



CT-1996/002 – Doc # 134a

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
EXAMINATION FOR DISCOVERY BY THE DIRECTOR**

Date of Pre-hearing Conference:

June 19, 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.**

Mark C. Katz
Rocco Di Pucchio
Tim Bermingham

Royal Bank of Canada

Peter L. Roy
David F. O'Connor

COMPETITION TRIBUNAL
REASONS FOR ORDER REGARDING
EXAMINATION FOR DISCOVERY BY THE DIRECTOR

The Director of Investigation and Research

v.

Canadian Pacific Limited et al.

There are a number of respondents, all corporations, to this application, namely Canadian Pacific Limited and four related companies (“CP respondents”) and the Royal Bank of Canada. At the pre-hearing conference on June 19, 1997, the Director of Investigation and Research (“Director”) made submissions to the Tribunal regarding his intention to conduct examinations for discovery of a number of representatives of the CP respondents. CP has submitted that it is only willing to produce for examination for discovery one individual who would represent all of the CP respondents, Raymond Miles. The Director wishes to examine, in addition to Mr. Miles, a representative of Cast and a representative of CP familiar with its rail operations. On June 20, 1997, the Tribunal ordered that the Director may examine for discovery Mr. Miles on behalf of the CP respondents. A portion of the Director’s argument dealing with a possible conflict of interest between the CP respondents and their chosen representative has been adjourned to July 2, 1997 at which time the issue will be revisited with respect to areas where there is an alleged conflict. These are the Tribunal’s reasons for its order in respect of the remainder of the issues raised by the Director.

The Director has premised much of his argument on the question of whether there is a

right to oral discovery in proceedings before the Tribunal. According to the Director, paragraph 21(2)(d) of the *Competition Tribunal Rules* (“Rules”), which allows the Tribunal at a pre-hearing conference to consider “the desirability of examination for discovery of particular persons”, implicitly recognizes that there is a right to oral discovery in Tribunal proceedings. Because paragraph 21(2)(d) is the sole reference to oral discovery in the Rules, the Director submits that by virtue of section 72 of the Rules, the Federal Court Rules relating to oral discovery ought to apply to Tribunal proceedings.

Relying on rule 456(1) of the Federal Court Rules¹, the Director submits that he has a right to discover every respondent adverse in interest to him. Under rule 456(2) each corporation to be discovered must select an “informed” officer, director or employee to be examined on its behalf. The Director asserts that paragraph 21(2)(d) of the Tribunal Rules has the effect of taking away the right in rule 456(2) of the corporation to choose its representative and instead places in the hands of the Tribunal the discretion to determine who should be a corporate respondent’s designate for discovery. On this basis, the Director takes the position that he has a *prima facie* right to discover a director, officer or employee of each of the respondents but that the Tribunal, with the input of counsel, designates the appropriate representative from each corporation.

CP’s position is that the existence of a right to oral discovery in Tribunal proceedings is not in issue in this case. All parties have agreed to engage in oral discovery. Rather, the issue is who is to be examined. CP disputes the Director’s argument that there is a gap in the Rules as they relate to oral discovery, arguing instead that the provision for oral discovery in Tribunal

¹ A party may, without leave of the Court, examine for discovery any adverse party only once.

proceedings is fully dealt with in paragraph 21(2)(d) of the Rules. CP asserts that while the Tribunal may wish to consider certain principles and practices embodied in the Federal Court Rules and related case law, the Tribunal is not strictly bound by those rules.

The Tribunal is in agreement with CP that the issue of whether there is a right to oral discovery in Tribunal proceedings need not be decided in this case. There is no dispute between the parties that there should be oral discoveries in this case.

Whether or not paragraph 21(2)(d) provides an absolute right to oral discovery, the Tribunal is of the view that that provision was intended to provide flexibility regarding the procedures governing oral discovery in a particular case by setting out a very general procedure bringing discovery within the realm of pre-hearing case management. Proceedings before the Tribunal are, by statute, to be dealt with as expeditiously as the circumstances and considerations of fairness permit. Given this mandate, it is important that the Tribunal has the flexibility to ensure that oral discoveries are conducted in such a way as to facilitate the disposition of cases before it. In establishing the principles and procedures which will govern oral discoveries in a given case, the Tribunal will, however, be guided by the principles applied in other jurisdictions and the experience of other courts.

The Tribunal does not share the Director's view that he has a *prima facie* right to discover a representative from each of the respondents. Rather, the Tribunal will permit the Director to conduct such examinations for discovery as are required to achieve the objectives of oral discovery, that is, to obtain admissions and relevant information which is in the knowledge of the opposing party. The Tribunal is obviously not in a position to pick the appropriate persons

and will, in case of a dispute, rely on the submissions of counsel to determine the identity and number of representatives of the parties that are required for effective and efficient discoveries. Accordingly, the issue to be determined by the Tribunal is whether the individual nominated by CP is an adequate representative to be discovered by the Director or whether examination of a different representative, or of additional representatives, would better achieve the objectives of oral discovery.

CP proposes Mr. Miles. Mr. Miles is the President of CP Ships Holdings Inc. (“CP Ships”), a subsidiary of the parent Canadian Pacific Limited. Mr. Miles oversees CP’s container shipping operations which include Canada Maritime, Cast and the terminals. The CEO of each of Canada Maritime, Cast and the terminals reports to Mr. Miles.

In addition to examining Mr. Miles, the Director asserts that he requires an examination of a representative of Cast as well as a representative of CP who is familiar with CP’s rail operations, namely Robert Ritchie, the President and CEO of CP Rail. The Director argues that Mr. Miles is not the appropriate person to provide information concerning the operations of Cast. He requires discovery of an individual with intimate knowledge of the operations of Cast.

The Director argues that information relating to the vertical integration of Cast and Canada Maritime with CP Rail is relevant to this application, and that, during the course of a section 11 examination, Mr. Miles demonstrated that he was unable to adequately provide relevant information regarding the operation of CP Rail. The Director submits that Mr. Ritchie is the individual best able to provide the information he seeks. Further the Director asserts that it is

apparent from the section 11 examination that Mr. Miles and Mr. Ritchie have “divergent views”, including on whether Cast was a failing firm prior to the acquisition.

It is premature at this stage for the Tribunal to conclude that Mr. Miles will be an inadequate representative of the CP respondents. Further, counsel for CP made it clear that to the extent that Mr. Miles was not in possession of information which the Director could properly seek from him during his examination for discovery, Mr. Miles would inform himself of that information. Indeed, there will be an obligation on Mr. Miles to ensure that he is adequately informed of relevant information relating to each of the CP respondents prior to his examination. Counsel for CP also acknowledged that the answers provided by Mr. Miles during his examination for discovery would be binding on all the CP respondents.

In the present case, the Director has failed to satisfy the Tribunal that the purposes of discovery will not be achieved through an examination of Mr. Miles alone. I accept CP’s argument and evidence that Mr. Miles has extensive direct knowledge of the issues relating to this proceeding. Mr. Miles holds a position which allows him access to information relating to the activities of both Cast and Canada Maritime. He was heavily involved in the acquisition of Cast. Mr. Miles is involved in and familiar with the integration of Cast, Canada Maritime and CP Rail, from the perspective of CP’s container shipping operations, granted, but that is the focus of this application. To the extent that Mr. Miles and Mr. Ritchie have divergent views on any issue, the relevance of their respective opinions is unclear at this juncture as the purpose of discoveries is to acquire facts, not opinions.

If, upon completing his examination of Mr. Miles, the Director is of the view that Mr. Miles was unable to provide the information or admissions which should be provided on discovery, the Director may move before the Tribunal for an order permitting him to conduct further discovery.

DATED at Ottawa, this 23rd day of June, 1997.

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

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