Competition Tribunal | Tribunal de la Concurrence

CT-1996/002 – Doc #106a

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

INTERIM CONFIDENTIALITY (PROTECTIVE) ORDER AND REASONS

Date of Pre-hearing Conference:

April 25, 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
Russell Cohen

Royal Bank of Canada

Peter L. Roy
Annie M. Finn

Counsel for the Intervenor:

Montreal Port Corporation

Adam Bobker

COMPETITION TRIBUNAL

INTERIM CONFIDENTIALITY (PROTECTIVE) ORDER AND REASONS

The Director of Investigation and Research

v.

Canadian Pacific Limited et al.

Both the Director of Investigation and Research ("Director") and the respondents Canadian Pacific Limited et al. ("CP") and the Royal Bank of Canada ("RBC") have moved for an interim confidentiality (protective) order over the documents listed in their respective affidavits which are subject to confidentiality claims by one or another of them. The parties have not yet exchanged the documents. Because of technical difficulties (the documents are in electronic form), the exchange will not take place until May 9, 1997. The parties agree that an interim confidentiality (protective) order is appropriate to allow the exchange of documents to be accomplished without compromising any confidentiality claims. Once they have the documents in hand, counsel will commence their review of the confidentiality claims and, hopefully, as has occurred in most other proceedings, will agree on the appropriate levels of confidentiality that need to be established and the classification of the vast majority of the documents. Since this process is expected to take some time, another concern is to allow the parties, to the extent possible, to continue their preparation for the hearing of this matter concurrently.

Although the draft orders submitted by the parties differed in format and detail, there appeared to be substantive disagreement on only a few issues. The first was the level of disclosure that

should be permitted at this interim stage, the second related to two paragraphs of the Director's draft order, and the third was the definition of an "independent expert". Brief reasons have been provided for the Tribunal's decision on the first two issues. The third issue was resolved at the pre-hearing conference to the satisfaction of all counsel and the order as issued reflects that agreement.

The Montreal Port Corporation ("Port") filed an affidavit of documents on April 21, 1997 and is scheduled to file another on May 9, 1997. As the Port has indicated that it has confidentiality claims to advance, its documents have been included in the interim confidentiality (protective) order. This seemed a practical course of action to avoid a later amendment to the order to include the Port. The Port was present at the pre-hearing conference but did not make any submissions.

1. Disclosure to Representatives of the Respondents

The respondents take the position that there should not be any documents, either on an interim or a more permanent basis, which are not available to, at least, their designated representatives. They argue that counsel cannot properly prepare for a case of this nature without access to their clients for consultation on documents.

I cannot accede to the respondents' request for immediate disclosure to their representatives, even designated representatives who have signed a confidentiality agreement. On an interim basis the documents must be protected at the highest level that might eventually be necessary. Once disclosure has taken place, it is too late to go back. As the Tribunal has noted on previous occasions, a "blanket" request for disclosure of all documents over which confidentiality is claimed to representatives of the respondent is problematic.[1] In those

circumstances, it is impossible for the Tribunal to balance properly the competing interests at stake, namely the ability of the respondents to prepare fully and the possible harm from disclosure. It is not suggested, nor would it be efficient or indeed feasible, that the Tribunal review all the documents at this stage to ensure that it is achieving the correct balance in releasing documents to the respondents' designated representatives.

It remains open to the respondents to advance any arguments against such a high level of confidentiality continuing beyond the interim period in negotiations with the Director. Where agreement cannot be reached on specific documents or groups of documents, the matter will be resolved by the Tribunal. While restricting documents to counsel and independent experts beyond an interim period is not something that the Tribunal will do lightly, it may prove to be necessary in the particular circumstances. The person claiming confidentiality will have to show that the potential harm is such that it justifies restricted disclosure of a particular document or, if there are numerous documents, of a particular class of documents. The other party will have to provide specific information about the nature of the documents and the necessity of consultation with party representatives to argue that the ability to prepare fully outweighs the potential harm.

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[1] *Director of Investigation and Research v. A.C. Nielsen Co. of Canada* (26 July 1994), CT9401/57, Reasons for Confidentiality (Protective) Order, [1994] C.C.T.D. No. 11 (QL); *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, [1994] C.C.T.D. No. 15 (QL).

2. Paragraphs 2 and 10 of the Director's Draft Order

Paragraph 2 of the Director's draft order reads:

> Nothing in this Order precludes the Director of Investigation and Research (the "Director") or members of the Director's staff from communicating any information obtained pursuant to sections 11, 15, 16 or 114 of the Competition Act (the AAct") or from a person requesting a certificate under section 102 of the Act, to any other person, including a Canadian law enforcement agency, for the purpose of the administration or enforcement of the Act in accordance with section 29 of the Act.

Paragraph 10 provides:

> For greater certainty, all persons, including the Director and his staff, who obtain access to protected documents and information provided through the discovery process in this application are subject to an implied undertaking to use the protected documents and information for the purposes of the application only and any related proceedings. The implied undertaking does not extend to documents which were or should have been produced to the Director in response to orders issued pursuant to section 11 of the Competition Act.

The parties disagree on the meaning of paragraph 2 and the propriety of including it in the interim order. The first sentence of paragraph 10 is not controversial; it is the last sentence of that paragraph which is the subject of dispute.

Counsel for the Director stated that paragraphs 2 and 10 were intended to set out in some detail what the Tribunal has decided in prior cases regarding the implied undertaking. He also submitted that paragraph 2 restates the statutory regime applicable to the Director. The respondents argue that the paragraphs are broader than the implied undertaking and, in fact, deal with two different concepts, the use of documents by the Director *within* the context of this litigation and outside the context of this litigation. CP is particularly concerned about the implications for certain documents in the Director's possession which were obtained from CP and RBC pursuant to section 11 orders.

The Tribunal has dealt with the implied undertaking on several occasions, most extensively in a June 1991 decision by Reed J. in the *Southam case*.[2] The Director brought a

motion for an order stating that any non-confidential document produced on discovery could be used by the Director for all purposes connected to his duties under the *Competition Act* ("Act"). The respondents argued that there was an implied undertaking that the documents and information obtained from an opposing party on discovery "must not be used for purposes other than the conduct of the litigation for which they are required to be produced."[3] Reed J. agreed with the respondents. She further declined to recognize a blanket exception to the implied undertaking for the Director for documents or information that might relate to other breaches of the Act. She held that the Director could apply to the Tribunal for an abrogation of the implied undertaking in a specific fact situation.

Reed J. noted, however, that where documents or information have been obtained from a source other than the discovery process, for example by the Director, the implied undertaking does not retroactively curtail usage of the information *for purposes other than* the conduct of the litigation in which they were produced. That is, documents and information obtained by the Director other than by way of discovery can be used by him for purposes outside the particular litigation that are within his mandate.

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[2] *Director of Investigation and Research v. Southam Inc.* (1991), 38 C.P.R. (3d) 395, [1991] C.C.T.D. No. 15 (QL), aff'd (6 May 1993), A-643-91 (F.C.A.). In an earlier decision in the same matter, Reed J. held that the Director was constrained by the requirement in a confidentiality order that documents obtained on discovery can only be used for the purposes of the present application and not outside it: *Director of Investigation and Research v. Southam Inc.* (1991), 38 C.P.R. (3d) 390, [1991] C.C.T.D. No. 10 (QL), aff'd (6 May 1993), A-429-91 (F.C.A.). In *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.* (1991), 38 C.P.R. (3d) 187, [1991] C.C.T.D. No. 12 (QL), Strayer J. agreed with Reed J. but emphasized that the restriction applied only to documents obtained through the discovery process and not documents obtained from some other source.

[3] *Southam, ibid.* at 398-99.

Paragraph 2 of the Director's proposed order cannot be characterized as merely a detailed restatement of previous Tribunal decisions relating to the implied undertaking. A literal reading

of paragraph 2 would lead one to conclude that the documents obtained by the Director from, for example, section 11 orders, are completely outside the scope of any Tribunal confidentiality orders. That is not a conclusion that follows from existing Tribunal case law. The implied undertaking, and the exception to it, relate to what the parties can do with discovery and non-discovery materials outside the context of the proceeding in which they were produced or obtained. The implied undertaking does not speak to what the parties can do with the materials in the conduct of the *particular proceeding*.

One of the restrictions on what can be done with documents within the context of a Tribunal proceeding arises from the Tribunal's rules of procedure governing confidentiality claims. As Reed J. stated in *Southam*, the confidentiality regime in the Tribunal's rules provides a mechanism for obtaining protection additional to the normal operation of the general principle respecting an implied undertaking.[4] It is my view that, irrespective of how they were originally obtained, once documents enter into the Tribunal's processes, the parties may claim confidentiality over them in accordance with Tribunal procedure, the Tribunal may rule on the validity of those claims and if upheld, the documents are subject to the Tribunal's confidentiality orders.

If, as the Director also argues, proposed paragraph 2 merely restates his statutory powers and obligations, such an exercise is not appropriate in a Tribunal confidentiality order. I make no

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[4] *Supra*, note 2 at 405-6.

finding as to whether the proposed paragraph is, in fact, an accurate statement of those powers and obligations. For these reasons, the Director's proposed paragraph 2 has been omitted in its entirety from the interim confidentiality (protective) order issued by the Tribunal.

With respect to the last sentence of the proposed paragraph 10, if one omits the words "or should have been" before the word "produced", it functions merely as a restatement of the exception to the implied undertaking, which is already clear from the case law. With those words left in, it looks very much like an extension of the exception beyond what has been established in the case law to date. Reed J. expressly denied to the Director a broad exemption from the implied undertaking where the documents obtained on discovery related to "other breaches" of the Act. The wording put forward by the Director in this case attempts to carve out an exemption for other breaches of the Act relating to the non-production of documents pursuant to a section 11 order (e.g., section 65). As it remains open to the Director to follow the procedure set out by Reed J. and return to the Tribunal with a specific fact situation, I am not inclined at present to broaden the exception to the implied undertaking. The last sentence of proposed paragraph 10 has not been included in the interim confidentiality (protective) order.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

1. For purposes of this order,

"independent expert" means an expert who

(a) has no existing employment relationship, apart from an independent consulting relationship, with one or more of the parties or the intervenor other than being retained for the purposes of this matter; and

(b) has signed a confidentiality agreement in the form attached to this order as Schedule A;

"protected documents" means the documents listed in

(a) Schedule C to the revised supplementary affidavit of documents of the Director sworn on April 18, 1997 and filed on April 22, 1997;

(b) Schedules A-1 and A-2 of the supplementary affidavit of documents of RBC sworn on March 7, 1997 and filed on March 13, 1997, Schedules A-3 and A-4 of the second supplementary affidavit of documents of RBC sworn and filed on March 14, 1997, and Schedules A-5, A-6 and A-7 of the third supplementary affidavit of documents of RBC sworn and filed on April 1, 1997;

(c) Schedule II of CP's affidavit of documents sworn and filed on February 27, 1997, Schedule II of CP's supplementary affidavit of documents sworn and filed on March 14, 1997, and Schedules II and II(a) of CP's further supplementary affidavit of documents sworn and filed on April 11, 1997; and

(d) the affidavit of documents of the Montreal Port Corporation ("Port") sworn on April 19, 1997 and filed on April 21, 1997 and the affidavit of documents to be filed on May 9, 1997, which the Port specifically identifies to the parties as documents subject to a claim for confidentiality.

2. Pending the Tribunal dealing with the question of confidentiality, no protected document produced in these proceedings shall be disclosed except in accordance with this order or with the prior written consent of the person that claimed confidentiality over the document.

3. Each party and the intervenor shall provide a copy of the protected documents listed in its affidavit of documents to counsel for each other party or the intervenor who requests a copy.

4. The parties and the intervenor may agree to exchange electronic versions of documents instead of documentary forms.

5. Forthwith after the exchange of documents, the parties and the intervenor shall commence a review of the protected documents and shall use their best efforts to agree on appropriate levels of confidentiality for the documents. If an agreement cannot be reached, the parties and the intervenor may apply to the Tribunal to determine the confidentiality or level of confidentiality of any document or group of documents.

6. Counsel for a party or the intervenor may disclose the protected documents to independent experts retained by the parties, the intervenor or their counsel, to the Director and to the members of the Director's staff and of counsel's firm directly involved in this application.

7. The termination of proceedings in this action shall not relieve any person to whom protected documents were disclosed pursuant to this order from the obligation of maintaining the confidentiality of such information in accordance with the provisions of this order and any confidentiality agreement.

8. A confidentiality agreement signed pursuant to this order shall be filed promptly with the Registrar of the Tribunal who shall retain all such agreements in confidence until completion or final disposition of this proceeding and any related appeals, at which time the agreements may be disclosed to the parties or the intervenor upon request.

9. If a party or the intervenor receives written notice from a person who has signed a confidentiality agreement pursuant to this order that the person is required by law to disclose a protected document, the party or intervenor shall give prompt written notice to the party or intervenor that claimed confidentiality over the document in its affidavit of documents so that the party or intervenor may seek a protective order or other appropriate remedy.

10. For greater certainty, all persons, including the Director and his staff, who obtain access to protected documents and information through the discovery process in this application are subject to an implied undertaking to use the protected documents and information for the purposes of this application and any related proceedings only.

11.(1) Subject to subparagraph (2), no copies of any protected document shall be made without the consent of the party or intervenor claiming confidentiality over the document in its affidavit of documents.

(2) Counsel for a party or the intervenor may, and the Director and his staff may, make such copies as they require in connection with these proceedings. Counsel for a party or the intervenor may make one copy of a protected document available to each independent expert retained by or on behalf of that party or the intervenor.

12. To the extent that it is within counsel's control, counsel shall take reasonable steps to ensure that duplication of protected documents and distribution of and access to copies of protected documents occur only in accordance with this order.

13. Upon completion or final disposition of these proceedings and any appeals, all protected documents and any copies of protected documents disclosed in accordance with this order, with the exception of protected documents in the possession of the Director and his staff, shall be returned to the party or intervenor that listed the documents in its affidavit unless the documents have become public or the party or intervenor that listed the documents states, in writing, that they may be disposed in some other manner. The protected documents and any copies in the possession of the Director and his staff shall be dealt with as directed by the Tribunal.

14. This order is subject to further direction of the Tribunal.

DATED at Vancouver, this 2nd day of May, 1997.

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

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

SCHEDULE A

IN CONSIDERATION of being provided with information or documentation in connection with this proceeding over which claims for confidentiality have been advanced, I, _____ _____, of the City of _____, in the _____ ____of _____, hereby agree to maintain the confidentiality of the information or documentation so obtained. I will not copy or disclose the information or documentation so obtained to any other person, except (a) counsel for the party on whose behalf I have been retained and members of his or her firm who are directly involved in this application; (b) other experts retained by or on behalf of the party on whose behalf I have been retained and who have signed a similar confidentiality agreement with the parties to this application; and (c) persons permitted by order of the Competition Tribunal, nor will I use the information or documentation so obtained for any purpose other than in connection with this proceeding.

Upon completion of this proceeding, I agree that such information or documentation, and any copies of same, shall be dealt with in accordance with instructions from counsel for the party I am retained by or as prescribed by order of the Competition Tribunal.

I acknowledge that I am aware of the order granted by the Competition Tribunal on May 2, 1997, in this regard, a copy of which is attached as Schedule A to this agreement, and agree to be bound by same. I acknowledge that any breach of this agreement by me will be considered to be a breach of the said order of the Competition Tribunal. I further acknowledge and agree that none of the Director of Investigation and Research ("Director"), Canadian Pacific Limited, Canada Maritime Limited, CP Containers (Bermuda) Limited, 3041123 Canada Inc. and Cast North America Inc., the Royal Bank of Canada and the Montreal Port Corporation, or any other owner of the information or documentation may have an adequate remedy at law and would be irreparably harmed in the event that any of the provisions of this agreement are not performed in accordance with its specific terms or otherwise breached. Accordingly, I agree that any one or more of the Director, Canadian Pacific Limited, Canada Maritime Limited, CP Containers (Bermuda) Limited, 3041123 Canada Inc. and Cast North America Inc., the Royal Bank of Canada and the Montreal Port Corporation, or any other owner shall be entitled to injunctive relief to prevent breaches of this agreement and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled at law or in equity.

In the event that I am required by law to disclose any of the information or documentation which is subject to this agreement, I will provide (*insert name of retaining or employing party*) with prompt written notice so that the person that claimed confidentiality over such information or documentation may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the information or documentation which is legally required and I will exercise my best efforts to obtain reliable assurance that confidential treatment will be accorded to the information or documentation.

[Insert for experts]

I will promptly, upon the request of the person providing the information or documentation, advise where such material is kept by me and at the conclusion of my involvement in these proceedings deliver to the said person the material without retaining any copies thereof. I will destroy all documents received by me relating to the material, except that I may retain in my confidential files, subject to the requirements of confidentiality imposed by this agreement, materials prepared by me, such as study results and materials of a general nature which do not replicate any confidential information.

I hereby attorn to the jurisdiction of the Federal Court of Canada and/or the Competition Tribunal to resolve any disputes arising under this agreement.

SIGNED, SEALED AND DELIVERED before a witness this _____ day of _____ , 1997.

_____ _____

(Witness Signature) (Signature)

_____ _____

(Print Name) (Print Name)