



Reference: *Commissioner of Competition v. Canada Pipe Company*, 2004 Comp. Trib. 5
File no.: CT2002006
Registry document no.: 0069

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to sections 79 and 77 of the *Competition Act*;

AND IN THE MATTER OF certain practices by Canada Pipe Company Ltd. through its Bibby Ste-Croix Division.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Canada Pipe Company Ltd.
(respondent)



Date of hearing: 20040303
Member: Blanchard J. (presiding)
Date of Reasons and Order: 20040310
Reasons and Order signed by: Blanchard J.

**REASONS AND ORDER REGARDING COMMISSIONER'S MOTION TO QUASH
SUBPOENAE *DUCES TECUM* DELIVERED TO WITNESSES**

[1] The Commissioner of Competition (the “Commissioner”) brings a motion to set aside subpoenae for the production of documents properly issued by the Competition Tribunal (the “Tribunal”) on February 19, 2004, at the request of Canada Pipe Company Ltd. (“Canada Pipe”). These subpoenae direct all witnesses to produce

. . . any and all documents provided by you or your employer to the Commissioner of Competition prior to August 21, 2003, whether you did so voluntarily or pursuant to a Court Order, as well as any documents received by you or your employer from the Commissioner relating to this matter.

[2] This motion gives rise to the following issues:

(a) Is Canada Pipe’s entitlement to obtain production of relevant documents from third party witnesses *res judicata*?

(b) Should the subpoenae for the production of documents by third party witnesses issued by the Tribunal be set aside?

[3] The main point of contention between the parties is whether certain third party witnesses called by the Commissioner should be required to produce under the authority of a subpoena *duces tecum*, at the request of Canada Pipe, documents not relied on and otherwise not disclosed by the Commissioner. In my view, this question has not been determined in any pre-hearing ruling in this case. Previous motions in this case dealt only with the Commissioner’s pre-hearing disclosure obligation under the new *Competition Tribunal Rules*, SOR/94-290, (the “Rules”). Since the same question has not previously been decided, the doctrine of *res judicata* cannot apply.

[4] Having read the written submissions of the parties and having heard the parties I conclude that the motion should be granted and the subpoenae *duces tecum* delivered by Canada Pipe to the Commissioner’s witnesses will be quashed for the reasons set out below.

[5] The Federal Court of Canada has clearly stated that a broad, sweeping request for documents once a proceeding is underway is not an appropriate use of the subpoena *duces tecum*. In *Merck & Co. v. Apotex Inc.* (1998), 145 F.T.R. 303 at 306, Mackay J. held, after a review of the facts in that case and the request for production:

. . . . the party seeking documentation, by too broadly describing what is desired, may be seen to be fishing in hopes of finding information relevant to the issues that concern it. That is not an appropriate use of the subpoena. . . .

[6] The subpoenae at issue direct witnesses to produce any and all documents provided or received by the witnesses, or the witnesses’ employers, to and from the Commissioner prior to August 21, 2003. The subpoenae fail to limit the documents that must be produced and, in my view, are overly broad. In the circumstances of this case, where Canada Pipe attempted and

failed to obtain further production of documents and persons by way of a pre-hearing motion brought pursuant to paragraph 21(2)(d.1) of the Rules (see Reasons and Order Regarding Respondent's Motion for Examination of Persons and Documents Pursuant to Paragraph 21(2)(d.1) of the *Competition Tribunal Rules* and Regarding Scheduling Issues dated January 23, 2004, [2004] C.C.T.D. No. 2), such broadly framed subpoenae are tantamount to an abuse of the Tribunal's process effectively circumventing an earlier ruling of the Tribunal.

[7] In *Commissioner of Competition v. Canada Pipe Company* (2003) C.C.T.D. No. 24, I held at paragraph 68 that:

. . . the Rules provide a complete answer to questions concerning the disclosure obligations of the parties, which, in non-merger proceedings, is to list and produce for inspection all documents intended to be relied upon by the Commissioner during the hearing (paragraph 4.1(2)(a) and subsection 4.1(4) of the Rules). . .

The Rules have not since changed. It is axiomatic that documents not relied on by the Commissioner and which the Commissioner is not obligated to disclose pursuant to the disclosure obligations under the Rules, cannot be otherwise ordered produced at the hearing through the use of subpoenae *duces tecum*. Such a process would defeat the purpose and object of the recently amended Rules, which are to ensure that proceedings with respect to contested reviewable matters be dealt with as expeditiously and informally as possible while preserving fairness. In the present circumstances, to allow such broad subpoenae would lengthen the hearing considerably and would allow future respondents to simply argue that they should be entitled to disclosure of *all* documents by the Commissioner, as subpoenae *duces tecum* could be used to obtain these documents at the hearing. Allowing these subpoenae would also undermine the Tribunal's authority to oversee the evidentiary basis upon which its proceedings would be conducted, and would improperly extend the disclosure of documents beyond the reliance standard established by the Rules, and affirmed by the Tribunal.

[8] In the circumstances, Canada Pipe's intended use of the subpoenae *duces tecum* is inappropriate. Having failed to secure further production of documents through the pre-hearing rules governing disclosure, Canada Pipe cannot now obtain such disclosure through the use of subpoenae *duces tecum* during the hearing.

[9] Since the rendering of my January 23, 2004, decision denying further production of documents referred to above, there is no new material before me to establish a change in circumstances or to show that further production is desirable or warranted.

[10] These reasons are to be read solely with respect to the appropriateness of the subpoenae at issue and should not reflect on the propriety and scope of cross-examination.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[11] The Commissioner's motion is granted and the subpoenae *duces tecum* issued to the Commissioner's witnesses are quashed.

DATED at Ottawa this 10th day of March 2004.

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

(s) Edmond P. Blanchard

APPEARANCES:

For the applicant:

The Commissioner of Competition

Donald J. Rennie
Nicole D. Samson
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For the respondent:

Canada Pipe Company Ltd.

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James Doris
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