Competition Tribunal | Tribunal de la Concurrence

CT-1996/002 – Doc # 0164c

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 OF SIMPSON J. DATED AUGUST 8, 1997 DISMISSING THE MOTION BROUGHT BY THE DIRECTOR OF INVESTIGATION AND RESEARCH SEEKING SUMMARIES OF THE FACTS OBTAINED BY THE RESPONDENTS THROUGH INTERVIEWS AND DISCUSSIONS WITH INDUSTRY PARTICIPANTS

Date of Pre-hearing Conference:

July 29, 1997

Member:

Simpson J. (presiding)

Counsel for the Applicant:

Director of Investigation and Research

Adam F. Fanaki
Benjamin T. Glustein

Counsel for the Respondents:

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

Brenda Hollingsworth
Rocco Di Pucchio
Russell Cohen

Royal Bank of Canada

Annie M. Finn

Counsel for the Intervenor:

Montreal Port Corporation

Pierre Grenier

COMPETITION TRIBUNAL

REASONS OF SIMPSON J. DATED AUGUST 8, 1997 DISMISSING THE MOTION BROUGHT BY THE DIRECTOR OF INVESTIGATION AND RESEARCH SEEKING SUMMARIES OF THE FACTS OBTAINED BY THE RESPONDENTS THROUGH INTERVIEWS AND DISCUSSIONS WITH INDUSTRY PARTICIPANTS

The Director of Investigation and Research
v.
Canadian Pacific Limited et al.

The Director of Investigation and Research ("Director") has moved for an order compelling the respondents Canadian Pacific et al. ("CP") and the Royal Bank of Canada ("RBC") to each provide in aggregated form a summary of the facts that each has obtained during its interviews and discussions with industry participants (the "Summaries"). This relief is sought in paragraph (c) of the Director's notice of motion dated June 16, 1997. The other matters raised in that notice of motion were not argued. By order dated July 29, 1997, I dismissed the Director's motion, indicating that reasons would follow shortly. These are those reasons.

On January 24, 1997, during a motion before the Tribunal in this matter, the Director undertook to provide aggregated summaries of the facts he obtained during his investigation. When he gave the undertaking, the Director mentioned that he would require equivalent disclosure in the form of Summaries from the respondents. However, he received no reaction from the respondents at that time.

The Director provided the respondents with his summaries in two batches. Under a covering letter of May 9, 1997, the Director sent out an aggregated summary of the facts contained in the transcripts of two examinations held by the Director pursuant to s. 11(1)(a) of

the *Competition Act* R.S.C. 1985, c. C-34. (the "Act") Thereafter, with a letter of June 6, 1997, the Director provided an aggregated summary of his interviews with industry participants. On the same date, the Director sent out an aggregated summary of the facts found in the documents he had obtained under section 11(1)(b) of the Act. In that letter the Director renewed his request for Summaries from the respondents. On June 9, 1997, CP wrote back and refused to supply a summary. RBC did not reply to the Director's request.

The Director suggests that, because the respondents were silent and did not object to his request for reciprocal summaries on January 24, 1997, I should conclude that the respondents implicitly agreed to provide the Summaries on a reciprocal basis. This I am not prepared to do. It was up to the Director to obtain a clear commitment from the respondents to provide the Summaries and, in my view, this was not done.

The Director says he should have the respondents' Summaries for three reasons. Firstly, they would be convenient and would assist him in his preparation for the continued examination for discovery of CP's representative in September, 1997. Secondly, it would be consistent with notions of fairness to order production of Summaries from the respondents because he provided summaries to the respondents and, thirdly, such production would follow the decisions of Reed J. in *Southam*.[1] I will deal with each submission in turn.

There is no doubt that oral discovery would be facilitated by the Summaries but, in my

---

1 *Director of Investigation and Research v. Southam Inc*. (1991), 38 C.P.R. (3d) 68, [1991] C.C.T.D. No 16 (QL) (Comp. Trib.); [1991] C.C.T.D. No. 21 (QL) (Comp. Trib.).

view this submission about fairness and reciprocity and the need to treat all parties equally is appealing at first blush, the difficulty is that the parties' situations are not comparable. The Director is in a situation where he cannot offer a representative to participate in an effective traditional examination for discovery. This is so firstly because, for the most part, his information is acquired using his informal and formal powers of investigation. He normally has no first hand information about the industry or its competitive situation. Secondly, the examination is frustrated because the information the Director obtains is often protected by public interest privilege which will prevail unless overridden by a more compelling competing interest. In an effort to overcome these difficulties in a manner consistent with the protection of public interest privilege the Director may voluntarily provide the respondents with summaries of the factual information he obtains. He has done so in this case.

The position of CP (with the support of RBC) is quite different. It is not concerned with public interest privilege. It asserts litigation privilege and says that, in this case, when the Director seeks the Summaries all the information he seeks is protected by litigation privilege. I accept this submission. There is no doubt in my mind that the respondents' interviews with industry participants all occurred in the context of seeking various governmental approvals for the merger and at a time when it was understood that litigation might ultimately be required to secure such approvals.

CP also says that litigation privilege is more sacrosanct than public interest privilege and includes protection for the fact that a privileged communication occurred as well as for the source and contents of the communication, together with any writings which reflect the

communication. CP lso submits, and the law is clear, that the facts contained in privileged communications are not protected.

CP objects to producing the Summaries because it says that the mere fact of providing the facts obtained from industry participants will disclose the fact that privileged communications have occurred. CP says disclosure of the mere fact of a privileged communication is, without more, a breach of litigation privilege. I am not at all sure that this is automatically true. It may be that in some situations there will need to be a further showing of prejudice. However, CP also submits that further prejudice exists. It says that the production of the Summaries in the circumstances of this case will indicate to the Director CP's areas of concern or perceived weakness in the litigation because the Director will be able to identify what CP wanted to know from industry participants.

CP submits that notions of convenience and reciprocity do not justify the production of the Summaries in this case and I agree. The Director is entitled to and will be able to obtain the facts in CP's privileged communications on oral discovery in answer to a question such as "what information do you have from privileged and non-privileged sources about X?" What "X" is will be defined by the issues in the pleadings as in any ordinary examination for discovery.

What the Director is not entitled to, in my view, is the information from privileged sources in a segregated identifiable form. That is what he would get if the Summaries were ordered. Accordingly, I have concluded that the Director is not entitled to the Summaries in the

circumstances of this case because I am satisfied that all of the information he is seeking is covered by litigation privilege.

Finally, the Director relied on Reed J.'s statements in *Southam* as authority for the existence of a corresponding requirement for respondents' summaries. In her first reasons Her Ladyship observed only that:

> One aspect of the present dispute between the parties which was not explored is the extent to which the respondents are conceding by their present request that the names, times and details of interviews and discussions they have had with various industry participants are required to be disclosed to the applicant. If the applicant is required to provide such information, would the respondents not similarly be required to do so?[2]

and in a further related set of reasons, issued for clarification, she added the following on this topic:

> As indicated in the reasons for that order, if the Director is required to provide summaries of the information he has collected, the respondents are equally required to provide summaries of all information collected by them (and their counsel) through, for example, the interviewing of non-parties. . . .[3]

In my view, these statements do not provide a precedent for this case because there is no reasoning given which addresses the propriety of ordering the production of summaries which would offend litigation privilege. Accordingly, the Director's motion was dismissed.

DATED at Toronto, this 8th day of August, 1997.

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

(s) Sandra J. Simpson
Sandra J. Simpson

---

[2] *Director of Investigation and Research v. Southam Inc.* (1991), 38 C.P.R. (3d) 68 at 85-86.

[3] *Director of Investigation and Research v. Southam Inc.* [1991] C.C.T.D. No. 21 (QL) (Comp. Trib.) at 4.