Competition Tribunal | Tribunal de la Concurrence

CT-1996/002 – Doc # 114a

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 AND ORDER REGARDING TRANSCRIPTS OF SECTION 11 EXAMINATIONS

Date of Pre-hearing Conference:

May 14, 1997

Member:

Noël 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

Royal Bank of Canada

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Montreal Port Corporation

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COMPETITION TRIBUNAL

REASONS AND ORDER REGARDING TRANSCRIPTS OF SECTION 11 EXAMINATIONS

The Director of Investigation and Research

v.

Canadian Pacific Limited et al.

The respondents Canadian Pacific Limited et al. ("CP") bring a motion to compel the Director of Investigation and Research ("Director") to produce to CP the transcripts of two examinations conducted by the Director pursuant to paragraph 11(1)(a) of the *Competition Act* ("Act") as part of his inquiry into the merger leading to this application. The merger in question is the acquisition by CP of certain assets of The Cast Group Limited and the shares of Cast North America Inc. (together, with affiliates, referred to as "Cast").

The Director conducted section 11 examinations of Raymond Miles, Peter Keller and Joseph Storozuk. Mr. Miles is the current head of CP Ships. Mr. Keller is the former President and Chief Executive Officer of Cast. Mr. Storozuk is the Vice-president and a director of Morlines Maritime Agency. Morlines is the exclusive agent for, and is affiliated with, BOLT Canada Line, a carrier operating out of the Port of Montreal. The Director has provided the transcript of the examination of Mr. Miles to CP. The Director claims public interest privilege over the transcripts of the examinations of Messrs. Keller and Storozuk. The Director agreed to provide, and has provided, a summary of those examinations. As alternative relief in its motion,

CP asks that the Director be compelled to produce a further and better summary of the two examinations.

Given the alternative request of CP, which might have required the member presiding at the pre-hearing conference to review the transcripts themselves, and might affect participation on the panel hearing this matter, the Tribunal advised the parties in advance that no such review would be conducted but that arguments on the public interest privilege *per se* would be heard. CP is of course entitled to renew its request for an assessment of the adequacy of the summary as it sees fit.

CP attacks the foundation of the public interest privilege, particularly as it relates to transcripts of section 11 examinations. In support of its contention that the public interest privilege does not extend to information provided in the course of compelled examinations pursuant to section 11 of the Act, CP states that neither Reed J. in *Southam* [1] nor McKeown J. in *Washington* [2] considered the legal basis for the privilege in the context of evidence obtained under compulsion of law and hence the matter remains to be decided. I disagree.

In *Southam*, Reed J., in recognizing a public interest privilege for the Director over details of interviews, expressed the legal basis for the existence of the privilege as follows:

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[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.).

[2] *Director of Investigation and Research v. Washington* (21 November 1996), CT 9601/156, Order Regarding Motion Regarding Discovery Issues, [1996] C.C.T.D. No. 24 (QL) (Comp. Trib.).

> ... In the competition law area, at least in merger and abuse of dominant position cases, the individuals who are interviewed may be potential or actual customers of the respondents; they may be potential or actual employees. They may fear reprisals if they provide the Director with information which is unfavourable to the respondents. Many of them are likely to be in a vulnerable position vis-à-vis the respondents. It is in the public interest, then, to allow the Director to keep their identities confidential, to protect the effectiveness of his investigations. It is in the public interest to keep interview notes confidential except when the interviewees are called as witnesses in a case or otherwise identified by the party claiming privilege. In addition, the Director is not required to prepare the respondents' case by identifying potential witnesses for them. .[3]

Although Reed J. was dealing with "voluntary" interviews, nothing in the reasoning which she advanced would justify the exclusion of the privilege on the sole ground that the information in issue was obtained under compulsion of law.

In *Washington*, McKeown J. considered the legal basis for the privilege and specifically held that it applied to information obtained under compulsion:

> We are of the view that the words of the Tribunal, [in Southam], and the various other decisions of both the Tribunal and the Court of Appeal dealing with the public interest privilege and information supplied voluntarily apply with equal, if not greater, force to the information, including documents, provided during section 11 examinations. The Act provides section 11 to the Director as an investigative tool. Protecting the Director's ability to effectively use all tools available to her in investigating potential competitive problems is in the public interest.[4]

CP submits that in so concluding McKeown J. failed to take into account the fact that persons being examined under section 11 must accept that the information which they provide could, in the end, be used by the Director in proceedings under the Act. Undoubtedly that is so. But I fail to see how this impacts on the policy reasons behind the existence of the privilege. In

[3] *Supra* note 1 at 84.

[4] *Supra* note 2 at 10.

claiming the privilege, the Director must ultimately be guided by his duty to apply the Act with the result that, whether obtained voluntarily or under compulsion of law, there is always a possibility that information will be disclosed beyond what the source of the information would like. What the privilege accomplishes, however, is that it gives the Director the ability to maintain control over information entrusted to him, thereby minimizing the risk of disclosure and preserving the effectiveness of the investigative process.

There is no basis for CP's submission that the privilege does not extend to information provided under compulsion of law.

If the privilege does apply, CP nevertheless argued that it is entitled to the transcripts because the interest in ensuring a fair hearing based on a full disclosure outweighs that protected by the claim of privilege. Citing *Biscotti v. Ontario Securities Commission*,[5] CP argued that this weighing exercise should take place on a "witness by witness" basis, taking into account all relevant interests and circumstances. I agree that this is a reasonable approach and I would add that one highly relevant circumstance is that to the extent that the Director claims privilege over any information provided to him, he cannot use that information before the Tribunal. If the privilege is to be waived at a later point in these proceedings, adequate and timely disclosure will have to be made to the respondents.

CP, evidently, now owns Cast. CP submits that Mr. Keller was examined as an officer of that company that the CP representative may be subject to discovery based on what Mr. Keller

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[5] (1991), 1 O.R. (3d) 409 (C.A.).

said and that the Keller transcript should be given the same treatment as the Miles transcript. CP submits that in these circumstances, fairness dictates that it should receive the verbatim record of the Keller examination rather than a summary of the transcript.

With respect to Mr. Storozuk, CP submits that as his identity is already known and as the facts relating to BOLT are extensively dealt with in the Director's notice of application, there is little left for the privilege to protect. Given the apparent importance of the BOLT information to the Director's position, CP argues that it must have the verbatim transcript to assess properly the validity of the pleadings.

The case of Mr. Storozuk, who is affiliated with a competitor of CP, is clear. The interests sought to be protected in asserting the privilege are readily apparent, and CP has been provided with a summary of the information which he has given to the Director. The fact that, in his case, there may be little left for the privilege to protect serves to highlight that the privilege has not been abused.

Mr. Keller's case is not as obvious. However, I believe that the circumstances surrounding his examination are entirely different from those surrounding Mr. Miles's examination. Mr. Miles was, prior to the acquisition, and remains part of the CP organization. CP was allowed to be represented at his section 11 examination. Mr. Keller, on the other hand, was part of the acquired entity prior to the acquisition but did not remain with the CP organization after the acquisition. CP counsels were excluded from his examination. Quite obviously, the nature of the relationship between CP and Mr. Miles and CP and Mr. Keller is not the same. It is

also worth noting that the Miles transcript was released after the interim confidentiality order became effective and its disclosure to other potential witnesses is prevented by that order.

The Director further states that both the Keller and Storozuk transcripts stand to reveal information obtained by him from other industry participants [6] as well as information provided by the examinees with respect to other industry participants. This type of information, including the identity of the persons from whom it emanates, falls clearly within the ambit of the public interest privilege.

CP has not convinced me that fairness dictates that the verbatim transcripts of the section 11 examinations of Messrs. Keller and Storozuk must be produced by the Director at the expense of the public interest privilege which protects them. CP has a summary of the information provided during those examinations. No reason was advanced as to why CP must know whether the information in the summary came from Mr. Keller or Mr. Storozuk or why CP must have a *verbatim* transcript of their examinations. If CP is of the view that the summary itself is inadequate, it remains open to it to bring forth the appropriate motion to have the Tribunal assess its adequacy.

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[6] Counsel for the Director pointed out that Mr. Miles was not provided with such information in the course of his examination having regard to the difference in the circumstances and nature of his relationship with CP.

FOR THESE REASONS, the motion for production of the transcripts of the section 11 examinations of Messrs. Keller and Storozuk is dismissed.

DATED at Ottawa, this 21st day of May, 1997.

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

(s) Marc Noël
Marc Noël