ The evidence also shows that the Gantry can travel at a certain speed, commensurate with its structure and size and the location where it was designed to be used (a terminal in a port).³⁴

29. *Transcript of Public Hearing*, Vol. 1, 20 October 2014, at 35; *Transcript of Public Hearing*, Vol. 2, 21 October 2014, at 139-40.

30. *Transcript of Public Hearing*, Vol. 1, 20 October 2014, at 106-07.

31. *Le Petit Robert*, 2009, s.v. « *manutention* ».

32. In fact, MGTP is the entity that succeeded to Cast Terminals Inc. and which now operates this same business at the Port of Montreal. *Transcript of Public Hearing*, Vol. 2, 21 October 2014, at 125-26.

33. *Transcript of Public Hearing*, Vol. 1, 20 October 2014, at 45-47; Vol. 2, 21 October 2014, at 154, 160-64.

34. Exhibit AP-2013-052-11A, Tab 9 at 7, Vol. 1A.

55. Therefore, we have, as factual evidence, a Gantry that can travel under the control of a driver, by means of a generator running on diesel fuel that generates electricity to activate the electric motors propelling its wheels.³⁵

56. On the basis of the preponderant evidence, the Tribunal therefore finds that the Gantry is a vehicle within the meaning of paragraph 23(8)(c) of the *Act*. Indeed, according to the definition of the term “vehicle”³⁶ and the interpretation given to that term by the Federal Court, this is a device equipped with four sets of four wheels each, which can be operated by a driver and which can transport goods (containers). The wheels are activated (propelled) by electric motors, which themselves are connected to a generator supplied by diesel fuel for the purpose of producing the electricity required.³⁷

57. In light of the foregoing, the Tribunal concludes that the electricity generated by means of the diesel fuel purchased by MGTP was used in the operation of a vehicle. Therefore, the diesel fuel purchased by MGTP that was used in the operation of its rubber-tyred gantry cranes at its terminals at the Port of Montreal cannot benefit from the exemption provided in paragraph 23(8)(c) of the *Act*.

DECISION

58. For the foregoing reasons, the appeal is dismissed.

Daniel Petit
Daniel Petit
Presiding Member

Jason W. Downey
Jason W. Downey
Member

Jean Bédard
Jean Bédard
Member

35. *Transcript of Public Hearing*, Vol. 2, 21 October 2014, at 156-59.

36. According to *Le Petit Robert*, “. . . wheeled machine or machine with a propulsion system, used to transport persons or goods . . .” [translation]. Exhibit AP-2013-052-04A, Tab H, Vol. 1A.

37. *Transcript of Public Hearing*, Vol. 2, 21 October 2014, at 202.