



CT-1996/002 – Doc # 150c

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 FOR ORDER REGARDING DISCOVERY REPRESENTATIVE

Date of Pre-hearing Conference:

July 2, 1997

Member:

McKeown J. (presiding)

Counsel for the Applicant:

Director of Investigation and Research

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Counsel for the Respondents:

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

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COMPETITION TRIBUNAL

REASONS FOR ORDER REGARDING DISCOVERY REPRESENTATIVE

The Director of Investigation and Research

v.

Canadian Pacific Limited et al.

The following are my brief reasons for dismissing the motion by the Director of Investigation and Research ("Director") for discovery of some person other than M on behalf of Canadian Pacific Limited et al. ("CP") on certain issues. The Tribunal ruled at the pre-hearing conference on July 2, 1997 that the documents relating to the motion should be kept confidential and that the argument should be held in camera.

The Director submits that there is a potential for a conflict of interest between M and CP with respect to three issues on which the Director wishes to examine CP. For the purposes of these reasons, there is no need to describe the issues or to deal with their materiality to the merger application. The Director argues that M's involvement in the events in question and certain ramifications alleged to flow from that involvement raise the spectre that in answering questions on those issues, M will be speaking personally rather than as the *alter ego* of CP. The Director emphasizes that the question is not one of the credibility of M, but rather whether in asking questions of M, the Director will be hearing *from* CP about whether or not it acquiesced in or authorized the conduct involved and whether it will continue to take similar actions as part of its corporate strategy.

It must be emphasized that it is CP that has selected M to represent it on discovery and to bind it with his answers. Can there be a conflict for discovery purposes that is not alleged and, in fact, not recognized by the corporate examinee? CP argues that the Director's allegations regarding conflict of interest are "entirely misguided". CP also argues that the allegations are premature. Unless and until M says something that CP denies, there is no conflict and, far from anticipating such a denial, CP is putting M forward to bind it as the appropriate person to be examined on its behalf, and to give binding answers, with respect to *all* issues in this proceeding.¹

The Director relies on various cases dealing with conflict of interest between a corporation and a discovery representative. All of the cases involve situations where the examining party had, as of right, selected a particular representative to be examined on behalf of the corporation,² and thus to bind it, and the corporation sought to substitute a different person because it did not want the first named representative to represent and bind it. Since the court is reluctant to displace the right of the examining party to choose the representative of a corporation that it wishes to examine, the corporation in each case had to establish why the substitution was justified in the particular circumstances and why the examining party would not be prejudiced by the proposed alternative. The cases show that where there is a potential for a conflict of interest between the initially selected representative and the employer corporation, such that the corporation should not be represented by or bound by the answers of that person, another representative may be substituted.

¹ CP, of course, cannot arbitrarily "pick and choose" which of M's statements on discovery it wishes to adopt and which it wishes to deny.

² This is the case in a number of provincial jurisdictions, including, judging by the cases cited, New Brunswick and Ontario.

In one case, the person chosen by the examining party was the subject of criminal charges arising out of his employment. The court accepted that it would be an “embarrassment” to the corporation to have the individual as its *alter ego* on discovery, to have to provide him with documentation and co-operate with him and yet its officers would be compellable witnesses in the criminal trial against him.³

In another case, a corporation sued a bank for the return of monies which the bank considered to be the realization of security for a guarantee given by the corporation.⁴ The bank selected the director whose signature appeared on the guarantee as the discovery representative for the corporation. The corporation alleged that the guarantee was not authorized by its board and that neither the board nor the corporation had the power to issue the guarantee. The court allowed the substitution requested by the corporation, although that director obviously had the most direct knowledge of the transaction, stating that:

There is a clear potential for a conflict of interest in the present matter. Under these circumstances, the plaintiff [corporation] should not, in the interest of justice, be bound by the discovery evidence of a person with whom this conflict of interest arises.⁵

In a third case, a substitution was ordered when requested by a defendant corporation in a wrongful dismissal action.⁶ The plaintiff wished to examine her immediate supervisor. The

³ *Protter Management Ltd. v. Ontario Housing Corp.* (1975), 8 O.R. (2d) 445 (H.C.).

⁴ *Exhibition Ass'n of the City and County of Saint John v. Canadian Imperial Bank of Commerce* (1987), 21 C.P.C. (2d) 88 (N.B.Q.B.).

⁵ *Ibid.* at 94.

⁶ *Kowk v. Kitchener-Waterloo Record Ltd.* (1985), 2 C.P.C. (2d) 250 (Ont. Dist. Ct).

court allowed the corporation to put forward instead a higher-ranking manager, because the latter was actually responsible for the termination and because he was “in a better and more responsible position to represent the corporate defendant.”⁷ The supervisor had written a letter of recommendation for the plaintiff after the dismissal, for which he had been disciplined by the corporation.

A potential for “conflict” for discovery purposes, as outlined in these cases, appears to arise only if the corporate party being examined raises it. While I do not want to be taken as ruling out the possibility, it is certainly difficult to conceive of a situation, and the cases are of no assistance in doing so, in which there could be a conflict between the corporation and its representative that the corporation did not recognize.

In the case before me, the examining party, the Director, is challenging the corporation’s choice of discovery representative for certain issues on the basis of a potential for conflict *between the corporation and the representative*. Thus, the Director argues that M should be preemptively disqualified as CP’s representative to answer questions on those issues.

The only question here is whether M is an appropriate representative *for* CP on discovery. He is not required to live up to an absolute standard of objectivity. Given CP’s endorsement of M as its representative for discovery, I cannot conclude that there is any conflict of interest between CP and M arising from the potential scenario put forward by the Director. Presumably CP has either concluded that M has no personal interest at stake or it does not see

⁷ *Ibid.* at 252.

any inconsistency in M's personal allegiance and that of the corporation. Whatever allegiances may or may not be operating on M, CP wants M as its representative and accepts that his answers are binding on it. In those circumstances, I cannot at this time see potential for a conflict of interest between them.

DATED at Ottawa, this 9th day of July, 1997.

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

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