



CT-1996/002 – Doc # 176a

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 CP Containers (Bermuda) Limited acquired certain assets held by The Cast Group Limited and of the acquisition by 3041123 Canada Inc. of all the shares of Cast North America Inc. by way of agreements entered into between or among Royal Bank of Canada, The Cast Group Limited, 3041123 Canada Inc., CP Containers (Bermuda) Limited and Canadian Pacific Limited.

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

Canadian Pacific Limited  
Canada Maritime Limited  
CP Containers (Bermuda) Limited  
3041123 Canada Inc.  
Cast North America Inc.  
Royal Bank of Canada

Respondents

- and -

Montreal Port Corporation

Intervenor



**REASONS AND ORDER REGARDING FURTHER AND BETTER SUMMARIES**

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**Date of Pre-hearing Conference:**

August 7, 1997

**Member:**

McKeown J. (presiding)

**Counsel for the Applicant:**

**Director of Investigation and Research**

Robert S. Russell  
Adam F. Fanaki

**Counsel for the Respondents:**

**Canadian Pacific Limited  
Canada Maritime Limited  
CP Containers (Bermuda) Limited  
3041123 Canada Inc.  
Cast North America Inc.**

Jeffrey W. Galway  
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**Montreal Port Corporation**

Gil Rémillard

## COMPETITION TRIBUNAL

### REASONS AND ORDER REGARDING FURTHER AND BETTER SUMMARIES

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#### *The Director of Investigation and Research*

v.

#### *Canadian Pacific Limited et al.*

The Director of Investigation and Research («Director») produced to the respondents three summaries of the facts obtained by him during his inquiry into this matter. Canadian Pacific Limited («CP») has brought a motion for an order requiring the Director to produce a further and better version of each of the three summaries. In addition, CP seeks an order which would allow it to disclose the summaries to Raymond Miles, the President of CP Ships Holdings Inc.

The three summaries produced by the Director can be described as follows. The first summary is an aggregation of the facts contained in the transcripts of two examinations conducted by the Director pursuant to paragraph 11(1)(a) of the *Competition Act* («Act»). The Director has claimed public interest privilege over the transcripts themselves. The second summary is an aggregated summary of the facts obtained by the Director through his interviews with industry participants over which he claims public interest privilege. The third summary is an aggregation of the facts contained in documents over which the Director claims public interest privilege. The purpose of these summaries is to reveal to the respondents, to the extent possible, the factual information obtained by the Director without compromising the public interest privilege.

CP argues that the Director's summaries are deficient in three respects. First, CP asserts that in each of the three summaries, the Director has failed to attribute certain statements to the classes or categories of informants from which the facts were obtained. Second, it is argued that the Director has failed to provide a temporal context for a number of statements contained in the summaries. Finally, CP submits that many of the statements contained in the summaries are vague or incomplete. I will deal with each submission in turn.

### Improper Attribution

CP submits that it is especially important that the Director properly attribute the statements in his interview summary to categories of homogeneous interviewees given that many of the statements in that summary resemble less factual statements than they do opinions or views of industry participants. CP submits that, unlike empirical facts which can stand and be assessed on their own, the nature of the statements contained in the interview summary are such that, to be meaningful, CP must know what category of industry participants holds the views or opinions summarized.

At the outset of the interview summary, the Director has provided a list of the categories of persons with whom he conducted interviews. The summary then contains a number of point form statements under the heading «Summary of the Facts» which is followed by a narrative of 12 paragraphs under the heading «Factual Overview Based on Category of Interviewee». The narrative portion of the summary contains at least one paragraph dedicated to the information obtained from virtually each category of interviewee identified by the Director.

CP takes the position that two of the Director's categories are too broad, arguing that the Director should be required to further break them down. Further, CP submits that there is no paragraph in the narrative portion of the summary which corresponds to one of the broad categories listed by the Director and argues that the Director should be required to clarify whether any of the statements in the summary can be attributed to this category.

CP also submits that the Director should be required to disclose to it the number of interviews conducted in respect of each of the categories listed in the interview summary. CP asserts that this is necessary because many of the statements in the summary use phrases such as «the vast majority» or «the general view». Without knowing the number of interviewees, CP submits, it is unable to evaluate the weight or importance of these views or opinions.

Finally, CP asserts that there are a number of failures to properly attribute the sources of statements and information in the document summary. CP submits that it is entitled to know from which (properly defined) categories of informants the statements in the document summary are derived.

In my view, CP's request is not proper. The Tribunal has long recognized that there is a public interest in protecting the sources of information provided to the Director in the course of his inquiries. A practice has developed in Tribunal proceedings where the Director provides to the respondents summaries of the facts he has obtained. However, in order to protect the identity of sources, the Director has not been required to provide this information otherwise than in an aggregated form, as was made clear by Reed J. in *Southam*, the first case where summaries were provided by the Director:

It should be noted that the earlier order did not require summaries on an interview-by-interview basis; aggregated information was said to suffice<sup>1</sup>.

This is precisely what the Director has done in this case. However, to enhance the usefulness of the summaries, the Director has chosen to provide a list of the categories of interviewees from whom he has obtained this information. In my view, to require the Director to further break down his categories in the manner suggested by CP would very likely reveal or significantly narrow the possible sources of the information. This is clearly contrary to the intention of providing aggregated summaries of facts. Similarly, to require the Director to reveal the number of interviews he has conducted under each category of interviewee would potentially have the effect of revealing, or significantly compromising the secrecy of, the identities of those interviewees.

The purpose of the summaries is to disclose to the respondents the facts known to the Director. This information is apparent from the Director's summaries, even if the categories of sources are not as discrete or homogeneous as CP would like or if it is not perfectly clear that a given statement is derived from a certain category of interviewee. At this stage, CP need not know whose views are reflected in the summaries with any greater degree of certainty than has already been provided by the Director. This is consistent with the Tribunal's decision in Nielsen where it was held:

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<sup>1</sup>  
*Director of Investigation and Research v. Southam Inc.* (16 July 1991), CT9001/130, Order Regarding Disclosure of Summaries at 4, [1991] C.C.T.D. No. 21 (QL) (Comp. Trib.).

While it might be useful for the respondent to know what every individual that the Director spoke to had to say, because it would probably reduce the length of case preparation, whether or not such information is made available is primarily a matter of convenience; the nature of the issues are not such that a case depends on the views of a few industry participants. Should this ever be so, the respondent would undoubtedly know who the participants in question were<sup>2</sup>.

CP is entitled to know that the Director has been provided with an opinion or view on a relevant subject. With this opinion or view in hand, CP is able to prepare its case by determining whether there is an opposing view or opinion. In my view, it is not necessary at this time that CP be able to assess the weight or importance of the views or opinions included in the Director's summaries. If at the hearing of the application the Director chooses to rely on a view or opinion contained in the summary, he will have waived his privilege over the information and the source of the statement will have been revealed to the respondents in a timely fashion.

### Temporal Context

CP submits that many of the statements in the Director's summaries are made without any indication of the date or general time period to which they relate. CP takes the position that, particularly in the context of the issues relevant to this application such as pricing, a temporal context is necessary for the information contained in the summaries to have any meaning. CP appended to its memorandum of argument as schedule B what CP submits is a list of those statements found in the summaries which lack a temporal context. CP submits that, to the extent the Director is aware of the temporal context to which the statements in schedule B relate, that information should be provided.

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*Director of Investigation and Research v. A.C. Nielsen Co. of Canada* (22 September 1994), CT9401/82, Reasons and Order Regarding Matters Considered at Pre-hearing Conference on September 14, 1994 at 13, [1994] C.C.T.D. No.15 (QL) (Comp. Trib.).

The Director asserts that if the three summaries are read as a whole, as opposed to reading each summary as a discrete document, the temporal context of the statements contained in schedule B may be apparent from other information contained within the summaries. In response to the Director's position, CP argues that it should not be required to piece together the facts that the Director has provided in the three summaries when it is within the Director's ability to provide this information more clearly. I agree with CP's position. The summaries are not intended to be puzzles. The Director should provide the facts in his possession in as practical a manner as possible.

However, the Director did indicate that, in the interest of taking a practical approach to the summaries, he would provide additional facts within his knowledge which relate to the temporal context of the statements contained in schedule B to the extent that the temporal context is not clear from the information already provided or subject to public interest privilege.

In my view, the Director's approach to this issue is a reasonable one. The Director has agreed that in those instances where he takes the position that the temporal context of a particular statement is already clear, he will provide to the respondents the basis of his opinion. To the extent that there is a dispute between the parties on this issue, the respondents may move before the Tribunal for further clarification.

#### Vague or Incomplete Statements

The final concern raised by CP is that there are statements in the summaries which contain language which is vague or which appear to be missing information. Appended to CP's memorandum of argument as schedule C is a list of these statements taken from the three



summaries. For those statements which CP characterizes as being incomplete, it has included in schedule C an indication of the additional information which it seeks to obtain from the Director. CP submits that to the extent the Director is able to clarify or complete these statements he should be required to do so.

The Director submits that he is not required in his summaries to explain the statements made by other persons. Furthermore, the Director submits that some of the information which CP seeks, if provided, could disclose the identities of the sources of certain of the statements, which information is subject to public interest privilege.

However, the Director again indicated that he will provide the respondents with any facts which have not already been disclosed that are relevant to the statements set out in schedule C and, more particularly, to the specific questions raised by CP in respect of those statements, subject to any claims of privilege. Again, I am of the view that this approach is a reasonable solution to the concerns raised by CP. To the extent that there is a dispute between the parties about the adequacy of the information provided by the Director in relation to schedule C, the respondents may bring a motion before the Tribunal.

The final issue before me is whether CP should be permitted to disclose the summaries to Mr. Miles. Currently, under the Interim Confidentiality (Protective) Order and Reasons of the Tribunal dated May 2, 1997, the summaries may only be disclosed to counsel for the parties and to independent experts. However, the Director has agreed to CP's request that Mr. Miles be given access to the three summaries, subject to his signing a confidentiality agreement. I agree that Mr. Miles should be permitted to have access to the Director's summaries on those terms.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

1. CP's request that the Director be required to provide further information relating to the sources of the statements contained in the summaries and the number of sources interviewed is dismissed.
  
- 2.(1) Subject to subparagraph (2), the Director shall provide to the respondents all additional facts within his knowledge which relate to the temporal context of the statements contained in schedule B to CP's memorandum of argument on the motion which are not subject to a claim of privilege.  
  
(2) To the extent that the Director takes the position that the temporal context of a statement found in schedule B is clear from the information already contained in the summaries, the Director shall provide the respondents with the basis of that position.
  
3. The Director shall provide to the respondents all additional facts within his knowledge which are relevant to the statements found in schedule C to CP's memorandum of argument, subject to any claims of privilege.
  
4. Subject to his signing a confidentiality agreement, Mr. Raymond Miles is permitted to have access to the three summaries produced by the Director to the respondents.

DATED at Quebec, this 19<sup>th</sup> day of August, 1997.

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

(s) W.P. McKeown  
W.P. McKeown