CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

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COMPETITION TRIBUNAL ISSUES DECISION IN AIRLINES CASE

On April 22, 1993, the Competition Tribunal issued its Reasons and Order with respect to the Director's Application to vary the Tribunal's consent order dated July 7, 1989 (the Consent Order), which permitted the merger of the computer reservation systems (CRS) of Air Canada and Canadian Airlines (Canadian). [1]

The Consent Order enabled Air Canada and Canadian to merge their previously independent CRSs to form Gemini. The Director sought to vary the Consent Order to permit Canadian to transfer its CRS hosting arrangements to American Airlines' Sabre system as required by the proposed transaction between PWA, Canadian and AMR Corporation (AMR), the parent of American Airlines. The majority of the Tribunal, Mr. Justice Strayer and Mr. Smith, decided that the Tribunal did not have jurisdiction to grant the relief requested by the Director, and therefore dismissed the application. However, the Tribunal made certain unanimous findings of fact on the evidence in contemplation of an appeal of its decision.

Jurisdiction

(a) Majority Decision

In the Tribunal's view, the relief sought by the Director would involve adding a condition to the Consent Order to bring an end to the contractual relationship by which Canadian was to be hosted with Gemini until 1999 (the Gemini Hosting Contract). The Tribunal noted that the Director was asking it to do what it could not have done in the 1989 consent proceedings, that is, to impose terms of a consent order which were not consented to by all the parties. The Tribunal further noted that these terms were being sought well after the three year limitation period applicable to proceedings challenging mergers.

In considering the interpretation and application of section 106(a) of the *Competition Act*, the Tribunal concluded that, as a matter of law, the change in circumstances which would permit adding terms to an earlier order must be those that demonstrably were taken into account by the Tribunal at the time of, and directly caused, the making of the order. Even if such changed circumstances exist, the order should not be varied unless it has become useless or inadequate for its intended purpose of solving the problem that led to the making of the original order.

According to the Tribunal, the Director identified the relevant change in circumstances to be the rapidly declining financial position of Canadian and the threat this posed to the maintenance of the duopoly in the airline market in Canada.

In applying its interpretation of section 106(a) to the facts of this case, the Tribunal found that the fundamental concern in the Director's 1988 application challenging the Gemini merger was the airline owners' use of their CRS for anti-competitive purposes. Although the existing duopoly in the airline market in Canada was noted in the Director's 1988 materials, it was not identified as the cause for making the order. Rather, the principal concern identified at the time was vertical integration by the two dominant airlines with a single CRS to produce anti-competitive results in both the CRS and airline markets. Therefore, the Tribunal concluded that the circumstances that led to the making of the Consent Order had not changed. For the majority of the Tribunal, the fact that one term of the Consent Order, which prohibited collusive use of Gemini by the airline owners, might no longer be necessary if the airline duopoly became a monopoly, did not permit variation of the Consent Order to ensure the preservation of that duopoly.

For essentially the same reasons, the majority of the Tribunal concluded that it is not possible to say that, in the circumstances that exist today, the Consent Order would not have been made, or would have been ineffective in achieving its intended purpose. In fact, the Tribunal found that the evidence before it demonstrated that the Consent Order has worked well and has achieved its essential pro-competitive purpose.

(b) Dissent

Dr. Roseman accepted the legal test for the variation of a consent order set out by the majority, but in applying that test to the facts, concluded that the Tribunal had jurisdiction to grant the relief requested by the Director.

However, Dr. Roseman disagreed with the majority's labelling of the Consent Order as primarily or essentially dealing with the effects on competition in airline and CRS markets arising from the vertical integration of an airline and its CRS. In Dr. Roseman's view, the Consent Order clearly dealt with both horizontal and vertical concerns arising from the Gemini merger. In other words, the circumstance that led to the insertion of the "collusion provision" in the Consent Order was the possible use of Gemini by Air Canada and Canadian to lessen competition substantially in airline markets in Canada.

Dr. Roseman found that a change in circumstances had taken place in that, because of Canadian's financial situation, Gemini can now be used to lessen competition substantially in airline markets in a manner unforeseen at the time of the making of the Consent Order. In Dr. Roseman's view, the Gemini Hosting Contract can now be used to prevent completion of the proposed transaction between Canadian and AMR with the likely result that competition in airline markets would be substantially lessened by Canadian's disappearance from the market.

Findings of Fact

In the event that a different view of the Tribunal's jurisdiction is taken on appeal, the Tribunal believed that it was essential to make the findings of fact necessary to issue an order should it have jurisdiction to do so. The Tribunal was concerned that, otherwise, the time and cost of the hearings before it would be wasted.

(a) Airline Markets

The Tribunal found that PWA and Canadian were financially viable when the Consent Order was issued, but that today they operate only at the forbearance of their creditors. Further, as a practical matter, the equity infusion which would result from the proposed transaction with AMR is currently the only alternative available to save PWA and Canadian from failure. Finally, the Tribunal also found that AMR will not complete the transaction without a transfer of hosting to Sabre, and that AMR has legitimate economic reasons for its insistence on that condition.

If Canadian fails, or if it is forced to merge with Air Canada, the Tribunal found that competition in domestic airline markets is likely to be lessened substantially. For purposes of competition analysis, the Tribunal viewed the failure of Canadian as analagous to an Air Canada/Canadian merger, and applied the scheme set out in sections 92 and 93 of the *Competition Act* for evaluating mergers. Based on this analysis, the Tribunal found that Air Canada would have an overwhelming share of domestic airline traffic, but recognized that a finding of substantial lessening of competition should not be based on concentration of market share alone.

In considering other relevant factors, the Tribunal found that although charter carriers have an important presence in some of the larger markets, their role is circumscribed, and they could not take up the competitive slack that would be created in the event that Canadian failed. The possibility of new entry is remote, and will not provide adequate competitive discipline to Air Canada, which will have an overwhelming market share on most routes. Even in high-density markets, where entry is most likely to occur, travellers are unlikely to enjoy competition with respect to matters that are important to them including frequency of service, range of service and frequent flyer points. Further, with Canadian's exit from high-density markets, travellers will no longer benefit from existing competition with respect to price, and from the major airlines' responses to low-price offerings by other carriers.

(b) CRS Markets

The Tribunal found that Gemini is unlikely to fail financially in the foreseeable future, even if Canadian is permitted to transfer its hosting to Sabre. Even with the most pessimistic assumptions, Gemini's financial forecasts indicate a strong position through 1995.

The estimate by Gemini and Covia experts of Gemini's market share losses to Sabre which would result from the transfer of Canadian's hosting to Sabre were not found to be credible. The fact that Gemini is no longer functionally inferior to Sabre means that earlier market share gains made by Sabre should be eroded as travel agents that do a large volume of business with Air Canada move back to Gemini. In fact, Gemini should be in a more favourable position than Sabre since the airline associated with Gemini (Air Canada) has a larger share of the domestic airline markets than the airline that would be associated with Sabre (Canadian). In any event, the Tribunal found that Air Canada and/or Covia would have an incentive to compete with Sabre in CRS markets in Canada. Accordingly, allowing Canadian to transfer its hosting to Sabre would not likely lessen competition substantially in CRS markets.

Remedies

In the event an appellate court finds that the Tribunal has jurisdiction to vary the Consent Order, the Tribunal set out the nature of the order which it would make in light of its factual findings. In this respect, the Tribunal would have granted the Director's request to amend the Gemini Hosting Contract to permit Canadian to de-host from Gemini on at least twelve months' notice, and upon reimbursement to Gemini of specified costs associated with de-hosting.

Appeal

As the Tribunal anticipated, its decision has been appealed to the Federal Court of Appeal. The Director has appealed the issue of the Tribunal's jurisdiction, while Canadian has appealed both on jurisdictional grounds and certain factual findings. Air Canada, Gemini and Covia have appealed the Tribunal's factual findings because if the Tribunal's conclusions on jurisdiction are reversed, and the findings of fact are upheld, the Director's Application for a variation of the Consent Order would be granted. The appeal is scheduled to be heard by the Federal Court of Appeal for two weeks commencing on July 12, 1993.

D.A.C. & R.T.H

Notes

1 *Director of Investigation and Research* v. *Air Canada*, (unreported), CT-88/1, April 22, 1993. For further background information and details regarding the Director's application and the Respondents' submissions, see Randal T. Hughes and Debbie A. Campbell, "Canadian Airline Melee Reaches Competition Tribunal" (1993) 14:1 Can. Comp. Rec. 1. [Ed. note: see also next article about an interlocutory decision of the Tribunal concerning intervenors in this case. For a discussion of a related action at the National Transportation Agency concerning this merger, see pp. 30-32]

DECISION ON INTERVENORS AT THE COMPETITION TRIBUNAL

On December 23, 1992, the Competition Tribunal released Mr. Justice Strayer's Reasons and Order Regarding Intervenors in the *Director of Investigation and Research* v. *Air Canada*. His Lordship first considered requests to intervene by parties who had not been granted intervenor status in the 1989 proceeding. They were the Council of Canadian Airlines Employees (CCAE), the Council of Canadians, IBM Canada Ltd. (IBM), VIA Rail Canada Inc. (VIA) and Unisys Canada Inc. In the course of his decision, Strayer J. made the following observations:

- The decision about intervenors' status involves a balancing of the statutory requirements of informality and expedition with the requirement of fairness also prescribed by the *Competition Tribunal Act* (*CTA*).
- The term "affects" in subsection 9(3) of the *CTA* means "directly affects"
- Intervenors must offer representations which are germane to the mandate of the Tribunal and which are not otherwise dealt with by the parties.
- The *Competition Act* does not identify Canadian sovereignty as a significant concern of the Tribunal, although there may be a tenuous connection by reason of the language in the purpose clause (s 1.1 of the *Competition Act*).
- Intervenors should be granted discovery rights only in very rare cases and they should not be granted when vigorous discoveries will be conducted by adverse parties.

In the end result, the Council of Canadians, which wished to raise sovereignty issues, was not granted leave to intervene as it was found not to be directly affected by the matters involved in the application.

IBM, VIA and Unisys were granted a right to intervene which was limited to representations concerning the form of any relief which might be granted. These representations included calling factual, but not expert evidence and making written argument.

CCAE was granted what it sought, the right to make written argument.

The Attorney General of Manitoba, the Consumers' Association of Canada, American Airlines Inc. and the Alliance of Canadian Travel Associations had been intervenors in the 1989 proceeding. These intervenors were permitted to call factual evidence subject to obtaining leave. They were also permitted to call expert evidence and to make written argument. In order to obtain leave to call factual evidence, the intervenors were required to identify the witness and show that the proposed evidence was relevant to their intervention, was not repetitive and that the Director or other parties had refused to call the evidence.

None of the intervenors were given discovery rights nor were any intervenors permitted to cross-examine witnesses without leave. Leave would be granted only if an intervenor demonstrated that it had pertinent questions for a witness which no cross-examining party would ask.

Finally, none of the intervenors were permitted to make oral argument unless requested to do so by the Competition Tribunal.

S.J.S.

CHARGES STAYED AGAINST NOVA SCOTIA PHARMACISTS

In the wake of the recent acquittal of two Nova Scotia pharmacy associations, the Bureau of Competition Policy has confirmed that all charges have been stayed against the individual pharmacists who were originally prosecuted along with the associations on charges of conspiracy to lessen competition. Furthermore, there will be no appeal of the decision of the Nova Scotia Supreme Court Trial Division in February 1993 to acquit the pharmacy associations.[1]

The case has a long history, including a pre-trial challenge by the defendants to the constitutional validity of aspects of the conspiracy provisions of the *Competition Act*. That challenge reached the Supreme Court of Canada where the provisions were upheld.[2]

Staff

Notes

1 See M. Goldbloom, "Nova Scotia Pharmaceutical Society Found Not Guilty Of Conspiracy" (1993) 14:1 Can. Comp. Rec. 7.

2 *R.* v. *Nova Scotia Pharmaceutical Society* (1992), 93 D.L.R. (4th) 36 (S.C.C.). See (1992) 13:3 Can. Comp. Rec. 1.

DIRECTOR SUBJECT TO IMPLIED UNDERTAKING ON DISCOVERY

On May 6, 1993, in brief oral reasons, the Federal Court of Appeal upheld the interlocutory decision made by Madam Justice Reed in *Director* v. *Southam*. Madam Justice Reed had held that the Director is subject to an implied undertaking not to use information disclosed in the discovery process except for purposes of the particular proceeding in which the information is obtained. In her decision, Reed J. noted that in most common law provinces, the courts have imposed such implied undertakings on parties to civil proceedings. The Director argued that, in view of his public responsibilities and obligations, he should not be precluded from using information obtained on discovery to enforce the *Competition Act* in other contexts. Although Madam Justice Reed rejected that argument, she indicated that it was open to the Director to apply to the Tribunal to be released from the undertaking in specific cases.

This decision applies only to information disclosed on discovery. The prohibition against disclosure of information obtained in certain other contexts (i.e. from search warrants, section 11 proceedings, etc.) in s. 29 of the *Competition Act* does not prevent the Director's use of such information in other proceedings involving the administration and enforcement of the Act.

D.B.H.

COMPETITION TRIBUNAL RULING ON PRIVILEGE AND THE DIRECTOR

On January 14, 1993, the Competition Tribunal released Mr. Justice Strayer's Reasons For Order Regarding Claims for Privilege, Confidentiality and Further Discovery of Documents. This was an interlocutory decision made in the case of the *Director of Investigation and Research* v. *Air Canada*.

The Director was given some 25 documents by PWA Corporation and Canadian Airlines International (PWA-Canadian) on a voluntary basis in the course of an inquiry under section 10 of the *Competition Act*. On the motion before His Lordship, PWA-Canadian asserted a general claim for solicitor-client privilege. However, the evidence on the motion disclosed that no claim for privilege was made at the time of production and that no such protection was granted by the Director's office. The Director, in this case, did not intend to use the documents as part of his case but proposed to produce them to other parties as required by the Tribunal's rules. The Director took the position that anyone providing information voluntarily in the course of an inquiry under section 10 of the Act must expect that such information may be used by the Director in applications to the Tribunal.

Mr. Justice Strayer held that PWA-Canadian had waived any privilege in respect of this material by producing it on a voluntary and unconditional basis.

S.J.S.

B.C. COURT RULES ON PRIVILEGE OF DEALINGS WITH DIRECTOR

In *Middelkamp* v. *Fraser Valley Real Estate Board*,[1] a civil conspiracy action which included allegations of breaches of the *Competition Act*, the Plaintiffs brought an application for production of documents exchanged between the Fraser Valley Real Estate Board and the Director of Investigation and Research. Privilege had been claimed on the following grounds:

a) the documents consisted of without prejudice communications written for the purpose of, and passing in the course of, *bona fide* negotiations between a party being investigated by the Bureau or its solicitors and the Director under the *Competition Act*, his representatives or solicitors, or the Attorney General of Canada or his representatives or solicitors; and

b) the negotiations were for the settlement of litigation and anticipated litigation between the party being investigated and the Director and the Attorney General of Canada.

The Plaintiffs' application was allowed at first instance based upon an earlier decision of the British Columbia Court of Appeal. However, on September 17, 1992, a five Judge bench of the British Columbia Court of Appeal ruled unanimously that the documents were privileged from production. Chief Justice McEachern, writing for himself and three other judges, held that there was a blanket, *prima facie*, common law or class privilege arising from settlement negotiations and that the privilege protected documents and communications created for the purpose of settlement negotiations from production and from admission in evidence, whether or not a settlement was reached.

S.C.D.N.

Notes

1 (1992), 71 B.C.L.R. (2d) 276 (C.A.).

COMCELL COMMENCES COMPETITION ACT CLAIM AGAINST ROGERS

A statement of claim was issued on December 31, 1992, by Comcell claiming damages, an accounting of profits and an injunction prohibiting the defendants, Rogers Cantel Inc. and Rogers Cantel Mobile Inc., from selling or promoting the sale of cellular telephone equipment in competition with the plaintiff.

In its claim, Comcell alleges that it was an approved agent for Rogers Cantel Inc. and, as such, had a written agreement under which it was to sell subscriptions on the Rogers Cantel cellular network and promote the use of Rogers' cellular system. At the time the agreement was signed, Comcell pleads that it was engaged in the wholesale and retail sale of cellular telephone equipment and that the defendants were not in that business.

Comcell's claim further alleges that the defendants now control the availability and cost of the equipment which the plaintiff must sell to carry on its business and that the defendants compete with the plaintiff in the retail sale of cellular equipment. There follows a general claim that "...in entering into and controlling the distribution market for cellular telephone equipment and in its business activities in selling such equipment and packaging such sales with subscriptions to its cellular network (the defendants), have breached the provisions of the Canadian *Competition Act*".

Although no sections of the Act are mentioned, the particulars which are later pleaded make it appear that tied selling, predatory pricing, price discrimination and refusal to deal are among the relevant matters.

The statement of defence denies that the plaintiff is obliged to purchase equipment from the defendants and notes that the defendants do not manufacture cellular equipment. It also denies that the defendants have market power in respect of cellular telephone equipment and further alleges that the defendants' prices and service fees are disciplined by vigorous competition from the telephone companies and from other suppliers of cellular telephone equipment. In particular, the defence denies breaches of the *Competition Act* and has addressed the plaintiff's specific allegations.

Michael Thurston of Feldman and Weisbrot in Toronto acts for the plaintiff while the defendants are represented by James B. Musgrove of Lang Michener in Toronto. Examinations for discovery are to be held this summer.

S.J.S.

QUEBEC PHARMACISTS INQUIRY

A preliminary inquiry is scheduled to begin on September 27, 1993, with respect to the charge that L'Association Québécoise des Pharmaciens Propriétaires (L'AQPP), certain pharmacy chains and individual wholesalers of prescription drugs acted contrary to s. 45 of the *Competition Act*. The Crown has alleged that between December 1, 1987, and September 30, 1989, various members of the Quebec pharmaceutical industry illegally combined, agreed, or arranged to limit competition unduly in the sale and supply of oral contraceptives pills and prescription narcotics in the province of Quebec. If ultimately convicted, the members of the pharmaceutical industry could face imprisonment for a maximum term of five years or a fine not exceeding $10 million or both.

M.G.

POPSICLE PETE SLAPPED WITH RECORD FINE

In what is a record fine levied under s. 59 of the *Competition Act*, Popsicle Industries Ltd. of Burlington, Ontario, was fined $200,000 on March 29, 1992, for running short of Nintendo game cartridges offered as prizes in a promotional contest that ran in 1990 and 1991. The charges brought under the Act stemmed from the undue delay involved in the distribution of prizes for the contest in which some participants waited as long as two years to receive their prizes and many others either never received their prizes or were sent substituted items of a lesser value.

On top of paying the fine imposed by Judge William Sharpe of the Ontario Court (Provincial Division), Popsicle Industries Ltd. will also have to abide by the terms of a settlement agreement reached with the Bureau of Competition Policy in December 1992 that requires the company to offer a choice of three videogame cartridges to as many as 4,500 households which won prizes by participating in the original promotion.[1]

D.P.L.

Notes

1 See K. Clease, "Popsicle Pete Settles with Director" (1993) 14:1 Can. Comp. Rec. 9.

COMPETITION TRIBUNAL MEMBERSHIP - AN UPDATE

Judicial Members

On April 2, 1993, The Honourable Mr. Justice William Philip McKeown, B. Comm., LL.B., was appointed a Justice of the Federal Court, Trial Division and a Judicial Member and Chairman of the Competition Tribunal. He succeeds Madam Justice Barbara Reed in the latter position. Mr. Justice McKeown was formerly a member of the Ontario Court of Justice (General Division).

Three additional Judicial Members remain to be appointed to the Tribunal.

Lay Members

Frank Roseman, B.A., M.A., PH.D., is an economist. He resides in Ottawa and has been a lay member of the Competition Tribunal since April 1, 1987. Victor Clarke, B.Sc. B.E., P.Eng., of Toronto, was appointed on January 31, 1990. Leslie Jack Smith and Gaëtan Mathieu, LL.L., M. Sc. Comm., were appointed as lay members on May 21, 1992. Mr. Smith is an experienced chartered accountant from Vancouver and Mr. Mathieu is a lawyer who is active in Quebec City in regional, provincial, economic and cultural organizations. Most recently, André Côté, F.C.A., B.A., L.Sc.com., L.Sc. compt., was appointed as a Lay Member on March 11, 1993. Mr. Côté is an experienced accountant and auditor. He resides in Montreal.

N.J.E.

UPCOMING CONFERENCES

Date	**Place**	**Seminar Description**
August 22-25	Quebec City	**Canadian Bar Association Annual Meeting** Includes sessions of CBA competition law section on Wednesday, August 25 entitled: "Dealing with the Bureau" panels of private bar and Bureau representatives, not yet finalized one panel on criminal issues, one on reviewable practices Convenor: Yves Bériault, McCarthy Tétrault, Montreal
October 1	Vancouver, B.C.	**CBA Competition Law Section Seminar** "Living with the *Competition Act* in the 1990s: Do's and Don'ts for Business" program designed particularly for corporate counsel speakers to include economists and representatives of the Bureau Convenor: Peter Franklyn, Osler, Hoskin & Harcourt, Toronto

To register for either program, contact
Canadian Bar Association: Margery Tenute (613) 237-2925

CBA COMPETITION LAW SECTION

As noted in the March issue of the *Record*, a national competition law section of the Canadian Bar Association was established at the last Annual Meeting of the Association. A number of committees have been formed, and members are active in organizing conferences to be held at Quebec City during the CBA Annual Meeting in August, and at Vancouver in October (see previous article).

The executive of the section and the chairs of the various committees are as follows :

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