Federal Court of Appeal

Citation: American Airlines, Inc. v. Canada (Competition Tribunal)*
Date: 1988-11-10

Iacobucci C.J., Heald and Stone JJ.

Counsel:
C.L. Campbell, for appellant.
N.J. Schultz and *J. Yale*, for respondent, Consumers' Association of Canada.
M.E. Rothstein, Q.C., for respondents, Air Canada Ltd., 153333 Canada Limited Partnership and Air Canada Services Inc.
J. Strekaf, for respondents, PWA Corporation, Canadian Airlines International Ltd., Pacific Western Airlines Ltd., Canadian Pacific Air Lines, Limited, 154793 Canada Ltd., 153333 Canada Limited Partnership and Air Canada Services Inc.
J.F. Rook, Q.C., and *T.S. Whiffen*, for respondents, Director of Investigation and Research.
No one appearing for Attorney-General of Manitoba.
No one appearing for Wardair Canada Inc.

The judgment of the court was delivered by

[1] IACOBUCCI C.J.:—This is an appeal by American Airlines, Inc. ("American" or "appellant"), pursuant to s. 13(1) of the *Competition Tribunal Act*, S.C. 1986, c. 26, Part I, from the order of Strayer J. of the Competition Tribunal with respect to an application by American to intervene, pursuant to s. 9(3) of the *Competition Tribunal Act*, in a proceeding before the Competition Tribunal.

[2] The proceeding in question was instituted by the application of the Director of Investigation and Research ("Director") for, amongst other things, an order under s. 64 of the *Competition Act*, R.S.C. 1970, c. C-23, as amended, and for an interim order under s. 76 of the *Competition Act* (The Director's application was subsequently amended by order of the Competition Tribunal to include a prayer for relief under ss. 64(1)(*e*)(iii) and 77(1)(*b*) of the *Competition Act.*) In effect, the Director has alleged that Air Canada and Canadian Airlines International Limited and other named parties have formed a merger of the computer reservations systems of Air Canada and Canadian Airlines International Limited which prevents or lessens, or is likely to prevent or lessen, competition substantially within the meaning of s. 64 of the *Competition Act*, in the provision of computer reservation system services to airlines, travel agents and consumers in Canada.

[3] Requests to intervene in the proceeding were also filed by Wardair Canada Inc. ("Wardair"), and the Consumers' Association of Canada ("CAC"). The order of Strayer J. gave leave to intervene in the proceeding to American, Wardair and CAC and, in particular, allowed them to attend and present argument on all motions and at all pre-hearing conferences and hearings, on any matter affecting them, respectively.

* An appeal to the Supreme Court of Canada was dismissed. The judgment will be published in due course.

[4] American, supported by CAC, appeals because of the limited scope of the intervention afforded by the order of Strayer J. CAC has appealed to this Court by way of cross-appeal pursuant to Rule 1203 of the *Federal Court Rules*, C.R.C. 1978, c. 663. It is noteworthy that the Director supports the arguments of the appellant and other intervenors for an increased role in their intervention.

[5] The appellant argues in short that Strayer J. erred in law in his interpretation of s. 9(3) of the *Competition Tribunal Act* which had the effect of preventing the interveners from participating in examination for discovery, calling evidence, and cross-examining witnesses. (Before Strayer J., Wardair apparently did not ask to participate in discovery but wished to call evidence and cross-examine witnesses in addition to presenting argument.)

[6] I am of the view that the appeal and cross-appeal should be allowed, but before setting out my reasons, I would like to refer to parts of the judgment appealed from because of the importance of the issue to proceedings under the *Competition Act* and because of the admirably comprehensive approach taken by Strayer J. in his reasoning.

[7] At the outset I think it appropriate to refer to s. 9 of the *Competition Tribunal Act*, which provides as follows:

> 9(1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.
>
> (2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.
>
> (3) Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal to *make representations* relevant to those proceedings in respect of any matter that affects that person. [Emphasis added.]

Judgment appealed from

[8] Strayer J. interpreted "representations" in s. 9(3) to mean "arguments" and held that the section could not be taken to include the rights claimed by the interveners, *viz.*, participating in discovery, calling evidence and cross-examining witnesses. In this connection, he stated (A.B., pp. 14-5):

> Section 9(3) of the *Competition Tribunal Act* authorizes any person, with leave of the tribunal, to "intervene ... to make representations ...". The first point to note is that the authority is given to intervene for a particular purpose only, and one therefore cannot derive any broader authority by reference to other meanings which the term "intervene" may have in other contexts. The term "to make representations" in normal English usage would suggest the presentation of argument; that is, persuasion rather than proof. If there is any lingering ambiguity of this term in the English version, it appears to be clarified in the French version which states the purpose of a permitted intervention as "afin de présenter des observations". The term "observations" is most commonly applied to the

presentation of comments or argument before a court or tribunal.

[9] Strayer J. said that this interpretation of s. 9(3) was strengthened by reference to ss. 97 and 98 of the *Competition Act* which authorizes the Director to participate before federal and provincial, respectively, boards and agencies. In each of those sections the Director is authorized to "make representations to *and call evidence*" before the board. A distinction is thus made between representations and the calling of evidence, which is supported in the French version of the two sections: "... présenter des observations et des preuves ..." in s. 97, and "... présenter des observations et soumettre des éléments de preuve ..." in s. 98. Because Strayer J. found the *Competition Tribunal Act* and the *Competition Act in pari materia*, he stated that similar language in the two statutes should be given similar meanings. Accordingly, since in ss. 97 and 98 of the *Competition Act* "representations" do not include the presentation of evidence, so it should be in s. 9(3) of the *Competition Tribunal Act*, namely, that "making representations" should not include the calling of evidence.

[10] In reaching this conclusion, Strayer J. also noted that to grant the interveners the role they wished would be tantamount to treating them as parties, and under the *Competition Act* only the Director can apply for orders against specified persons. Thus, the only parties in proceedings under the *Competition Act* are to be the Director and the persons against whom orders are sought. He concluded that the *Competition Act* does not provide any private right of action against the parties to an anti-competitive merger since the only action contemplated is one taken by the Director.

[11] Strayer J. also found that the general implied authority of a court to permit interventions on terms it thinks flt was restricted by the limiting language of s. 9(3) of the *Competition Tribunal Act.* In addition, in looking at the context of the *Competition Act*, Strayer J. was of the view that proceedings before the Competition Tribunal were justiciable in nature which in his view reinforced a narrow interpretation of s. 9(3). In this respect, he said (A.B., pp. 22-3):

> It is quite consistent with the view that Parliament has, in effect, created a *lis* between the Director of Investigation and Research and the parties to the merger; a *lis* which is determined on the basis of the facts and the law for which the proper parties to the proceedings have the prime responsibility of presentation. In such a context it is not inappropriate that the potential role of intervenants be quite limited, nor can an interpretation of s. 9(3) to this effect be considered absurd or inconsistent with the general purposes of the Act. It was open to Parliament to allow anyone potentially aggrieved by a merger to commence a proceeding before the tribunal against the merging parties, but Parliament elected not to do so. Instead, it obviously saw the commencement of such a proceeding and its direction as a matter involving an important public interest which was to be defined and pursued by the director, a public officer, as he thinks best in the public interest. In such circumstances it is irrelevant that other persons might take a different view of when or how such proceeding should be conducted. Their assistance will no doubt be welcomed by the director in the development of evidence supportive of the allegations he has made but it is he who has the carriage of the proceeding. It is he who, together with the respondents, has the ultimate responsibility of shaping the issues and, indeed, of settling the matter (subject to the approval of the

tribunal should a consent order be required).

[12] Strayer J. also pointed to s. 9(2) which directs the Competition Tribunal to deal with all proceedings "... as informally and expeditiously as the circumstances and considerations of fairness permit". In his view, allowing interveners to prolong proceedings through the multiplication of witnesses and cross-examination of witnesses could only lead to delaying the decisions of the Tribunal and discourage use of it. Thus, a narrow interpretation of "representations" in s. 9(3) was justified. By way of final comment, Strayer J. referred to the intervention role of provincial and federal Attorneys-General in constitutional cases at the appellate level and the fact that they had not been handicapped unduly in their interventions by not having been involved at the trial level in the presentation of evidence and cross-examination of witnesses. He said (A.B., p. 28):

> The role of the Competition Tribunal in merger proceedings is more akin to that of a court than to that of a public inquiry and it is not absurd, illogical, or demeaning that non-parties to such proceedings have only a limited part to play. If they have evidence to provide which would be helpful to one of the authorized parties to these proceedings it is difficult to believe such party will not welcome their assistance. But if they want to raise new issues which neither party is prepared to embrace, they cannot do so because that would be inconsistent with the adversarial system which Parliament has prescribed.

Issue before the court

[13] With this background and review of the reasons of Strayer J., the issue before us focuses on the meaning of s. 9(3) of the *Competition Tribunal Act.* Indeed, every party appearing before this court agrees with the observation made by Strayer J. that, were it not for s. 9(3), the Tribunal would have implied authority to permit interveners to call evidence and cross-examine witnesses. The issue then is whether s. 9(3) restricts interveners in the manner held by Strayer J. or whether, as contended by the appellants, s. 9(3) does not prevent the Competition Tribunal from using its discretion to decide the role that interveners will play.

Reasons for allowing the appeal

[14] A useful starting point to answer the issue before us is the principle, which is widely recognized and accepted, that courts and Tribunals are the master of their own procedures. As a part of this principle, courts have also been recognized as having an inherent authority or power to permit interventions basically on terms and conditions that they believe are appropriate in the circumstances. This principle was clearly articulated by this court in *Fishing Vessel Owners' Ass'n of B.C. v. Canada* (1985), 1 C.P.C. (2d) 312 at p. 319, 57 N.R. 377 at p. 381:

> Every Tribunal has the fundamental power to control its own procedure in order to ensure that justice is done. *This, however, is subject to any limitations or provisions imposed on it by the law generally, by statute or by the rules of Court.*

(Emphasis added).

[15] With respect to the Competition Tribunal, it is clearly stated in its statute that the Tribunal is given court-like powers and a concomitant procedural discretion to deal with matters before it: see ss. 8, 9(1) and 16 of the *Competition Tribunal Act.* (Section 8(1) gives the Tribunal jurisdiction to hear applications under Part VII of the *Competition Act* and related matters and s. 8(3) deals with contempt orders of the Tribunal. Section 9(1) stipulates that the Tribunal is a court of record and shall have an official seal which shall be judicially noticed. Section 16 gives rule-making power to the Tribunal.) Of particular relevance is s. 8(2):

> 8(2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

[16] The principle of a court's authority and discretion over its procedure is so fundamental to the proper functioning of a court and the interests of justice that, in my view, only clearly expressed language in a court's constating statute or other applicable law should be employed to take away that authority and discretion. When one looks at the dictionary meaning of the operative words used in s. 9 as well as the context of the section and of the proceedings under the *Competition Act*, I do not think that the wording of s. 9(3) is clearly expressed to eliminate the Tribunal's inherent authority or discretion in the manner found by Strayer J.

[17] Section 9(3) allows persons to intervene, with leave of the Competition Tribunal, "to make representations relevant to [the] proceedings in respect of any matter that affects that person". To ascertain the meaning of the words in the section one should look not only at the dictionary definition and the context but also at the nature of the matters being dealt with in the action as well as the overall objectives of the underlying legislation.

[18] In the Shorter Oxford Dictionary, "representation" is stated to mean, among other things, the following, which I find applicable to s. 9(3): "... a formal and serious statement of *facts, reasons* or *arguments* made with a view to effecting some change, preventing some action, etc. ..." (emphasis added).

[19] Strayer J. chose to restrict representations to mean only "argument" in the sense of persuasion and not proof. Under Strayer J.'s reasoning, the *facts* or *reasons*, relied on by interveners to support their arguments would be provided by the Director (or possibly by the party against whom the Director was seeking an order).

[20] But it is important to note that s. 9(3) allows persons to intervene to make representations relevant to those proceedings in respect of any matter that *affects* that person. It is expressly recognized that orders of the Tribunal could be made that would affect the interveners, such as in the case at bar. If the interveners can make a statement of facts, reasons or argument on matters that affect them, the question arises whether they should be allowed, at the discretion of the court in accordance with the general principle discussed above, to call evidence to support the *facts* which would show the manner in which the intervener was affected by the proceeding. Similarly, one can question why the interveners cannot ensure that *their argument or reasons* are supported by facts that *they* have had the chance to prove in evidence.

[21] It seems to me that it is not a satisfactory answer to say that the Director must be relied on to establish the facts (or reasons) for the interveners because only the Director is a party, or only the Director and the persons against whom an order is sought are the parties or have a *lis* between them, or that the Director must have carriage of the proceedings under the *Competition Act.*

[22] I fail to see how allowing interveners to have an effective and meaningful intervention to ensure they are able to show how they could be affected by an order, all subject to the discretion and supervision of the Tribunal, cannot be reconciled with the adversarial or justiciable nature of proceedings before the Tribunal. Moreover, such a role for interveners will not necessarily displace the status of the parties before the Tribunal, the carriage of the matter by the Director, or the *lis* nature of the proceedings. I am confident that the presiding members of the Competition Tribunal can deal with the matters to give respect to those concerns if or as needed.

[23] My conclusion on this meaning of "representations" for the purpose of s. 9(3) of the *Competition Tribunal Act* is strengthened when one looks to the wider context and nature of the proceedings under the *Competition Act.*

[24] The purpose of the *Competition Act* as shown in s. 1.1 thereof is extremely broad:

> 1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

[25] It is evident from the purpose clause that the effects of anticompetitive behaviour, such as a merger that has the result of substantially lessening competition, can be widespread and of great interest to many persons. In these matters, Parliament has provided for the Director to serve as the guardian of the competition ethic and the initiator of Tribunal proceedings under Part VII of the *Competition Act*; but Parliament has also provided a means to ensure that those who may be affected can participate in the proceedings in order to inform the Tribunal of the ways in which the matters complained of impact on them. I would ascribe to Parliament the intention to permit those interveners not only to participate but also to do so effectively. A restrictive interpretation of s. 9(3) could, in some cases, run counter to the effective handling of disputes coming before the Tribunal.

[26] At issue in the case before us is, among other things, an order for dissolution, pursuant to s. 64 of the *Competition Act*, of the merger of computer reservation systems in the airline business. Section 65 lists various factors that the Tribunal may consider in deciding whether to issue such an order. These factors are fairly broad and it would seem reasonable to assume that persons attaining intervener status under s. 9(3) could be well-positioned to provide insights concerning them through argument and reasons based on facts. Moreover, they arguably could more effectively and efficiently prove these facts if they have the ability to lead evidence or cross-examine witnesses depending on the issue involved and the circumstances

of the particular case.

[27] It seems to me that permitting interveners to play a role wider than simply presenting argument is also a fairer way of treating them. Although the Director is supporting the wider interpretation before us, it is not difficult to envision future situations where the Director and an intervener might disagree on some matter of fact or evidence of which the Tribunal should be apprised. It is therefore not only logical to give the Tribunal the jurisdiction to decide the issue rather than simply leaving it to the Director to decide in each case, but it is also fair.

[28] Fairness is a relevant consideration because s. 9(2) of the *Competition Tribunal Act* expressly requires that proceedings before the Tribunal be dealt with as informally and as expeditiously as the circumstances and *fairness* allow. This point of fairness also answers the concern raised by Strayer J. that a wider role for interveners will prolong and complicate proceedings before and thereby delay decisions of the Tribunal. But, if a wider role for interveners does lead to longer or more complex proceedings before the Tribunal, surely that is a necessary price to pay in the interests of fairness, which is expressly required under s. 9(2).

[29] Finally, I refer to the view of Strayer J. that his conclusion for a narrow interpretation was strengthened when one looked to the wording of ss. 97 and 98 of the *Competition Act.* Those sections, which were found by Strayer J. to be in a statute *in pari materia* with the *Competition Tribunal Act*, distinguished between making representations and calling evidence; he concluded the same distinction should be made in interpreting s. 9(3) of the *Competition Tribunal Act.*

[30] I do not dispute his finding the statutes *in pari materia*; however, I do not accept that the choice of words in ss. 97 and 98 of the *Competition Act* dictates their meaning in s. 9(3) of the *Competition Tribunal Act.* There are several other sections in both statutes which use the words "representations" or "make representations". Sections 60 and 73 of the *Competition Act* allow interventions by the Attorneys-General of provinces "for the purpose of making representations" on behalf of provinces; s. 22(2) and (3) of the *Competition Act* allows interested persons "to make representations" with respect to proposed regulations relating to certain applications, orders and proceedings; and s. 17 of the *Competition Tribunal Act* invites interested persons "to make representations ... in writing" with respect to any rules that the Competition Tribunal may make. I do not think that in each section of the two statutes the use of "representations" must necessarily be given the same meaning, especially where the context and purpose of a particular section may dictate otherwise. Sections 97 and 98 of the *Competition Act* deal with endowing the Director with the authority to appear before federal and provincial agencies or boards which raises different considerations from those raised by s. 9(3) of the *Competition Tribunal Act.* It may be, although I refrain from any formal holding on the matter, that Parliament, out of an abundance of caution, has added the "calling of evidence" in ss. 97 and 98 to ensure that making representations is not interpreted narrowly by the federal or provincial boards and agencies before which the Director is appearing. In any event, I believe the main task of a court is in each case to ascertain the meaning of a specific section by looking to its wording and context. The fact that Parliament has chosen a formulation of words in another section of a related statute which appears to convey a particular meaning should not of itself displace convincing reasons why the same interpretation

should not apply to the section in issue before the court. The point made about ss. 97 and 98 is, after all, a rule of interpretation that can be rebutted, and in this case has been, by more persuasive arguments.

[31] In light of my reasons for allowing the appeal, I do not find it necessary to deal with other arguments of the appellant relating to the judgment of Strayer J. amounting to a denial of natural justice or as being contrary to the *Canadian Bill of Rights.*

Conclusion

[32] Mindful of the ordinary dictionary meaning of "representations" as discussed above, and of the recognition in s. 9(3) itself of interveners as persons who are affected by competition proceedings, and of the overall purpose and context of the *Competition Act* and proceedings thereunder, I conclude that the meaning of "representations" in s. 9(3) of the *Competition Tribunal Act* is not as restrictive as decided by Strayer J. I would therefore allow the appeal and the cross-appeal, set aside the decision of Strayer J., and refer the matter back to the Tribunal on the following bases:

> (a) that the Tribunal is not precluded, in exercising its inherent discretion from allowing interveners to fully participate in the proceedings before it, including, if it so determines, the right to discovery, the calling of evidence and the cross-examination of witnesses, and
>
> (b) that the specific role of the interveners in this proceeding should be left to the Tribunal to decide, in the circumstances of this case, but in accordance with fairness and fundamental justice and subject to the requirements of s. 9(3) that the interveners' representations must be relevant to this proceeding in respect of any matter affecting those interveners.

[33] The only matter remaining to be considered is the question of costs. Neither the appellant nor any of those supporting it asked for costs either in their memoranda or orally at the hearing of the appeal. On the other hand, counsel for the respondents appearing on the appeal asked, in their memorandum, that the appeal be dismissed with costs. They did not, however, make any oral argument with respect to costs. The position then of the court is that no argument, written or oral, has been addressed to it in this regard. However, I am of the view that the question of costs should be dealt with.

[34] Section 13(1) of the *Competition Tribunal Act* provides that any decision or order of the Tribunal may be appealed to this court "... as if it were a judgment of the Federal Court—Trial Division". Accordingly, it would seem that costs should be disposed of in an appeal from the Tribunal on a basis similar to that employed in appeals from the Trial Division. Under new Rule 344, which came into effect on April 2, 1987, SOR 87-221, s. 2, it seems clear that an award of costs is in the complete discretion of the court. Subrule (3) of Rule 344 sets out a number of matters that the court is entitled to consider when awarding costs. One of the matters enumerated is the result of the proceeding. Since the appellant and those supporting it have been successful in this appeal, I consider this to be a cogent reason, in the circumstances of

this case, for awarding costs. A perusal of the various other matters enumerated in subrule (3), when they are related to the circumstances of this appeal, do not persuade me otherwise.

[35] I should add that, were it not for the provisions of s. 13(1) of the *Competition Tribunal Act*, the court's discretion under Rule 344(1) would have been displaced by the provisions of Rule 1312, which is the general rule applicable to appeals from Tribunals other than the Trial Division. That rule provides:

> *1312.* No costs shall be payable by any party to an appeal under this Division to another unless the Court, in its discretion, for special reasons, so orders.

[36] If that rule were otherwise to apply here, I would have had no hesitation in concluding that costs should not be awarded unless special reasons to the contrary had been established on the record. However, in view of the words used in s. 13, I think Rule /?/44(1) and not Rule 1312 applies to this appeal and because, if this were an appeal from the Trial Division, I would award costs for the reasons expressed earlier herein, I would allow this appeal and the cross-appeal with costs, if asked for.

[37] Appeal allowed.