

CT-96/02

THE COMPETITION TRIBUNAL

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, as amended;

AND IN THE MATTER OF the merger whereby CP Containers (Bermuda) Limited acquired certain assets held by The Cast Group Limited and of the merger by 3041123 Canada Inc. of all the shares of Cast North America Inc. by way of agreements entered into between or among The Royal Bank of Canada, The Cast Group Limited, 3041123 Canada Inc., C.P. Containers (Bermuda) Limited and Canadian Pacific Limited.

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

RCT / GTC
FAXLINE # 0307

Applicant

- and -

CANADIAN PACIFIC LIMITED, CANADA MARITIME LIMITED, C.P. CONTAINERS (BERMUDA) LIMITED, 3041123 CANADA INC., CAST NORTH AMERICA INC. and THE ROYAL BANK OF CANADA

Respondents

**RESPONSE OF THE RESPONDENT,
ROYAL BANK OF CANADA**

**COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE**
FEB 7 1997 *RB*
REGISTRAR - REGISTRAIRE
OTTAWA, ONT. #14



STATEMENT OF GROUNDS AND MATERIAL FACTS**OVERVIEW**

1. The Respondent, Royal Bank of Canada ("Royal Bank"), admits that the merger referred to in the Notice of Application (the "merger") constitutes a merger as defined by section 91 of the *Competition Act* ("Act"). Royal Bank denies however that the merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a trade or industry within the meaning of section 92 of the Act.

2. Cast was a failing firm at, and prior to, the date of the merger. Cast was insolvent and on the brink of failure for years. Cast continued its operations until March of 1995 solely at the forbearance and indulgence of Royal Bank. Once Royal Bank concluded that it was no longer willing to provide funds to Cast, Cast was doomed to fail.

3. At the time of the merger:

- a) an extensive and thorough search for purchasers of, or investors in, Cast had been conducted;
- b) there was no ready, willing and able third party:
 - i) whose purchase of Cast would likely have resulted in a materially higher level of competition in a substantial part of the relevant market; and
 - ii) who would have paid a price which was greater than the proceeds that would have flowed from the liquidation of Cast;
- c) if the merger was not completed, Cast would not likely have remained in the relevant market, either in its actual state prior to the merger or in any retrenched state which would have allowed it to be a meaningful competitor in the relevant market;

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- d) if there were any retrenchment alternatives which would have allowed Cast to remain in the relevant market (which is denied), Royal Bank contends that such alternatives would not likely have resulted in a materially higher level of competition in the market than existed following the merger; and
- e) the liquidation of Cast would not likely have resulted in a materially higher level of competition in a substantial part of the relevant market than existed following the merger.

4. Further, Royal Bank says that, to the extent that there is a finding that the merger prevented or lessened competition substantially (which is denied), an order forcing Royal Bank to participate in the dissolution of the merger is not feasible, appropriate or necessary, and would not result in a materially higher level of competition in the relevant market. The dissolution of the merger is not feasible or appropriate because:

- a) it is not possible to reinstate Royal Bank's secured position over the assets of Cast if returned to CGL and CMHL;
- b) a substantial part of Royal Bank's security over the assets of Cast has been spent or discharged;
- c) the debt of CGL and CMHL to Royal Bank has been irrevocably reduced by US\$55,000,000;
- d) there are no Directors, Officers or employees of CGL or CMHL to carry on the business of Cast;
- e) Cast would immediately be forced through a completely unnecessary receivership in Bermuda with no assurance that a greater level of competition would be achieved;
- f) the business and operations of Cast have substantially changed from the date of the merger; and
- g) the Director has allowed the parties to fundamentally alter their pre-merger positions.



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Given the foregoing and having regard to the developments since the merger, the only appropriate and feasible remedy is an order requiring Canadian Pacific Limited or its subsidiaries to dispose of Cast.

5. Royal Bank pleads and relies upon the decision and findings of the National Transportation Agency (the "Agency") with respect to the merger in question. Without limiting the foregoing, and as discussed more thoroughly below in paragraphs 66 to 78, the Agency held that the merger was not against the public interest and, in reaching that conclusion, found that, *inter alia*:

- a) the relevant market was the market for intermodal transportation of 20 and 40 foot containers via the North Atlantic between Northern Europe and Central Canada, the US Mid-West states and the US Northeast states; and
- b) the ability of the port of Montreal and of the carriers operating at that port to maintain a strong presence in the US Mid-West market is crucial to Canadian shippers. The availability to Canadian shippers of a world-class service with its infrastructure is primarily due to the ability of Montreal-based carriers to serve the US Mid-West market in an efficient and effective manner. The port of Montreal is an integral component of this world-class service and to see it maintained is in the public interest.

The more narrowly defined market suggested by the Director fails to recognize the importance of a critical mass of container traffic which is necessary to ensure that the Port of Montreal maintains its competitive position and its viability to the benefit of Canadian shippers.

6. Royal Bank submits that the scope of the within application, in the face of the decision of the Agency, is an abuse of process and is unnecessarily duplicative. Royal Bank submits that the decision and findings of the Agency should be binding upon the Director and the Competition Tribunal in this application on the basis of *res judicata* or issue estoppel. In the alternative, Royal Bank submits that the Competition



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Tribunal herein should accord deference to, or a presumption in favour of, the decision and findings of the Agency.

7. Royal Bank further asserts that there were gains in efficiency resulting from the merger that will be, or have been, greater than the effects of any prevention or lessening of competition (which prevention or lessening is denied). These gains would not likely have been obtained if the merger had not been completed and will be lost if the relief requested by the Director is granted. One of the gains resulting from this merger was to ensure the continued viability of the Port of Montreal as a world class shipping facility, with resulting benefits to Canadian shippers.

ADMISSIONS AND DENIALS

8. Royal Bank admits the allegations in paragraphs 7, 8, 10, 11, 13, 14, 30, 32, 41, 43, 45 and 46 of the Notice of Application.

9. Royal Bank has no direct knowledge of the allegations in paragraphs 33, 35, 38, 40, 42, 44 and 47-51 of the Notice of Application.

10. Except as expressly admitted hereinafter, Royal Bank denies all other allegations in the Notice of Application.

THE PARTIES

11. Royal Bank is a chartered bank within the meaning of the *Bank Act*, S.C. 1991 c.46.

12. Prior to the merger Royal Bank was the principal banker and secured creditor of Cast Marine Holdings Ltd. ("CMHL") and its subsidiaries including Cast North America Inc. ("CNA"), The Cast Group Ltd. ("CGL"), and Cast Group Europe Limited ("CGEL").

13. CMHL is a Bermuda company that held the shares of CGL and CNA. CMHL was a holding company and had no office or place of business in Canada.

14. CGL is a Bermuda company that provided a fully integrated door-to-door intermodal service for moving containerized cargo between

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Canada, the United States and Europe (which business is hereinafter referred to as "Cast"). CGL had no office or place of business in Canada. CGL was not acquired by Canadian Pacific in the merger.

15. CNA is a Canadian company which, prior to the merger, was owned by CMHL and was the North American agent of CGL responsible for the inland transportation of containers within North America. CGL owned all the shares in CGEL and Cast Logistics (U.S.A.) Limited ("CLUSA").

16. CGEL is an English company which, prior to the merger, was owned by CGL and was the European agent of CGL responsible for the inland transportation of containers within Europe.

17. CLUSA is a company incorporated in Bermuda which, prior to the merger, was owned by CGL and was licensed to transport goods between the eastern U.S.A. and the Commonwealth of Independent States.

18. The corporate structure of the Cast companies prior to the merger is set out in the diagram attached hereto as Schedule A.

19. CP Containers (Bermuda) Limited ("CP Bermuda") was incorporated in Bermuda in July of 1994 for the purpose of acquiring the assets of CGL including the shares CGEL and CLUSA held by CGL. CP Bermuda is a wholly-owned subsidiary of Canadian Pacific Limited ("Canadian Pacific").

20. 3041123 Canada Inc. ("3041123") was an inactive company incorporated under the Canada Business Corporations Act and was purchased by Canadian Pacific for the purpose of acquiring the shares of CNA.

21. CMHL and CGL were not acquired as part of the merger.

22. Canadian Pacific is a Canadian corporation involved directly and indirectly through its subsidiaries in an array of businesses, including transportation by rail and water. Canadian Pacific owns the whole beneficial interest in the shares of Canadian Maritime Limited ("Canmar"), which operates a fully integrated door-to-door intermodal transportation system for

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moving containerized cargo between North America and northern Europe, and between North America and the Mediterranean.

ROYAL BANK HISTORY WITH CAST

23. Since the late 1970's Royal Bank had been the principal banker to the business that now operates as Cast .

24. In 1982 Eurocanadian Shipholdings Limited ("Eurocanadian") owned Cast. Eurocanadian was owned by the following persons in the following proportions:

| | |
|------------------------------------|------|
| Dolphin Investments (F. Narby) | 61 % |
| Canadian National Railway ("CN") | 18 % |
| Helix Shipping Ltd. (D.C. Webster) | 21 % |

25. In 1982 Eurocanadian was insolvent and indebted to Royal Bank in an aggregate amount exceeding US\$180,000,000.

26. In 1982 and 1983 Royal Bank held discussions with CN in an effort to restructure the Eurocanadian group. Those discussions failed. As a consequence, in June of 1983 Royal Bank demanded its loans from the Eurocanadian group, exercised its security and sold Cast to CGL (the "First Failure").

27. At the time of the First Failure Royal Bank's potential losses on its loans to Eurocanadian exceeded US\$100,000,000. As a consequence of the First Failure, CN and Helix Shipping lost significant sums of money.

28. From June of 1983 to December of 1985 Royal Bank owned substantially all of the shares of CGL. In the summer of 1985 Royal Bank entered into discussions with CN to sell Cast to CN. Those discussions failed. In December of 1985 Royal Bank sold Cast to CMHL which owned it until the date of the merger. The consideration paid to Royal Bank for Cast in 1985 was US\$94,000,000.

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29. CMHL was capitalized to acquire Cast as follows:

| | |
|------------------|------------------------|
| Preferred Shares | US\$ 20,000,000 |
| Common Shares | US\$ 5,000,000 |
| Debt | <u>US\$ 69,000,000</u> |
| TOTAL | US\$ 94,000,000 |

30. Of this total, Royal Bank and its subsidiary, R.B.C. Holdings (Bahamas) Limited ("RBCB") advanced US\$48,000,000 to CMHL comprised of US\$4,000,000 paid for preferred shares, US\$1,000,000 paid for common shares and a loan of US\$43,000,000. Helix Investments Limited or parties affiliated with it including Mr. D.C. Webster ("Helix") advanced most of the balance of CMHL's initial capitalization.

31. During the period 1986 to 1988 Cast generated positive cash flow from its operations and repaid in excess of US\$25,000,000 of its loan indebtedness to Helix and RBCB. It also repaid a substantial amount of its ship debt. However, by the end of 1989, Cast was unable to pay its obligations to Helix and RBCB as they fell due and its borrowings from Royal Bank were increasing.

32. As a result of losses sustained by Cast during the fiscal year ending March 31, 1990, Royal Bank restructured its loan facilities with Cast on July 12, 1990, and agreed to lend additional sums to Cast to permit it to continue in business.

33. Later in fiscal year 1991, Royal Bank lent Cast a further US\$6,000,000. During the 1991 fiscal year Cast lost US\$7,043,000.

34. During the fiscal year 1992, Royal Bank lent Cast a further US\$5,000,000. During this same period Cast lost a further US\$71,419,000.

35. In addition to the US\$5,000,000 loan referred to above, in January of 1992, Royal Bank again agreed to make further significant financial concessions to Cast in an effort to prevent the failure of Cast. The parties entered into a restructuring agreement (the "Restructuring Agreement"), dated January 30, 1992 which allowed Cast a 27 month moratorium on the



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principal payments of its debt to Royal Bank. Pursuant to the terms of the Restructuring Agreement, Cast was required to remain current on its interest payments and to strictly observe certain specified financial covenants.

36. By the summer of 1992, Cast was in default under the Restructuring Agreement. It was unable to comply with the financial covenants or make the required interest payments.

37. In November of 1992, Cast ceased making any interest payments on its indebtedness to Royal Bank.

38. Cast's cash flow problems persisted and in the later half of fiscal 1993, Royal Bank advanced a further US\$15,000,000 to Cast to fund its losses.

39. In January of 1993, Cast management acknowledged Cast's default under its credit agreements with Royal Bank, its insolvency and the fact that it was a failing firm, and consented to the appointment by Royal Bank of a receiver for Cast.

40. During fiscal 1993 Cast lost US\$48,159,000.

41. In the spring of 1993, Cast promised Royal Bank that it would begin making the required payments on Royal Bank's loans by September, 1993. These payments were not made as promised.

42. In March of 1994, Cast began to make interest payments on part, but not all, of its debt to Royal Bank. During fiscal 1994 Cast lost US\$10,928,000.

43. Apart from the limited interest payments which commenced in March 1994, Cast applied any positive cash flow generated from its operations to reduce its most pressing trade debts to general trade creditors; these payments were made at the expense of Royal Bank.

44. In the spring of 1994, Royal Bank advised Cast of its strong preference that Royal Bank cease to be its principal banker. As of March 31, 1994 the deficit of Cast was US\$157,415,000.



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45. In June 1994, Royal Bank reiterated to Cast that it would not provide any new money to Cast.

46. The only debt reduction Cast was able to make to Royal Bank in fiscal years 1994 and 1995 was derived from the sale of its three conbulklers. These ships were subject to Royal Bank's security. However the proceeds of sale were substantially less than the indebtedness owed to Royal Bank which was secured against these ships. From 1992 until the sale of the conbulklers, Cast made no payments to Royal Bank on this ship debt.

47. On June 16, 1994, Royal Bank entered into a letter of intent (referred to in paragraph 11 of the Notice of Application as the Agreement in Principle) with Canadian Pacific under which Royal Bank, acting in its capacity as the principal secured creditor of Cast, agreed to sell, or cause CMHL and CGL to sell, Cast to Canadian Pacific.

48. On or about July 21, 1994, Canadian Pacific gave notice of the proposed merger under the *Competition Act* to the Director.

49. On July 27, 1994, Royal Bank wrote to Cast, declaring the whole of Cast's indebtedness to it to be immediately due and payable.

50. On August 22, 1994, Canadian Pacific delivered the required notice of the proposed merger under the National Transportation Act ("NTA") to the Agency.

51. On October 1, 1994, the Agency published notice of the proposed merger in the *Canada Gazette*.

52. Between December 5 and 16, 1994, the Agency conducted a public hearing into the merger. The Agency released its decision on January 20, 1995.

53. Having received the favourable decision of the Agency, Royal Bank took steps to carry out the merger and it informed the Director of these intentions.



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54. On February 21, 1995, Royal Bank demanded repayment of all outstanding indebtedness owing by Cast and issued notices of its intention to enforce its security.

55. The Federal Court of Appeal rejected CN's motion for leave to appeal from the Agency's decision on March 2, 1995.

THE MERGER

56. On March 31, 1995, the date of the merger, Cast was a failing firm which was indebted to Royal Bank for an amount in excess of US\$100,000,000. This indebtedness was comprised of loan indebtedness to Royal Bank which exceeded US\$53,000,000 as well as indebtedness by way of a guarantee in favour of Royal Bank which exceeded US\$31,000,000. The US\$16,000,000 balance of the indebtedness owing to Royal Bank was unpaid interest which had accrued since November 1992.

57. At the date of the merger, Cast was also indebted to RBCB and Helix for advances in excess of US\$42,000,000 plus debt service arrears of US\$4,000,000 which had accrued since July of 1992. This indebtedness of over US\$46,000,000 was secured by a specific charge over the shares of CGL and a floating charge over all other property and assets of CMHL. Despite this security, no portion of this debt has been repaid. Helix and RBCB did, however, consent to the merger as they considered it to be in the best interest of the general body of creditors of Cast.

58. Cast consented to the enforcement of Royal Bank's security on March 31, 1995. As a result, David Eugene William Lines and Peter Charles Barnes Mitchell were appointed by Royal Bank as the receivers of CMHL and of CGL (the "Receivers") pursuant to Royal Bank's debenture security. The Receivers are resident and domiciled in Bermuda.

59. Immediately following their appointment, the Receivers exercised the power of sale contained in Royal Bank's debenture security and sold the assets of CGL (including, CGL's containers, goodwill, intellectual property, marketing information, outstanding receivables, computer systems, contracts, shares of CGEL and rights to the "Cast" name) to CP Bermuda.



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60. As part of the merger, Royal Bank exercised its power of sale rights under a share pledge agreement and sold the shares of CNA held by CMHL to 3041123 Canada Inc. ("3041123").

61. Royal Bank was a secured creditor of Cast. The rights and powers it exercised were as a secured creditor. Royal Bank did not own Cast nor did it own the shares of CNA.

62. CP Bermuda and 3041123 purchased the assets of Cast (including the shares of CNA) in the merger for a price of US\$55,000,000. The purchasers also assumed the ordinary course trade credit of Cast in excess of US\$50,000,000 as well as the obligations owing to the employees of Cast.

63. CMHL is still in receivership and has not carried on any business since the merger. There are no employees of CMHL. All directors of CMHL have resigned. The only assets of CMHL are shares in insolvent subsidiaries. The liabilities of CMHL exceed US\$90,000,000 of which at least US\$45,000,000 is owing to Royal Bank.

64. CGL is still in receivership and does not carry on any business. There are no employees of CGL. All directors of CGL have resigned. The only assets of CGL are shares in insolvent subsidiaries and amounts owing on judgment debts and insurance claims aggregating approximately US\$1,000,000. These assets are subject to Royal Bank's security. The outstanding liabilities of CGL exceed US\$90,000,000 of which at least US\$45,000,000 is owing to Royal Bank.

65. Royal Bank's share pledge security has been spent. If the Cast assets were ordered to be returned to CGL and CMHL and Royal Bank was ordered to pay the US\$55,000,000 back to the purchasers, Royal Bank would have no claim against CGL and CMHL for the US\$55,000,000 repaid to the purchasers and Royal Bank would have no security over many of the returned assets. As part of the merger Royal Bank discharged a substantial portion of its security over the assets of Cast, including all of its security over the European assets of Cast. Royal Bank can never be restored to its pre-merger secured position.

The Agency Decision

66. The National Transportation Agency is a specialized tribunal created pursuant to the NTA.

67. The Agency's mandate, as specified in part by section 257(1) of the NTA is:

"to decide whether, in the opinion of the Agency, a proposed merger is against or not against the public interest and, if the Agency decides that the proposed merger is against the public interest, the Agency shall disallow the proposed merger."

68. In the exercise of its mandate the Agency is guided, in part, by the transportation policy set forth in section 3(1) of the NTA which reads as follows:

"3. (1) It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services accessible to persons with disabilities and making the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travelers, including persons with disabilities, and to maintain the economic well-being and growth of Canada and its regions and that those objectives are most likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy and to legal and constitutional requirements,

a) the national transportation system meets the highest practicable safety standards,

b) competition and market forces are, whenever possible, the prime agents in providing viable and effective transportation services,

c) economic regulation of carriers and modes of transportation occurs only in respect of those services and regions where regulation is necessary to serve the transportation needs of shippers and travelers and such regulation will not unfairly limit the ability of any carrier or mode of transportation to compete freely with any other carrier or mode of transportation,

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d) transportation is recognized as a key to regional economic development and commercial viability of transportation links is balanced with regional economic development objectives in order that the potential economic strengths of each region may be realized,

e) each carrier or mode of transportation, so far as practicable, bears a fair proportion of the real costs of the resources, facilities and services provided to that carrier or mode of transportation at public expense,

f) each carrier or mode of transportation, so far as practicable, receives fair and reasonable compensation for the resources, facilities and services that it is required to provide as an imposed public duty, and

g) each carrier or mode of transportation, so far as practicable, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute

i) an unfair disadvantage in respect of any such traffic beyond that disadvantage inherent in the location or volume of the traffic, the scale of operation connected therewith or the type of traffic or service involved,

ii) an undue obstacle to the mobility of persons, including those persons who are disabled,

iii) an undue obstacle to the interchange of commodities between points in Canada, or

iv) an unreasonable discouragement to the development of primary or secondary industries or to export trade in or from any region of Canada or to the movement of commodities through Canadian ports,

and this Act is enacted in accordance with and for the attainment of those objectives to the extent that they fall within the purview of subject-matters under the legislative authority of Parliament relating to transportation."

69. On August 22, 1994, Canadian Pacific delivered the notice of the proposed merger, which was required pursuant to the provisions of the NTA, to the Agency.



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70. The Agency caused notice of the proposed merger to be published in the Canada Gazette on October 1, 1994. The Agency received a number of objections and conducted a thorough investigation. During the course of its investigation the Agency identified issues which warranted detailed examination as follows:

- a) market definition and market dominance;
- b) Montreal Port Corporation - Competitiveness related to other ports;
- c) impact of the proposed merger on intermodal (between modes) and intermodal (within modes) competition;
- d) impact of proposed merger on Canadian shippers;
- e) barriers to entry; and
- f) evaluation of efficiency gains and possible economic loss to Canada.

71. The Director was informed of the proposed merger by Canadian Pacific on or about July 21, 1994. As stated in paragraph 30 of the Notice of Application, the Director caused an Information Request to be sent to Canadian Pacific on July 27, 1994. Responses were provided to the Director over the next three months.

72. The Agency received a number of interventions in support of, and in opposition to, the proposed merger. One of the opposing intervenors was CN. The opposing intervenors, including CN, claimed that the proposed merger would provide the combined entity of Canmar and Cast with the ability to raise prices significantly at the port of Montreal and would lessen competition.

73. As part of its investigation, the Agency convened and conducted a public hearing in Montreal between December 5 and December 16, 1994. At all relevant times the Director was aware of the Agency investigation, the public hearing and the scope of the Agency's inquiry, and could easily have participated in those proceedings.



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74. As evidenced by its decision released on January 20, 1995, the Agency analyzed the proposed transaction, made findings of fact and formed an opinion on the consequences of the proposed transaction all within the confines of the Agency's very broad discretion to determine whether the merger was in the public interest. In so doing, the Agency was acting within its specialized area of expertise and, as a consequence, its decision and the reasons for that decision are, at the very least, entitled to deference from this Tribunal.

75. In concluding that the proposed merger was not against the public interest, the Agency made, *inter alia*, the following findings:

- a) The relevant market to consider in this case is the market for intermodal transportation of 20 and 40 foot containers via the North Atlantic between Northern Europe and Central Canada, the US Mid-West states and the US Northeast states.
- b) The combined share of Carumar and Cast following the proposed merger in the aforesaid market would be in the vicinity of 21 percent.
- c) With a combined market share of 21 percent, and with the effective competition provided by other liners serving the North Atlantic trade, Carumar and Cast should not be able to dominate, or abuse any resulting post-merger market power.
- d) The infrastructure that has been put in place in the port of Montreal for containerized cargo greatly exceeds what would be necessary to handle Canadian containerized cargo. The ability of the port of Montreal to remain competitive vis-à-vis other gateways for the US Mid-West market is of fundamental importance because 50 percent of the container traffic through the port of Montreal is dependent upon the ability of the port to compete in the US Mid-West market.
- e) The Montreal gateway faces stiff competition from the US East Coast ("USEC") ports for US Mid-West traffic and significant competition from the port of Halifax for Ontario and Quebec

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traffic on the Canada/U.S.A. - Northern Europe trade route. Continuing efforts are needed by the port of Montreal, as well as by other transportation interests, to maintain the competitive position and viability of the port, all of which are in the public interest.

- f) The ability of the port of Montreal and of the carriers operating at that port to maintain a strong presence in the US Mid-West market is crucial to Canadian shippers. The availability to Canadian shippers of a world-class service with its infrastructure is primarily due to the ability of Montreal-based carriers to serve the US Mid-West market in an efficient and effective manner. The port of Montreal is an integral component of this world-class service and to see it maintained is in the public interest.
- g) Without the US traffic volumes, the port of Montreal would not be able to support its current level of container handling operations and such a situation would have negative repercussions on employment, long term investments and service. The loss of a "critical mass" of container traffic to the port of Montreal represented by US volumes would be particularly detrimental to port employees, the Montreal community, the region and, ultimately, Canadian shippers operating out of Quebec and Ontario.
- h) The level of competition between shipping lines serving the Canada/U.S.A. -Northern Europe trade route will not be adversely affected by the combined operations of Cast and Canmar, and accordingly the merger will not affect the competitive position of other carriers that serve the North Atlantic trade.
- i) Conference as well as non-conference carriers in Montreal and Halifax have offered and should continue to offer effective competition in this market.



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- j) Existing barriers to entry would not be enhanced by the proposed merger.

76. It would be an abuse of process and an inappropriately duplicative proceeding for the Tribunal to conduct a hearing, *ab initio*, into matters and issues already decided by the Agency.

77. In the alternative, the decision and findings of the Agency are binding upon the Director and the Competition Tribunal in this application.

78. In the further alternative, the decision and findings of the Agency are to be accorded deference or presumed to be correct by the Tribunal.

THE DIRECTOR'S INVESTIGATION

79. The Director was informed of the proposed merger by Canadian Pacific on or about July 21, 1994. On or about July 27, 1994, the Director caused an information request to be sent to Canadian Pacific. Responses to the request were provided over the next three months.

80. On January 13, 1995, one week before the Agency was required to reach its decision, the Director commenced a formal inquiry into the proposed merger (the "Inquiry").

81. In and after March of 1995, the Director obtained a number of orders compelling various parties to produce relevant documents and to attend examinations pursuant to Section 11 of the *Competition Act*.

82. In paragraph 36 of the Notice of Application, the Director asserts that on March 9, 1995 the Honourable Mr. Justice Fawley held that the jurisdiction of the Director and the Competition Tribunal was unaffected by the exercise of jurisdiction by the Agency. The decision dealt with the standing of Canadian Pacific to bring the application. The comments of His Honour to which the Director refers and relies upon are *obiter dicta*. In *obiter* His Honour identified, but did not decide the effect of the absence of functional delegation with respect to the *Competition Act* and the NTA. There has been no judicial determination of the effect or relevance of the decision of the Agency vis-à-vis the within application.



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83. Royal Bank admits that the Director requested that the merger in question be postponed pending the completion of his Inquiry. The Director was advised that Royal Bank was not prepared to postpone exercising its power of sale under its security because Cast was likely to fail thereby exposing Royal Bank to significant civil liability for unlawful trading and potential criminal liability for fraudulent trading in Bermuda and the United Kingdom.

84. Prior to the merger, the Director was invited to state its position with respect to the merger in question and take whatever action it deemed appropriate. Despite all of the investigation and related proceedings which had been conducted by that time, the Director took no steps to challenge the merger.

85. The Director took approximately 23 months to complete the Inquiry. The Notice of Application was issued on December 20, 1996, some 29 months after the Director was informed of the proposed merger and over 20 months since the merger.

86. Prior to being called to a meeting on December 18, 1996, Royal Bank was unaware that the Director would be bringing the within application.

87. Royal Bank submits that the Director's request for an order forcing Royal Bank to participate in a dissolution is neither feasible nor appropriate in these circumstances because:

- a) it is not possible to reinstate Royal Bank's secured position over the assets of Cast if returned to CGL and CMHL;
- b) a substantial part of Royal Bank's security over the assets of Cast has been spent or discharged;
- c) the debt of CGL and CMHL to Royal Bank has been irrevocably reduced by US\$55,000,000;
- d) there are no Directors, Officers or employees of CGL or CMHL to carry on the business of Cast;



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- e) Cast would immediately be forced through a completely unnecessary receivership in Bermuda with no assurance that a greater level of competition would be achieved;
- f) the business and operations of Cast have substantially changed from the date of the merger; and
- g) the Director has allowed the parties to fundamentally alter their pre-merger positions.

COMPETITION ANALYSIS

88. Royal Bank pleads and relies upon the finding of the Agency with respect to the relevant market, the relevant market shares and the other issues referred to in paragraph 75 above. Royal Bank adopts the position of the Canadian Pacific Response dealing with competition analyses in its entirety.

89. Royal Bank specifically denies that the merger provided Canadian Pacific with a market share of approximately 63% or provides the SLCS (as defined in the Notice of Application) with a market share of approximately 85%.

90. Further, Royal Bank specifically denies that the SLCS can be treated, as alleged in paragraph 16 in the Notice of Application, for most purposes as a single competitor. To the contrary, and as admitted by the Director in paragraph 92 of the Notice of Application, intra-Conference competition is commonplace.

Failing Firm

91. Cast was a failing business at the time of the merger on March 31, 1995. At that time, Cast was insolvent and in an precarious position with its trade creditors and customers. Royal Bank asserts that, without the completion of the merger, Cast would likely have failed or exited the market.



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Insolvency and Receivership

92. At the time of the merger, Cast was insolvent.

93. Cast's insolvency is evident from, *inter alia*, the following:

- a) During the five fiscal years preceding the merger, Cast incurred aggregate operating losses in excess of US\$159,000,000:

| <u>Financial Year</u> | <u>Net Operating Loss</u> |
|---------------------------|-------------------------------|
| 1991 | US \$7,043,000 |
| 1992 | US \$71,419,000 |
| 1993 | US \$48,159,000 |
| 1994 | US \$10,928,000 |
| 1995 | US \$21,763,000 |

- b) At the time of the merger, CMHL had a deficit of US\$181,000,000;
- c) At the time of the merger, Cast reported a working capital deficiency in excess of US\$39,000,000;
- d) At the time of the merger, Cast reported total liabilities exceeding its total assets by more than US\$117,000,000;
- e) By March of 1995, Cast's financial situation had deteriorated further and reported net operating losses almost twice of those experienced in fiscal year 1994 and cash flow from operations before interest, taxes and depreciation dropping from US\$17,000,000 in 1994 to less than US\$1,000,000 in 1995;
- f) Cast's working capital position deteriorated significantly in the three months preceding the merger;
- g) At the time of the merger, Cast was unable to pay its debts as they became due;
- h) At the time of the merger, Royal Bank was no longer prepared to financially support Cast and, with the exception of Canadian Pacific, no other person was ready, willing and able to do so;



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- i) During the financial quarter preceding the merger, Cast reported operating losses of US\$13,257,000; and
- j) During the fiscal year ending on the date of the merger, Cast reported a decrease in working capital of over US\$15,000,000 with the result that payables and accrued liabilities were more than three times the trade accounts receivable.

Cast's Precarious Position with Trade Creditors and Customers

94. Prior to the merger, many of Cast's trade creditors had refused to grant Cast any further credit and were only willing to supply goods and services on a cash on delivery basis. Cast would not have been able to continue to operate on this basis without further loans from Royal Bank, which would not have been made.

95. Following the signing of the letter of intent with Canadian Pacific on June 16, 1994, many of Cast's other trade creditors were only willing to continue to do business with Cast based on assurances that Canadian Pacific or its subsidiaries would satisfy their accounts following the merger. Without the merger and the stated intent of Canadian Pacific or its subsidiaries to satisfy Cast's trade debts, Cast would likely have ceased operation prior to the time of the merger.

96. During this same period prior to the merger, the amount owing by Cast to Canadian Pacific Railway substantially increased. If Canadian Pacific or its subsidiaries had not been purchasing Cast, they would not have allowed the rail payable to so increase.

97. Immediately following the merger Canadian Pacific was required to inject US\$9,400,000 to reduce Cast's overdue trade payables. Cast would have been unable to satisfy these trade creditors without Canadian Pacific's involvement.

98. In addition, without the completion of the merger, Cast's operating revenues would, in all likelihood, have decreased significantly as shippers chose alternative shipping lines. Absent the prospect of a merger



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with Canadian Pacific, shippers would not have continued to ship with Cast because of concerns that Cast would not be able to deliver their cargo.

No Competitively Preferable Purchaser

99. At the time of the merger, there was no competitively preferable purchaser of Cast. In particular, there was no ready, willing and able third party:

- a) whose purchase of Cast would likely have resulted in a materially higher level of competition in a substantial part of the market; and
- b) who would have paid a price which was greater than the proceeds from the liquidation of Cast.

100. Since at least 1992, Royal Bank had expressed its concern with the ongoing survival of Cast and its strong preference that Royal Bank cease to be Cast's principal banker. From that time, and contrary to the assertions in paragraph 125 of the Notice of Application, Royal Bank consistently encouraged the management of Cast to actively market Cast and pursue potential purchasers or investors and, did not dissuade management from seeking an alternative purchaser for Cast.

101. In January of 1993, Cast management engaged R.K. Johns & Associates, Inc. ("R.K. Johns") to identify and contact prospective purchasers for Cast's container shipping business. R.K. Johns is a New York based shipping consulting firm with extensive experience and contacts in the shipping industry. Canadian Pacific and CN, which everyone recognized as the most obvious purchasers, were specifically excluded from the scope of the R.K. Johns search. R.K. Johns would have been entitled to a US\$1,000,000 incentive fee had they been able to find a purchaser for Cast.

102. R.K. Johns and Cast conducted a thorough and extensive search for potential purchasers and investors. They identified and approached those prospective purchasers in the transportation industry, other than Canadian Pacific and CN, who would reasonably have been expected to have a strategic interest in, or be able to achieve synergies as a result of, acquiring Cast.



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103. During the same period, D.C. Webster contacted investment banking firms for potential investment in Cast. D.C. Webster was a director of CGL who had been actively involved in the management of Cast for many years. He was also an investor in CMHL through Helix.

104. During this same period, Royal Bank and Cast management held discussions with CN about a potential purchase of, or investment in, Cast. Those discussions ended in the fall of 1993 as CN requested Royal Bank, *inter alia*, to write-off substantial portions of the Cast indebtedness to Royal Bank while at the same time CN was not prepared to make any substantial cash investment in Cast.

105. Once the discussions with CN failed, Royal Bank approached Canadian Pacific to determine their interest in an investment in, or purchase of, Cast.

106. Between mid-1993 to May of 1994, R.K. Johns and Cast management had discussions with 31 parties or investor groups with respect to the possibility of the purchase of, or an investment in, Cast. No prospective purchaser identified by R.K. Johns as a party which might have had a strategic interest in, or might have been able to achieve synergies as a result of, acquiring Cast expressed an interest in pursuing an acquisition of, or investment in, Cast.

107. The investor groups referred to in subparagraphs 123(a) through (c) of the Notice of Application were not identified by R.K. Johns. The proposals made by these investor groups:

- a) were preliminary expressions of interest which did not indicate or evidence a serious commitment by the investor groups to acquire Cast;
- b) did not indicate or evidence an ability on the part of the investor groups to complete an acquisition; or
- c) contained unreasonable restrictions on continued marketing efforts.



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108. Royal Bank held an initial meeting with each of these investor groups at which Royal Bank expressed its determination to sell Cast. Royal Bank encouraged these groups to conduct any necessary due diligence and submit a concrete offer to acquire Cast. No such concrete offers were ever made.

109. The last investor proposal referred to in subparagraph 123(d) of the Notice of Application was made by a group (the "Vitran Group") comprised of Vitran Corporation Inc. ("Vitran"), Helix and Cast management.

110. Helix had not demonstrated an ability or desire to invest any substantial amount of new money to acquire Cast. Vitran did not appear to have the experience, ability and financial resources to acquire Cast and sustain its operations. As a result, Royal Bank had serious doubts about the ability of the Vitran Group to complete the acquisition.

111. Notwithstanding these concerns of Royal Bank about the Vitran Group, meetings and discussions were held with the Vitran Group.

112. Royal Bank was under a duty to obtain the best price possible on the realization of its security over Cast. Royal Bank was also quite circumspect to ensure that there was a level playing field for all potential purchasers. To that end and to bring matters to a head, Royal Bank then advised both the Vitran Group and Canadian Pacific that they should submit their best offer to buy Cast. They were both told that the offer should be in a form capable of acceptance and, as a demonstration of their sincerity, they were also told to provide a significant non-refundable deposit, which would be returned if their offer was not accepted.

113. On June 16, 1994, Canadian Pacific submitted an all cash offer for US\$55,000,000. Canadian Pacific also provided a US\$5,000,000 non-refundable deposit.

114. The Vitran Group did not submit an offer capable of acceptance nor did they provide a deposit. Instead, the Vitran Group submitted an invitation to treat with respect to the purchase of Cast for \$40,000,000 plus a participation in cash flow. The Vitran Group proposal also stipulated that



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there were numerous issues of substance which were yet to be identified, negotiated and finalized, including the structure of their own group.

115. The assertion in paragraph 125(a) of the Notice of Application that Royal Bank insisted upon a non-refundable deposit in the amount of US\$5,000,000 before the Vitran Group would be given access to all information required by a potential purchaser of Cast is false and misleading. The Vitran Group had more than adequate access to information from its own members, which included Cast's management. Royal Bank never controlled or denied access to Cast information to any prospective purchaser. At all times, that information was in the control of Cast's management.

116. The Vitran Group proposal was substantially inferior to the Canadian Pacific offer. Accordingly, Royal Bank accepted the Canadian Pacific offer.

117. Six days after Royal Bank accepted the Canadian Pacific offer, the Vitran Group submitted a further proposal to acquire Cast for \$50,000,000 cash. This proposal still remained subject to other material terms which had yet to be identified by the Vitran Group. It also did not provide any deposit. This proposal was still substantially inferior to the Canadian Pacific offer. Royal Bank was bound by its duty to obtain the best price possible and by its acceptance of the Canadian Pacific offer.

118. Furthermore and in any event, given the substantial deterioration in Cast's financial position during the latter half of fiscal 1995, at the time of the merger, neither the Vitran Group nor any other party (except Canadian Pacific) would have had any interest in acquiring Cast at a price above liquidation value.

119. The acquisition by Canadian Pacific on March 31, 1995 provided significant benefits for other stakeholders in Cast. The intermodal container transport business of CGL was to continue as a going concern. As a result, ordinary trade creditors of Cast would not be prejudiced, CGL's customer cargo would be delivered without interruption and the employment of over 700 current employees of Cast would be continued in the various jurisdictions in which Cast carried on business.



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Retrenchment

120. Royal Bank says that there was no retrenchment alternative or reorganization process which would have allowed Cast to remain in the market and would likely have resulted in a materially greater level of competition than was the case following the merger.

121. In 1992, Coopers & Lybrand identified a number of cost saving and operational initiatives to rationalize Cast's business. These initiatives which were subsequently implemented by Cast resulting in a cost savings of US\$20,000,000 per annum, included:

- a) eliminating four levels of senior management in 1992 and 1993;
- b) closing unprofitable shortsea operations;
- c) reducing corporate advertising;
- d) closing non-essential offices in Vancouver, Pittsburgh, Baltimore and Scandinavia;
- e) consolidating staff;
- f) reducing inland costs;
- g) replacing the Ipswich terminal with Felixstowe;
- h) closing a refurbishment plant for containers and purchasing new or used containers instead;
- i) reducing trucking expenses through the lease of new vehicles;
- j) renegotiating the Montreal head office lease;
- k) relocating to Flanders terminal; and
- l) introducing outside stevedoring contracts in Montreal.

122. On an ongoing basis, Cast management, with the assistance of Coopers & Lybrand, continued in their efforts to identify, investigate and analyze cost saving measures and initiatives.



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123. During fiscal 1995, Cast management entered into strategic alliances and slot charter arrangements with other carriers in order to increase revenues. In addition, Cast withdrew from the bulk and conventional cargo trades, sold their three conbulklers and chartered fully cellularized vessels.

124. Prior to the merger, Cast management had carried out all cost savings or operational initiatives which reasonably could or would have had a significant impact on Cast's operations or viability.

125. A formal reorganization of Cast would have been impossible for the following reasons:

- a) Cast was suffering ongoing operating losses and there was no one available to advance funds to it to fund those losses;
- b) if Cast filed for formal protection all suppliers would only supply on a cash on delivery basis;
- c) notwithstanding any formal stay or protection, shippers would not entrust their cargo to Cast and Cast revenues would decline further;
- d) formal proceedings were not available in Europe and unpaid trade creditors would have exercised lien rights and powers of arrest to recover their overdue accounts;
- e) Cast did not have the funds available to pay the significant costs required to carry out formal reorganization proceedings in Canada, the United States and the United Kingdom.

126. An informal reorganization would have been virtually impossible because of competing priorities of creditors. In particular, creditors in possession of Cast's containers could not reasonably be expected to abandon their lien rights and release those containers without full payment. In addition, suppliers to vessels carrying Cast's cargo could reasonably be expected to arrest Cast's vessels unless they were paid in full.

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Liquidation

127. Royal Bank specifically denies the allegations contained in paragraph 126 of the Notice of Application. Royal Bank adopts Canadian Pacific's response with respect to the liquidation of Cast.

RELIEF SOUGHT

128. Royal Bank respectfully requests this Application be dismissed and that the relief sought by the Director be denied.

129. In the alternative, if this Tribunal decides that a remedy is appropriate, Royal Bank says that dissolution should not be ordered.

PROCEDURAL MATTERS

130. Royal Bank does not object to this Application being heard in the City of Ottawa.

131. Royal Bank further agrees to these proceedings being conducted in the English language.

132. For the purposes of this Application, service of all documents on Royal Bank may be served on:

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DATED at Toronto, Ontario, this 7th day of February, 1997.


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