



CT-1996/002 – Doc # 165c

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 REGARDING A MOTION
BROUGHT BY THE FIRST FIVE RESPONDENTS FOR PRODUCTION OF
SECTION 11 TRANSCRIPTS OVER WHICH THE DIRECTOR OF
INVESTIGATION AND RESEARCH CLAIMS PUBLIC INTEREST PRIVILEGE**

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

Canadian Pacific et al.'s ("CP") request for the production of the transcripts (together "the Transcripts") of the examinations of Messrs. Peter Keller ("Keller") and Joseph Storozuk ("Storozuk") taken pursuant to section 11(1)(a) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") has been before the Tribunal on two prior occasions.

On the first occasion, in his order dated January 30, 1997, McKeown J. refused CP's request on the basis that the Transcripts, and a further transcript relating to Raymond Miles, were not needed for the purposes of preparing CP's response to the Director of Investigation and Research's ("Director") notice of application (the "Application") dated December 20, 1996. On the second occasion, Noël J., in his reasons and order dated May 21, 1997, again refused CP's request for production of the Transcripts on the basis of the Director's assertion of public interest privilege.

CP has renewed its request before me stating that since Noël J.'s decision there have been material changes in circumstances. CP submits that those changes should cause me to conclude that the Director's public interest privilege is now outweighed by the principle of fairness which dictates that CP must know the case it has to meet. By order dated July 29, 1997, I dismissed CP's motion and indicated that reasons would follow shortly. These are those reasons.

By way of background, the Director provided CP with an aggregated summary of the facts contained in the Transcripts with a covering letter dated May 9, 1997 (the "Summary"). Counsel for the Director acknowledged that the Summary does not include detailed information about competitors' pricing or competitors' customers. As well, the identities of the Director's sources are not revealed in the Summary. Noël J. knew that the Summary had been provided when he refused to order production of the Transcripts on May 21, 1997.

a) The Keller Transcript

Keller was the President and CEO of Cast prior to the merger. On March 6, 1995, the Director obtained an order under section 11(1)(a) of the Act and thereafter Keller was examined by the Director and a transcript of his evidence was prepared.

The event which gives rise to this further request for the Keller transcript occurred at the June 19, 1997 pre-hearing conference in this case. The transcript of that proceeding discloses at page 200 that counsel for the Director said:

We very much expect Mr. Keller to be testifying before the Tribunal, there is no mystery about that.

CP submits that this statement (the "Statement") amounts to a final decision to call Keller as a witness for the Director at the hearing of the Application on its merits in January of 1998 (the "Hearing"). However, I am not prepared to read the Statement as a final decision for two reasons. Firstly, counsel used the word "expect" rather than definitive language and secondly, the examinations for discovery had not even begun when the Statement was made. In this context I am not prepared to conclude that counsel was in a position to make a final decision to call a witness.

In the absence of a clear commitment to call Keller as a witness there is no change of circumstances which would cause me to depart from the decision reached by Noël J. against the production of the Keller transcript.

That being said, it seems clear that the Director's counsel may well decide to call Keller as a witness and, once he makes a final decision, further issues may well have to be argued before a decision can be reached by the Tribunal about the production of the Keller transcript. For example, does it automatically follow that, because Keller is to give evidence, his full verbatim transcript is to be produced or will production of all or parts of the Keller transcript depend on how the Director is permitted by the Tribunal to use the transcript at the Hearing?

Accordingly, to ensure that there will be time for the consideration of such issues, the Director will be ordered to give the respondents and the intervenor his final decision about whether he will call Keller as a witness at the Hearing. This is to be done on or before Friday, October 31, 1997. This date gives the Director one week after the close of discoveries on October 24, 1997 to reach his decision. It also gives the respondents, if so advised, time to raise issues about the production of Keller's transcript at the Tribunal's pre-hearing conference on November 17, 1997.

CP also submitted that it needs the Keller transcript to prepare its representative for his continued examination for discovery in September 1997. However, as this argument did not persuade Noël J., and, since no new circumstances have since arisen, this submission must fail.

b) The Storozuk Transcript

Storozuk is a Director and Vice President of Morlines Maritime Agency. It is the exclusive agent for, and is affiliated with BOLT Canada Line, which is a carrier operating out of the Port of Montreal. Accordingly, Storozuk's company is affiliated with one of CP's competitors.

In his Application at paragraph 116 the Director pleaded that he had:

. . . obtained evidence of an arrangement between some or all of the Conference participants and BOLT, whereby BOLT will price its services at approximately 10% below the Conference tariff. . . .

The Conference is an unincorporated association of shipping companies (the "Conference") which has among its members a CP company. As well, since the merger, Cast has become a Conference member. As noted above, the Director alleges that the Conference members entered into a pricing arrangement with BOLT Canada Line (the "Agreement"). BOLT Canada Line is not a member of the Conference. The Director further alleges that the Agreement continues to be in force and has the effect of constraining post-merger competition. It is noteworthy that neither the Application nor the Director's replies contain any allegation that the pricing Agreement was illegal.

However, CP says, and I accept that, during argument on an earlier motion, criminal conduct was alleged. Because of this new development, CP takes the position that, unless it knows what Storozuk said about Conference pricing and the Agreement, CP cannot meet the allegations against it at the Hearing.

The Director's position is that his allegations of criminal conduct are no longer relevant and therefore will not be raised at the Hearing. Counsel for CP agreed. He stated in oral submissions before me that all that will be relevant for the Hearing will be the existence or otherwise of the Agreement. That being so, I am not prepared to order production of the Storozuk transcript

because it is clear that no allegations of criminal or improper conduct will be advanced at the Hearing.

CP's second submission, which took the Director by surprise as it was not in its pre-hearing written material, is that the Director's decision to waive his public interest privilege and produce what he alleges is evidence of the Agreement and related documents is a change which justifies production of the *verbatim* Storozuk transcript. CP says the transcript is needed to prepare to meet the Director's case at the Hearing as it relates to the Agreement. Counsel stated that what CP wants at a minimum is the portions of the Storozuk transcript (if any) where Storozuk gives evidence about Conference pricing and the Agreement. I say "if any" because the evidence is not clear that the Storozuk transcript actually deals with the Agreement. Mr. Peters, on his examination for discovery on behalf of the Director, said that information about the Agreement's current status came from section 11 examinations. Unfortunately it was not clear whether he meant oral or document examinations. When he was asked later which he meant, his counsel refused to let him answer the question.

There is no doubt that, if the Director intends to call Mr. Storozuk as a witness or use his transcript in some fashion at the Hearing, a determination will have to be made about the availability of the transcript. Until then, the mere fact that the Director has waived his public interest privilege in the Agreement by producing related documents does not, in my view, overcome the continuing privilege in the Storozuk transcript as it relates to the Agreement and to the pricing practices of Conference members.

Accordingly, I have found no change in circumstances which justifies the production of the Storozuk transcript.

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