**CT-2011-003**

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

**IN THE MATTER OF** an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

**AND IN THE MATTER OF** certain rules, policies and agreements relating to the multiple listing service of the Toronto Real Estate Board.

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

**AND**

**THE TORONTO REAL ESTATE BOARD**

**Respondent**

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# BRIEF OF AUTHORITIES OF THE COMMISSIONER
(Re: Motions for Leave to Intervene)

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# TAB 1

*Case Name:*

# Canada (Commissioner of Competition) v. Canadian Real Estate Assn.

**Order allowing national FSBO Network Inc.'s motion for leave to intervene**
**IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended;**
**AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the Competition Act;**
**AND IN THE MATTER OF certain rules, regulations and policies of the Canadian Real Estate Association;**
**Between**
**The Commissioner of Competition (applicant)**
**The Canadian Real Estate Association (respondent)**
**and**
**National FSBO Network Inc. (applicant for leave to intervene)**

[2010] C.C.T.D. No. 12

[2010] D.T.C.C. no 12

2010 Comp. Trib. 12

File No.: CT-2010-002

Registry Document No.: 0063

Canada Competition Tribunal
Ottawa, Ontario

**Panel: Simpson J. (Chairperson)**

Heard:
Decision: July 8, 2010.

(16 paras.)

**Appearances:**

The Commissioner of Competition, Andrew D. Little : Roger Nassrallah.

For the respondent, The Canadian Real Estate Association : Katherine Kay and Mark E. Walli.

For the applicant for leave to intervene, National FSBO Network Inc.: Stephen J. Skdlly.

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## DECISION

**1** The National FSBO Network Inc. (the "NFN") is moving for leave to intervene in these proceedings commenced by the Commissioner of Competition (the "Commissioner") against the Canadian Real Estate Association ("CREA") pursuant to section 79 of the *Competition Act,* R.S.C. 1985, c. C-34 (the "Act").

### I. BACKGROUND

**2** In her application filed on February 8, 2010, the Cornnilssioner alleges that CREA is abusing its dominant position in the market for residential real estate brokerage services. CREA owns the Multiple Listing Service ("MIS"), which provides CREA's members with a comprehensive computerized listing of homes for sale across Canada. CREA also owns the MIS & Design trademarks (together the "MLS and Related Trademarks").

**3** The Commissioner further asserts that CREA imposes exclusionary restrictions on the use of the MLS and Related Trademarks when it licences the trademarks to its member real estate boards. These restrictions, according to the Commissioner, lessen or prevent competition substantially by excluding competition from brokers and others wishing to offer a reduced set of services to theft customers including "mere postings" or "MLS-only listing" services. The Commissioner seeks an order from the Tribunal prohibiting CREA from directly or indirectly imposing such restrictions.

**4** CREA denies the Commissioner's allegations. It asserts, *inter aim,* that its rules allow for a range of options for residential real estate brokerage services, including the ability to contract for minimal service offerings, discounted commission rates and fee-for-service products.

**5** The NFN, the applicant for intervenor status, is offering an "MLS" type of service for "for sale by owner" businesses across Canada. Mr. Stephen Skelly, the Vice-President, Operations of the NFN, attests in his affidavit that the NFN was incorporated "to fill a void within the 'for sale by owner' (FSBO) market, by creating a national listing network for FSBO businesses, which would be equivalent to and would compliment [sic] the Canadian Real Estate Association's M7LS."

**6** The NFN asks that it be given leave to intervene only so that it can submit an affidavit of Mr. Skelly regarding the role of FSBO businesses in the Canadian real estate market,, the services provided, the fees for such services and information about its market share.

**7** The Commissioner does not support the motion for leave; she asserts that the NFN is not directly affected by this proceeding because it does not participate in the relevant product market. CREA does not oppose the motion and says that, if leave is granted, it should have the right to documentary and oral discovery of the NFN. CREA further submits that if the NFN is permitted to intervene and submit written evidence, the Tribunal should direct that such sworn evidence is to be

disclosed by the date on which the parties are required to exchange their witness statements and that CREA will be pennitted to examine Mi. Skelly at the hearing.

## II. TUE LAW

**8** Subsection 9(3) of the *Competition TribunalAct,* R.S.C. 1985, c. 19 (2nd Supp.), reads as follows:

> Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII. 1 of the *Competition Act,* to make representations relevant to those proceedings in respect of any matter that affects that person.

**9** The Tribunal held in *Commissioner of Competition v. Canadian Waste Services Holdings Inc.,* 2000 Comp. Trib. 10, that it must be satisfied that all of the following elements are met in order to grant the status of intervenor:

(a) The matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate (see *Director of Investigation and Research v. Air Canada* 1992 CanLII 2035 (C.T.), (1992), 46 C.P.R. (3d) 184 at 187, [1992], C.C.T.D.No. 24(QL)).

(b) The person seeking leave to intervene must be directly affected. The word "affects" has been interpreted in *Air Canada,* ibid., to mean "directly affects".

(c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (see *Tele-Direct,* cited above in s. [2]).

(d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (see *Washington v. Director ofInvestigation and Research,* [1998] C.C.T.D. No.4 (QL) (Comp. Trib.)).

## III. DISCUSSION

**10** The Commissioner's Notice of Application provides in paragraph 2 that "[w]hile other options exist for marketing a home for sale, such as newspaper advertising, they are not adequate substitutes for an IvI7LS listing" as well paragraph 30 reads that "[f]or the majority of home sellers, there are no reasonable substitutes to real estate brokerage services."

**11** It is the Tribunal's view that evidence about the NFN's operations could have a bearing on the question of whether there has been an impact on competition in the market under paragraph 79(l)(c) of the Act. Accordingly tests (a) and (c) described above have been satisfied.

**12** The Tribunal has also concluded that, as a competitor of CREA, the NFN will be directly affected by any order made about the operation of CREA's MLS service. Thus the requirement in part (b) of the test is met.

**13** Finally, the Tribunal is satisfied that the NFN does have a unique perspective which the Commissioner has not addressed. This conclusion satisfies part Cd) of the test.

FOR THESE REASONS, THE TRIBUNAL ORDERS **THAT:**

**14** On or before a date to be set in a fixture order, Mr. Skelly will serve the Commissioner and CREA and file with the Tribunal an affidavit which may describe the business of the NW and the FSBO businesses and may include any comments he has on the relief sought by the Commissioner. Mr. Skelly is to attach as exhibits to his affidavit any relevant documents.

**15** At a date which may be set in a future order, Mr. Skelly will appear at the Tribunal to be examined on his affidavit.

**16** There is no order as to costs.

DATED at Ottawa, this 8th day of July, 2010.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

cp/i/qlecl/qlhbb

# TAB 2

*Case Name:*

# Canada (Commissioner of Competition) v. Visa Canada Corp.

**Reasons and Order Regarding Motions for Leave to Intervene by The Toronto-Dominion Bank and The Canadian Bankers Association**
**IN THE MATTER of the Competition Act, R.S.C. 1985, c. C-34, as amended;**
**AND IN THE MATTER of an application by the Commissioner of Competition pursuant to section 76 of the Competition Act**
**Between**
**The Commissioner of Competition (applicant), and**
**Visa Canada Corporation and MasterCard International Incorporated (respondents), and**
**The Toronto-Dominion Bank, The Canadian Bankers Association (applicants for leave to intervene)**

[2011] C.C.T.D. No. 2

Comp. Trib. 2

File No.: CT-2010-10

Registry Document No.: 50

Canada Competition Tribunal
Ottawa, Ontario

**Before: Simpson J. (Chairperson)**

Heard: March 7, 2011.
Decision: April 5, 2011.

(54 paras.)

**Appearances:**

For the applicant: The Commissioner of Competition: Kent Thomson, Adam Fanaki, William Miller, David D. Akman.

For the respondents: MasterCard International Incorporated: Jeffrey B. Simpson, James Musgrove. Visa Canada Corporation: Robert Kwinter, Randall Hofley.

For the applicants for leave to intervene: The Canadian Bankers Association: Mahmud Jamal, Michelle Lally, Jason MacLean. The Toronto-Dominion Bank: Paul Morrison, Christine Lonsdale.

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REASONS AND ORDER REGARDING MOTIONS FOR
LEAVE TO INTERVENE BY THE TORONTO-DOMINION BANK
AND THE CANADIAN BANKERS ASSOCIATION

**Introduction**

**1** The Toronto-Dominion Bank and the Canadian Bankers Association (the "Proposed Intervenors") are moving for leave to intervene in proceedings commenced by the Commissioner of Competition (the "Commissioner") against Visa Canada Corporation ("Visa") and MasterCard International Incorporated ("MasterCard") pursuant to section 76 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"). This provision deals with price maintenance.

**Background**

**2** Visa and MasterCard do not issue credit cards. Rather, they operate the credit card networks which are used to process credit card transactions. Visa and MasterCard credit cards are issued to shoppers by financial institutions such as banks. They are described as "Issuers" when they perform this function. Some banks also operate as "Acquirers". In this role, they provide services to merchants which allow them to process payments made with Visa and MasterCard credit cards. Acquirers are required by Visa and MasterCard to include certain terms in the agreements they make with merchants. Those terms include provisions which require merchants to accept all Visa and MasterCard credit cards and which prohibit merchants from imposing a surcharge on a shopper who uses a premium credit card. Terms of this kind have been described by the Commissioner as the "Merchant Restraints".

**3** In broad terms, the Commissioner's application concerns the fees paid by merchants (the "Card Acceptance Fees") for the ability to accept Visa and MasterCard credit cards when shoppers make retail purchases.

**4** The application also deals with the portion of Card Acceptance Fees known as "Interchange Fees". Interchange Fees are retained by Issuers and represent a significant portion of Card Acceptance Fees. The Commissioner asks the Tribunal to order the abolition of the Merchant Restraints (the "Proposed Order") saying that such an order will promote competition in the setting of Card Acceptance Fees. The suggestion is that, if competition is introduced, Card Acceptance Fees will decline.

**5** The Commissioner's application raises a number of issues and, based on the pleadings, Visa and MasterCard dispute all the fundamentals of her case. In particular they:

(a) do not agree with her definition of "credit card network services" as the product market;
(b) do not agree that section 76 of the Act applies on the facts of this case;
(c) characterize the Merchant Restraints as pro-competitive; and

(d) forecast negative consequences for their credit card networks and for their cardholders if the Merchant Restraints are abolished.

**The Proposed Intervenors**

**6** Against this background, the Toronto-Dominion Bank ("TD Bank") and the Canadian Bankers Association (the "Association") seek leave to intervene under subsection 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd supp.) (the "Tribunal Act").

**7** TD Bank is a Schedule I bank incorporated under the *Bank Act*, S.C. 1991, c. 46. It is one of the largest banks in Canada and it is the only Canadian chartered bank which carries on business as both an Issuer and an Acquirer. If granted leave, TD Bank will support the positions taken by Visa and MasterCard.

**8** The Association is a national organization which represents the Canadian banking industry. Its members include 51 domestic chartered banks, subsidiaries of foreign banks, and foreign bank branches operating in Canada. The Association deals with matters of concern to the banking industry as a whole and its main activities are in the fields of legislation, education, publication, public relations, and information. The Association, if granted leave, will also support Visa and MasterCard.

**9** Visa and MasterCard are in favour of the interventions but did not make oral submissions on the motions for leave. The Commissioner, on the other hand, argued that both Proposed Intervenors should be denied leave to intervene.

**The Development of the Test**

**10** Subsection 9(3) of the Tribunal Act reads as follows:

> **9(3).** Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person
>
> * * *
>
> **9(3).** Toute personne peut, avec l'autorisation du Tribunal, intervenir dans les procédures se déroulant devant celui-ci, sauf celles intentées en vertu de la partie VII.1 de la *Loi sur la concurrence*, afin de présenter toutes observations la concernant à l'égard de ces procédures.

**11** The first guidance provided by the courts regarding the test for leave to intervene is found in the Federal Court of Appeal decision in *American Airlines, Inc. v. Canada (Competition Tribunal)* (1988), 54 D.L.R. (4th) 741, aff'd [1989] 1 S.C.R. 236. The Tribunal had concluded that the word "representations" in subsection 9(3) of the Tribunal Act meant that intervenors were only entitled to make submissions. Mr. Justice Iacobucci, as he then was, disagreed. He concluded that, in appropriate cases, the Tribunal could allow intervenors broader rights of participation including a right of discovery, the right to call evidence and the right to cross-examine witnesses.

**12** In *Director of Investigation and Research v. Air Canada et al.* (1992), 46 C.P.R. (3d) 184, the Tribunal held that the term "affects" in subsection 9(3) of the Tribunal Act means "directly affects". Accordingly, leave to intervene would be denied to a person who might have strong views

about the outcome of a case, but would not be affected differently from members of the general public. The Tribunal also concluded that the representations to be made by a proposed intervenor would have to be germane to the mandate of the Tribunal.

**13** In *AC Nielsen Company of Canada Ltd. v. Canada (Director of Investigation and Research)*, [1994] C.C.T.D. No. 9 (QL), the Tribunal refused to grant leave to lawyers who had a particular interest in competition law but who had failed to allege or demonstrate how the proceeding affected them. The Tribunal found that a particular interest in the area of competition law, without more, did not justify leave to intervene.

**14** In *Director of Investigation and Research v. Tele-Direct (Publications) Inc. et al.* (1995), 61 C.P.R. (3d) 528, the Tribunal granted leave to intervene to a publisher of a classified telephone directory and two advertising agencies, but refused to grant leave on all their proposed issues because the Director of Investigation and Research had not raised them in his application.

**15** In *Canada (Director of Investigation and Research) v. Canadian Pacific Ltd. et al.* (1997), 74 C.P.R. (3d) 37, the Tribunal held that a proposed intervenor must identify the capacity in which it is directly affected. The Tribunal further held that the representations to be made by a proposed intervenor must be relevant and of assistance to the Tribunal.

**16** In *Southam Inc. et al. v. Director of Investigation and Research* (1997), 78 C.P.R. (3d) 315, the Tribunal referred to the requirement that an applicant for intervenor status must bring to the Tribunal a distinct perspective. In that instance, Noël J., as he then was, held that intervenors are intended to "supplement the case of a party by bringing to the Tribunal their own and distinct perspective of the subject matter in dispute" (at p. 319).

**17** In *Washington v. Canada (Director of Investigation and Research)* (1998), 78 C.P.R. (3d) 479, the merging parties sought a variation of a consent order to remove the requirement for a divestiture of certain assets. The variation was on consent and was sought because a new entrant had appeared in the relevant market. The proposed intervenor advised the Tribunal that it would undertake an investigation about the effect of the entry and would put before the Tribunal evidence which might differ from that presented by the parties. The Tribunal denied leave to intervene and held that a proposed intervenor should have a unique and distinct perspective and should be able to satisfy the Tribunal that it had facts to present without conducting a "fishing expedition".

**18** Lastly, the Tribunal also has provided guidance about requests for leave to intervene made by associations. In *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.*, [1994] C.C.T.D. No. 19 (QL), McKeown J. held that the Canadian Council of Grocery Distributors was directly affected because it was sufficient that there were matters in issue that would directly affect the persons it represented. In the Tribunal's view, having the association as the sole intervenor would be more efficient than requiring each individual retailer to appear independently. Similarly, in *Canada (Director of Investigation and Research) v. Bank of Montreal* (1996), 66 C.P.R. (3d) 409, the Tribunal granted intervenor status to two associations, the Retail Council of Canada and the Canadian Life and Health Insurance Association Inc., noting (at para. 7) that the "association provides a convenient and efficient means of representing the many affected persons in a coherent way before the Tribunal".

**The Test**

**19** In *The Commissioner of Competition v. Canadian Waste Services Holdings*, 2000 Comp. Trib. 9, Mr. Justice McKeown reviewed the above case law and listed the requirements to be met by a proposed intervenor. They are:

(a) The matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate (see *Director of Investigation and Research v. Air Canada* (1992), 46 C.P.R. (3d) 184 at 187, [1992] C.C.T.D. No. 24 (QL)).

(b) The person seeking leave to intervene must be directly affected. The word "affects" has been interpreted in *Air Canada*, *ibid.*, to mean "directly affects".

(c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (see *Tele-Direct*).

(d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (see *Washington v. Director of Investigation and Research*, [1998] C.C.T.D. No. 4 (QL) (Comp. Trib.)).

**The Proposed Intervenors' Evidence**

**20** TD Bank's motion for leave to intervene is supported by a joint affidavit sworn on February 9, 2011, by Jim Sallas, Senior Vice-President, Personal Lending and Credit Cards, and by Jeff van Duynhoven, President of Merchant Services (the "Bank's Affidavit"). None of the parties challenged the joint format or cross-examined the deponents.

**21** The deponents say that TD Bank is directly affected by the proceedings in its dual roles as Issuer and Acquirer and also in its overall banking business. They say that if the Merchant Restraints are removed, there will be significant migration away from credit cards to other forms of payment. This change would directly impact TD Bank as an Issuer and as an Acquirer and, if its customers' credit cards were refused, those refusals might negatively affect its overall banking business.

**22** The deponents also say that TD Bank brings a distinct and unique perspective to the proceedings because of its dual roles. They note that Visa and MasterCard generally do not have any direct interaction with cardholders and say that they can neither explain the costs associated with the creation of features and benefits associated with TD Bank's credit cards nor detail the role played by Card Acceptance Fees in the viability of TD Bank's issuing business.

**23** Mr. Sallas and Mr. van Duynhoven also believe that the Commissioner's application will affect Canada's entire payments system and that the credit card networks cannot and should not be examined by the Tribunal in isolation from their place in Canada's overall payments system.

**24** The Association has filed the affidavit of Darren Hannah, Director of Banking Operations for the Association, sworn on February 10, 2011. Mr. Hannah was not cross-examined.

**25** He says that the Association's 51 member banks are key participants in the Canadian credit card system as the principal customers of the Respondents' credit card networks and as credit card issuers both large and small. He adds that the Association's member banks also have significant commercial relationships with their personal and commercial retail banking customers, including

cardholders. He notes that some member banks have an interest in the business of acquiring credit card transactions and some operate their own acquiring businesses.

**26** He also says that the member banks issue approximately 90% of the credit cards in use in Canada and that from the banks' perspective as issuers of credit cards to consumers and businesses, the Merchant Restraints are critical to the efficiency, integrity, and reliability of Canada's credit card networks.

**The Issues**

**27** On the facts presented on these motions, the questions for determination are:

1. Are the TD Bank and the Association's members directly affected by the Commissioner's application? And, if so,
2. Are the topics they wish to address relevant to issues raised in the Commissioner's application? And, if so,
3. Are the TD Bank and the Association in a unique or distinct position to address those topics and will their participation assist the Tribunal?
4. Finally, if leave is granted what should be the extent of the intervenors' participation before and during the hearing?

**Question 1 - Are the Proposed Intervenors Directly Affected?**

**The TD Bank**

**28** TD Bank says that the Merchant Restraints are found in all its contracts with merchants and that it is directly affected because the abolition of the Merchant Restraints will effectively rewrite the contracts it holds as an Acquirer. TD Bank also functions as an Issuer and says that, if the Merchant Restraints are eliminated and its customers' credit cards are refused by merchants, it will be directly affected because customers will make less use of their cards, fewer Card Acceptance Fees will be paid by merchants and customers may blame the bank for their inability to use their credit cards.

**29** The Commissioner submits that the impacts foreseen by TD Bank are merely speculative predictions and, as such, do not meet the requirement to show a definite impact. She says that that requirement is found in *Burns Lake Native Development Corporation et al. v. The Commissioner of Competition and West Fraser Timber Co. Ltd. et al.*, 2006 Comp. Trib. 16, ("Burns Lake"). Burns Lake dealt with whether a party had standing to challenge a registered consent agreement under section 106 of the Act. In my view, the reasoning in Burns Lake does not apply to requests for intervenor status under subsection 9(3) of the Tribunal Act because the context for the applications is entirely different. In section 106 challenges, the registered consent agreement has ended a dispute and has imposed remedies for alleged anti-competitive conduct. It is therefore reasonable to require a party challenging the agreement to be certain about its impact.

**30** The situation for those seeking leave to intervene under subsection 9(3) of the Tribunal Act is very different. Proposed intervenors are required to apply for leave to intervene ten days after a response is filed to a Commissioner's application. At that point, since the Commissioner has a right of reply, the pleadings are not closed and the hearing of the application is at a future date. In these circumstances, it is not reasonable to require a proposed intervenor to be completely certain about

the ways in which it might be affected by the relief sought by the Commissioner. Some speculation is acceptable.

**31** The Commissioner also says that the Proposed Order will have an impact on the 670,000 merchants who accept credit cards and on the 20 million Canadians who hold such cards. For this reason she says that the fact that TD Bank is a party to contracts with merchants and cardholders should not justify an intervention because it is not affected in a manner which is different from a vast number of Canadians and Canadian businesses.

**32** However, the fact that many Canadians hold credit cards from Issuers and numerous merchants deal with Acquirers does not mean that the banks which offer contracts to those cardholders and merchants are not directly affected in their businesses of issuing and acquiring if those contracts are to change as a result of the Proposed Order.

**33** TD Bank also says it is directly affected by what it describes as the allegations of anti-competitive behaviour found in paragraph 12 of the Commissioner's application. There she states that Acquirers are required by Visa and MasterCard to include the Merchant Restraints in their contracts with merchants. Then, in paragraphs 14, 47, 48 and 58, the Commissioner asserts that the Merchant Restraints are anti-competitive. TD Bank says that, because it is an Acquirer, these paragraphs, taken together, allege anti-competitive behaviour on its part.

**34** In my view, this submission is not sound. No remedy is sought against TD Bank or any other Acquirer. TD Bank is not named as a party and no impropriety is suggested. Rather, the pleadings, as a whole, make it clear that, in the Commissioner's view, Acquirers and merchants, who make agreements which include the Merchants Restraints, have no alternative but to agree to their inclusion because they have no bargaining power. Further, the Commissioner's counsel confirmed in the hearing that no allegations were made against TD Bank. Accordingly, there are no allegations of anti-competitive conduct to underpin this submission that TD Bank is directly affected.

**35** TD Bank has a third reason for alleging that it is directly affected. It says that it provides full banking services to many of the cardholders it deals with as an Issuer. It submits that if the Merchant Restraints are removed, TD Bank's customers who hold credit cards issued by the bank might re-evaluate their overall banking relationship with the bank when merchants refuse those cards.

**36** I have not accepted this submission as evidence of a direct effect which justifies an intervention. In my view, if cardholders are apprehensive about the Proposed Order and its impact on their overall banking relationships, that information must come from them.

**Conclusion - TD Bank**

**37** Although I have rejected two of TD Bank's reasons for saying that it is directly affected, I am persuaded by its initial submission that it is directly affected by reason of its businesses as Issuer and Acquirer.

**The Canadian Bankers Association**

**38** The Commissioner again says that the Association only speculates about the impact of the Proposed Order on the Association's members and that speculation cannot support an application for leave to intervene.

**39** For the reasons given above some speculation is permissible. However, in my view, the Association's evidence is not speculative. Mr. Hannah's affidavit shows that the Association is certain

that cardholders will complain to Issuers and cancel their credit cards if these cards are refused by merchants.

**40** As well, two of the Association's members have a 50% interest in Acquirer businesses and, as discussed earlier, their contracts with merchants will change if the Proposed Order is made.

**Conclusion - The Association**

**41** I accept the Association's evidence and am satisfied that many of its members are directly affected.

**Question 2 - Are the Proposed Intervenors' Proposed Topics Relevant?**

**42** During the hearing, counsel for each of the Proposed Intervenors was asked to list the topics their clients wished to address if given leave to intervene.

**43** The TD Bank's proposed topics are:

1. Interactions the bank has with merchants in its role as an Acquirer;
2. Interactions the bank has with cardholders in its role as an Issuer;
3. The bank's interactions with Visa and MasterCard in its dual roles as Issuer and Acquirer;
4. The impact of the Proposed Order on the payments system;
5. The impact of the Proposed Order on TD Bank's business as an Issuer and as an Acquirer;
6. TD Bank's perceptions of the impact of the Proposed Order on its merchant and cardholder customers;
7. TD Bank's view of the reasons for the Merchant Restraints.

**44** The Association wishes to address the following topics from the multiple perspectives of its members:

1. The competitiveness of the payments system and the benefits it provides to all its participants;
2. How the Merchant Restraints are pro-competitive and critical to the efficiency, integrity and reliability of the Visa and MasterCard credit card networks;
3. The role of Card Acceptance Fees from the perspective of the Issuer;
4. The impact of the Proposed Order on benefits and services Issuers provide to cardholders;
5. The reasons why section 76 of the Act does not apply on the facts of this case.
6. The impact of the Proposed Order on Issuers, Acquirers, merchants and cardholders.

**General Observations - The Relevance of the Business of Issuers and of the Canadian Payments System**

**45** The Commissioner's case does not center on the business of issuing credit cards. However, the Bank's Affidavit shows that it seeks to expand the hearing to have the Tribunal consider all aspects of the business including its costs and the services it provides to cardholders. As well, the As-

sociation says that the Tribunal must consider the competitiveness of the payments system because the Proposed Order will affect the system as a whole.

**46** I have concluded that it is not appropriate to permit the Proposed Intervenors to expand the hearing to deal extensively with matters which are not the subject of allegations by the Commissioner. Accordingly, the Proposed Intervenors will not be given leave to adduce general broad-based evidence about the business of issuing credit cards or about the operation of the Canadian payments system. However, there is room for limited evidence on these topics for the reasons given below.

**47** The Commissioner deals with the impact of the Proposed Order on Issuers in her Application at paragraphs 48, 58, 71 and 73 and in her Reply at paragraphs 57-59, 61 and 83. She alleges that, with the Proposed Order, there will be an incentive for Issuers to compete with one another by issuing credit cards with reduced Interchange Fees so that merchants will accept their cards without surcharges. In view of this allegation, it would be relevant for the Proposed Intervenors to adduce evidence about the likely impact of the Proposed Order on Interchange Fees.

**48** Turning to the payments system, the Commissioner asks for a discretionary order and both Visa and MasterCard have said that, even if price maintenance is established, the Tribunal should not exercise its discretion in favour of the order. For this reason, the impact of the Proposed Order on the payments system is relevant.

**Question 2 (cont'd) and 3 - Relevance, Uniqueness and Assistance**

**49** I now turn to the specific topics suggested by the Proposed Intervenors.

**TD Bank**

**Proposed Topic 1**

The interactions between TD Bank acting as an Acquirer and merchants is a relevant topic and, in my view, the bank is in a position to provide a unique firsthand perspective which will assist the Tribunal. Accordingly, its intervention on this topic will be allowed.

**Proposed Topic 2**

However, as discussed above, a broad intervention dealing with TD Bank's business as an Issuer and its interactions with cardholders is not relevant.

**Proposed Topic 3**

TD Bank's interactions with Visa and MasterCard in its role as an Acquirer is also relevant and its firsthand evidence on this topic is likely to assist the Tribunal. Accordingly, leave will be given to intervene on this aspect of topic 3. However, as discussed above, a broad intervention dealing with TD Bank's interactions with Visa and MasterCard in its role as an Issuer is not relevant. However, a narrower intervention focussed on the setting of Interchange Fees would assist the Tribunal.

**Proposed Topic 4**

The impact of the Proposed Order on the payments system is relevant. The Association has not listed this as a topic and it appears that Visa and MasterCard will focus on the impact of the order on their credit card networks. Accordingly, an intervention on this topic will assist the Tribunal.

**Proposed Topic 5**

Firsthand evidence about the impact of the Proposed Order on TD Bank's business as an Issuer and Acquirer is relevant and, in my view, will assist the Tribunal as long as it does not duplicate the Association's evidence on this topic.

**Proposed Topic 6**

The impact of the Proposed Order on merchants and cardholders is relevant. However, TD Bank has no direct evidence to offer on this issue. It only proposes to give the Tribunal the benefit of its "perceptions". In my view, evidence of this nature will not assist the Tribunal and this intervention will not be permitted.

**Proposed Topic 7**

TD Bank is not the author of the Merchant Restraints and is not responsible for their imposition. Accordingly, it is not uniquely placed to address the reasons for their use. Evidence on this topic will presumably come from Visa and MasterCard. Further, to the extent that TD Bank raised this topic to respond to perceived allegations of anti-competitive conduct, such a response, as noted above, is not required since no such allegations were made.

**The Association**

**Proposed Topic 1**

For the reasons given above, I have concluded that general evidence about the competitiveness and benefits of the Canadian payment services market is not relevant.

**Proposed Topic 2**

Whether or not the Merchant Restraints are pro-competitive and what role they play in the provision of credit card networks are relevant topics. However, Visa and MasterCard will address these issues and are in the best position to do so since they impose the restraints and operate the networks.

The Association does not offer a unique perspective on these topics. Accordingly, an intervention on this topic will not be permitted.

**Proposed Topic 3**

The Issuers' perspective on the role of Card Acceptance Fees and, in particular, Interchange Fees is relevant. It cannot be addressed by Visa and MasterCard and it is not on TD Bank's list of topics. Accordingly, intervention on this issue is appropriate.

**Proposed Topic 4**

As mentioned earlier, the impact of the Proposed Order on Interchange Fees is relevant. As well, the impact of the Proposed Order on benefits and services available to cardholders is also relevant. These topics are included in Topic 6 below.

**Proposed Topic 5**

The application of section 76 of the Act to the facts of this case is, of course, relevant. However, it will be addressed by Visa and MasterCard. Accordingly, an intervention on this issue is not warranted.

**Proposed Topic 6**

The impact of the Proposed Order on Issuers, Acquirers, merchants and cardholders is relevant. However, the Association does not have merchants and cardholders among its members so any evidence about their views of the impact would be entirely speculative and will therefore not assist the Tribunal.

However, views of the Association's members about the impact of the Proposed Order on Issuers and Acquirers may well assist the Tribunal. An intervention will be permitted on this topic but only to the extent that the evidence and the submissions do not duplicate those made by the TD Bank.

## ORDER

**50** For the reasons given above, TD Bank is given leave to intervene to address the following topics:

A. Its interactions with merchants as an Acquirer.
B. Its interactions with Visa and MasterCard as an Acquirer.
C. Its interactions with Visa and MasterCard as an Issuer as those interactions relate to Interchange Fees.
D. The impact of the Proposed Order on the payments system.

E. The impact of the Proposed Order on its business as an Issuer and an Acquirer to the extent that there is no duplication with the Association's evidence and submissions.

**51** For the reasons given above, the Association is given leave to intervene on the following topics:

A. The Issuer's perspective on the role of Card Acceptance Fees.
B. The impact of the Proposed Order on Issuers and Acquirers to the extent that there is no duplication with the TD Bank's evidence and submissions.

**Question 4 - The Scope of the Interventions**

**52** Having determined that the Proposed Intervenors have relevant evidence to offer, the question is how to structure their interventions so that they effectively assist the Tribunal without unduly lengthening the proceeding or unduly interfering with the *lis* between the Commissioner and Visa and MasterCard.

**53** To achieve these objectives, the Tribunal orders that:

(i) The intervenors must proceed according to the schedule for the case agreed to by the parties in a letter to the Tribunal from Blakes dated March 29, 2011 as it relates to the Respondents.
(ii) Subject to any orders dealing with confidentiality, the intervenors are to be served with the parties' productions and affidavits of documents as they become available.
(iii) The intervenors are to produce the documents relevant to the topics of their respective interventions and deliver affidavits of documents on or before August 15, 2011.
(iv) The intervenors have not asked for oral discovery of a representative of the Commissioner. They may not attend such discoveries but may, as requested, review those transcripts.
(v) If the Commissioner wishes to discover a representative of each of the intervenors, she may do so. However, her right to discovery is limited to the topics on which each has been given leave to intervene and is also limited in time to three (3) hours for the representative of the TD Bank and two (2) hours for the Association's representative.
(vi) TD Bank may call a maximum of three witnesses and the Association may call a maximum of two witnesses at the hearing. Those limits include any experts the intervenors may wish to call.
(vii) At the hearing, the intervenors' counsel may cross-examine the Commissioner's witnesses only on the topics of their respective interventions. When cross-examining, counsel may not repeat questions already asked by any other counsel.
(viii) Intervenors may make written and oral argument which is not repetitive.
(ix) When the Chess Clock timing is established, the intervenors will be given distinct time allotments. In other words, the Commissioner's suggestion

that their time be deducted from the time allotted to Visa and MasterCard is not accepted.

**54** There is no order as to costs.

DATED at Ottawa, this 5th day of April, 2011.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

cp/e/qlaim

# TAB 3

*Indexed as:*

# Canada (Director of Investigation and Research, Competition Act) v. Air Canada

**Reasons and Order Regarding Intervenors**
**IN THE MATTER OF an application by the Director of Investigation and Research under subsection 64(1) of the Competition Act, R.S.C. 1970, c. C-23, as amended;**
**AND IN THE MATTER OF a Limited Partnership formed to combine the operations of the Reservec and Pegasus computer reservation systems;**
**AND IN THE MATTER OF The Gemini Group Automated Distribution Systems Inc.; AND IN THE MATTER OF an application by the Director of Investigation and Research under section 106 of the Competition Act, R.S.C. 1985, c. C-34, as amended, to vary the Consent Order of the Tribunal dated July 7, 1989.**
**Between:**
**The Director of Investigation and Research, Applicant, and Air Canada, PWA Corporation, Canadian Airlines International, Ltd., The Gemini Group Limited Partnership, The Gemini Group Automated Distribution Systems Inc., Covia Canada Corp. Covia Canada Partnership Corp., Respondents, and Consumers' Association of Canada, American Airlines, Inc., Attorney General of Manitoba, Alliance of Canadian Travel Associations, Bios Computing Corporation, Intervenors, and IBM Canada Ltd., VIA Rail Canada Inc., Council of Canadians, Unisys Canada Inc., Council of Canadian Airlines, Employees, Applicants for Leave to Intervene.**

[1992] C.C.T.D. No. 24

Trib. Dec. No. CT8801/686

Also reported at:46 C.P.R. (3d) 184

Canada Competition Tribunal
Ottawa, Ontario

**Before: Strayer, J., Presiding Judicial Member**

Heard: December 21, 1992
Decision: December 23, 1992

(18 pp.)

**Summary:**

The Tribunal refused to grant leave to intervene to the Council of Canadians because it had not shown that it was adequately "affected" by the proceedings or that its representations would significantly assist the Tribunal in dealing with issues within the Tribunal's mandate. The Tribunal held that there must be some matter involved that "directly affects" the person applying for leave to intervene in order for leave to be granted. The Tribunal found that while its eventual decision might gratify or offend the public policy views of the Council, the Council could not be said to be directly affected by the matters in issue. Further, the Council did not demonstrate that it had any representations to make that were sufficiently germane to the mandate of the Tribunal to allow the intervention. The Tribunal qualified its statement in an earlier decision that the threshold to intervene in proceedings before the Tribunal is "very low". The statement was made in the context of a decision restricting the participation of intervenors to legal argument which was subsequently overruled.

The Tribunal granted leave to intervene to IBM Canada Ltd, VIA Rail Canada Inc. and Unisys Canada Inc. to make representations on remedy only. The Council of Canadian Airlines Employees was also granted leave to intervene; its participation was restricted to argument at its own request. The intervenors with continuing status from the original consent order proceeding were accorded the same participation rights as they had in the earlier proceeding.

Counsel for the Applicant:

Director of Investigation and Research

L. Yves Fortier, Q.C.
Donald B. Houston
Jean G. Bertrand

Counsel for the Respondents:

Air Canada

J. William Rowley, Q.C.

Canadian Airlines International Ltd. and PWA Corporation

Robert W. Thompson
Jo'Anne Strekaf
Myron Tetreault
Richard Low

The Gemini Group Limited Partnership and The Gemini Group Automated Distribution Systems Inc.

Michael L. Phelan
Timothy J. McCunn
Timothy Kennish

Covia Canada Corp. and Covia Canada Partnership Corp.

William L. Vanveen
Todd J. Burke

Counsel for the Intervenors:

Consumers' Association of Canada

Not represented

American Airlines, Inc.

Colin L. Campbell, Q.C.
Lisa Clarkson

Attorney General of Manitoba

Not represented

Alliance of Canadian Travel Associations

Douglas Crozier

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Reasons and Order Regarding Intervenors

At the hearing in 1989 in respect of the consent order of the Tribunal which the Director of Investigation and Research ("Director") now seeks to have modified, there were several intervenors who were allowed to participate subject to certain conditions. Of those intervenors the ones now still in existence and indicating thus far that they wish to participate in the present application are the Consumers' Association of Canada, American Airlines, Inc. ("American") and the Alliance of Canadian Travel Associations ("ACTA"). I have assumed that they have a continuing right to intervene and no party has suggested otherwise.

Several new requests for leave to intervene in respect of the Director's application filed on November 5, 1992 were submitted to the Tribunal and argued on December 21, 1992. These were the applications of IBM Canada Ltd. ("IBM"), VIA Rail Canada Inc. ("VIA"), Unisys Canada Inc. ("Unisys"), the Council of Canadian Airlines Employees, and the Council of Canadians.

At that time the Tribunal also heard from the existing intervenors that wish to continue with respect to the role that they wish to play. Counsel for the parties had an opportunity to make representations with respect to all of these matters.

In making the order herein I have had to exercise my discretion within the parameters of subsections 9(2) and (3) of the Competition Tribunal Act[1] which provides as follows:

> 9.(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.

It will be noted that the Tribunal is exhorted to deal with applications as "informally and expeditiously" as, inter alia, "considerations of fairness permit". Under subsection 9(3) I have a discretion whether or not to let in as an intervenant someone who is affected by the proceeding, such intervention to involve the making of "representations" relevant to "any matter that affects that person".

To understand the problem confronting the Tribunal one must have regard to the circumstances of this application. The Director's application for an order varying the Tribunal's consent order dated July 7, 1989 approving the merger of the computer reservation systems of Air Canada and Canadian Airlines International Ltd., to be operated by a partnership named Gemini, was filed by the Director on November 5, 1992 and service of that application was completed by November 9, 1992. It is the thrust of the Director's application that Canadian Airlines International Ltd. and its parent company, PWA Corporation (the two will be referred to together in these reasons as simply "Canadian") are in serious financial difficulty. It is alleged that Canadian's only realistic hope of survival is now an arrangement with American whereby American would invest a substantial amount of money in Canadian and mutually advantageous operating arrangements would be made. It is said to be a condition of American's investment in Canadian that Canadian withdraw from Gemini and have its reservation system hosted in Sabre, the computer reservation system of American. Therefore, the Director seeks a modification of the 1989 Tribunal order which had approved the merger embodied in Gemini. Otherwise, it is said, Canadian may have to cease operations, possibly resulting in a virtual monopoly for Air Canada in airline services in Canada.

I am satisfied from evidence, some of it confidential, produced on interlocutory proceedings to date that time is of the essence in having this application dealt with in order that some meaningful decision may be made before Canadian's financial position substantially worsens. The Director initially suggested a hearing in December 1992. Canadian pressed for a January hearing. It has typically taken at least six months in this Tribunal from the time an application is filed to have a hearing and sometimes it has taken much longer. If the Tribunal is to have any relevance to the present problem, regardless of what decision the Tribunal may ultimately make, it must obviously be allowed to act much more quickly -- as quickly as requirements of basic fairness to the parties will permit. After giving due regard to the concerns of the respondents who wanted more time to prepare, I have fixed a hearing date commencing February 1, 1993.

This is the background against which I have tried to balance the statutory requirements of informality and expedition with the requirements of fairness also prescribed by the statute. In doing so, I have had to consider very seriously to what extent intervenors should be allowed to prolong and complicate the process.

I am rejecting the request of the Council of Canadians for leave to intervene because in my view it has not shown that it is adequately "affected" by these proceedings or that the representations it might have to offer would significantly assist the Tribunal in dealing with the issues within its mandate under the Competition Act.[2] I believe that the term "affects" in subsection 9(3) of the Competition Tribunal Act must be read as meaning "directly affects". Several counsel cited to me, in support of the ready grant of intervenor status, my statement in another interlocutory decision during the previous proceedings in this matter. I said then that subsection 9(3) "imposes a very low

threshold . . . . it requires only that there be some matter involved which 'affects that person'".[3] I would make two observations on this statement. Firstly, I did not attempt then to qualify the word "affects" as it was unnecessary to do so. Secondly, the statement was made in the context of a decision in which I understood subsection 9(3) to restrict intervenors to presenting argument only. This led me to think that Parliament intended that interventions could more readily be allowed since the consequence would not be very burdensome on the Tribunal's process and thus would be consistent with the "expeditious" proceedings required by subsection 9(2). That interpretation of the word "representations" in subsection 9(3) was rejected on appeal.[4] The implication of the Federal Court of Appeal decision seems to be that if intervenors are admitted then, because the Tribunal must consider giving them the right to present evidence relevant to their intervention, the normal requirements of fairness may well oblige the Tribunal to allow them to present such evidence if it has not otherwise been presented to the Tribunal. A broader role of this sort should not in my view be automatically accorded to anyone who as a member of the public may have strong views on the appropriate outcome of the case but can demonstrate no direct effect on him or her that is different from all or a large segment of the public at large. In the present case, if one accepts the thesis of the Director, it is arguable that the decision on this application will "affect" indirectly a vast number of Canadians, at least all of those who travel by air. But it could not have been contemplated that the Tribunal is obliged to admit intervenors on such a scale.

> The Council of Canadians describes itself as:
>
> a national organization, composed of approximately 25,000 Canadians, dedicated to the political, economic and cultural sovereignty of Canada.

This does not suggest that the Council represents persons who are, as members of the Council, affected by these proceedings other than in an indirect way having regard to any consequences for Canadian ownership and Canadian protectionism that this application may have. The outcome may offend or gratify the public policy views of the Council and its members on Canadian sovereignty, but I do not think the members of the Council can be said to be directly affected as such by the matters involved in this application. Further, the Council did not demonstrate to me that it had any representations to make on the subject which were sufficiently germane to the mandate of the Tribunal to justify allowing this intervention. Nowhere does the Competition Act, which authorizes these proceedings, identify Canadian sovereignty as a significant concern of the Tribunal. The general purpose of the Act, as I understand it, is to promote competition and to deter activities and arrangements which unduly interfere with free competition of enterprises in Canada, whether of foreign or Canadian ownership. There are some vague references in section 1.1 of the Act to matters which might have some tenuous connection to the "political, economic and cultural sovereignty of Canada" but the connection is neither clear enough nor strong enough to make the proposed representations of the Council of Canadians relevant to these proceedings in any meaningful way.

I am somewhat narrowly defining the matter upon which I am allowing IBM, VIA and Unisys to intervene. IBM and Unisys are suppliers to Gemini and VIA is a user of Gemini services. No doubt they would all be directly affected if, as several of the respondents predict, Gemini were to fail as a result of an order of this Tribunal allowing Canadian to terminate its hosting contract with Gemini. However, it is not clear that they can make any useful representations beyond those of the respondents with respect to the question of whether the order should be granted: Gemini and the members of the Gemini partnership represented by the respondents can be relied upon, I think, to

say everything that can be said for the continued existence of Gemini. It was said in argument that these applicants for leave to intervene should be able to make representations on the nature and form of any relief which might be granted. I believe that this is legitimate as it is a matter upon which they can best speak, having regard to their particular circumstances. I think it would be a legitimate concern of the Tribunal, if it were satisfied that the relief sought by the Director would result in the destruction of Gemini, that any remedy framed should avoid as much as possible harming third parties who may be able to show that they entered into arrangements with Gemini on the strength of the Tribunal's order of 1989. As I cannot foresee how any expert evidence would be particularly useful in respect of framing the order, however, I have not thought that fairness required the possibility of these intervenors introducing expert evidence. It should be sufficient if they demonstrate from the facts of their situation the implications for them of any given remedy.

I have admitted the Council of Canadian Airlines Employees, which represents 15,000 of the 18,000 employees of Canadian in Canada, on the basis that at issue in these proceedings may be the continued existence or termination of that airline. Not only will the employees be directly affected by the outcome, facing unemployment if the airline does not survive, but they are also parties to current negotiations for restoring financial stability to Canadian involving a potential equity investment in Canadian by its employees of approximately $185 million. Although they are thus directly affected, the Council has asked to play only a limited role, namely to make argument but not to present evidence. I have therefore limited their role accordingly.

With respect to the intervenors continuing from the earlier proceedings, I have essentially applied to them, as well as to IBM, VIA and Unisys (limited to the issue of the remedy, in their cases), the rules for introduction of factual evidence by intervenors prescribed by an order of this Tribunal of January 9, 1989 in the earlier proceeding in this matter. At that time, the proceeding still involved a contested application by the Director to prevent the merger of the two airlines' reservation systems. There was broad consensus at the hearing on December 21, 1992 that such rules were appropriate and there is probably some merit in continuing, at least with the existing intervenors, the regime which was originally applied to them. Their right to introduce expert evidence will continue as provided in the earlier order even though I have not extended that right to the new intervenors for reasons already stated. I have modified the order slightly to provide for any intervenor who does not support any of the parties. I did this for the benefit of ACTA which says it does not know yet on whose side it is, being primarily concerned about the implications for travel agents of any order made in these proceedings.

ACTA also requested the right to present interrogatories to the parties. I understand this flows from ACTA's uncertainty as to its position. Seemingly, it wants to see what information it can glean from the parties before it determines where its interests lie. I have refused any form of discovery to intervenors. In my view it would be a very rare case where discovery by intervenors would be justified. Generally, intervenors should be admitted because they have something new to offer the Tribunal by way of "representations" on matters which may be helpful to the Tribunal. Where, as appears to be the case here, examination for discovery will be vigorously pursued by adverse parties with respect to the issues which the Tribunal must decide, I do not think it would be desirable to allow an intervenor to add to this process. This is particularly true in a case such as the present where, for reasons which I have already stated, time is of the essence. This requires, inter alia, that parties not be unduly burdened by additional demands for discovery by intervenors.

While there was some suggestion that intervenors wished to be assured of the right to receive documents and to participate at hearings, I believe that the general entitlement of intervenors in these respects is adequately described in section 28 of our Rules and need not be the subject of a special order at this stage.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

1. IBM Canada Ltd., VIA Rail Canada Inc., and Unisys Canada Inc. are granted leave to intervene but only on the issue of the nature and form of any relief which the Tribunal may be asked to grant in respect of the application of the Director filed on November 5, 1992.
2. The Council of Canadians is refused leave to intervene.
3. The Council of Canadian Airlines Employees is given leave to intervene with its role being limited, as it requests, to making submissions by way of argument.
4. American Airlines, Inc., the Consumers' Association of Canada, and the Alliance of Canadian Travel Associations shall continue as intervenors in these proceedings, subject to the following directions as to their role. The Attorney General of Manitoba, who has been an intervenor and has the right to continue as such, should he choose to do so, is likewise subject to the following directions as to the role of the intervenors.
5. No intervenors shall participate, as intervenors, in seeking or providing discovery, by oral examination, interrogatories or otherwise.
6. Subject to paragraph 3, the intervenors that support the Director's position may apply, after the Director has adduced his evidence, to adduce factual evidence of their own, on the following terms and conditions. The application must be made in writing and must contain:

   (i) the names of the witnesses sought to be called;
   (ii) the nature of the evidence to be provided and an explanation as to what issue within the scope of the intervention such evidence would be relevant;

   (iii) a demonstration that such evidence is not repetitive (i.e. that the facts to be proven have not been adequately dealt with in the evidence so far);

   (iv) a statement that the Director had been asked to adduce such evidence and had refused.

7. The intervenors that support the position of the respondents Air Canada, The Gemini Group Limited Partnership, The Gemini Group Automated Distribution Systems Inc., Covia Canada Corp. and Covia Canada Partnership Corp. may apply in a similar fashion to that described in paragraph 6, but after the said respondents' evidence has been concluded and only after having asked them to adduce such evidence as the intervenors now seek to adduce.
8. Any intervenor that supports neither the Director's nor the said respondents' position may apply in a similar fashion after those respondents' evidence is completed, without

having first to request a party to adduce the evidence but demonstrating that such intervenor's position is significantly different from any of the parties.

9. Intervenors may not cross-examine any witnesses without first obtaining leave by demonstrating that they have questions pertinent to their intervention which no cross-examining party was willing or could be requested to ask.

10. Parties may oppose applications made under paragraphs 6, 7, 8 and 9 and request any procedural or other modifications and safeguards to ensure that they are not prejudiced in the presentation of their case by any involvement which the Tribunal permits or might permit to the intervenors.

11. American Airlines, Inc., the Alliance of Canadian Travel Associations, the Consumers' Association of Canada and the Attorney General of Manitoba may call expert evidence provided that they file and serve affidavits of their expert witnesses, as required in section 42 of the Competition Tribunal Rules, by January 18, 1993. Any party wishing to rebut such evidence may do so at the hearing without complying with subsection 42(2).

12. Intervenors shall file any final submissions in writing prior to commencement of argument by the parties and may make oral argument only if requested by the Tribunal to do so.

DATED at Ottawa, this 23rd day of December, 1992.

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

(s) B.L. Strayer B.L. Strayer

1 R.S.C., 1985 (2d Supp.), c. 19.

2 R.S.C., 1985, c. C-34, as amended.

3 Director of Investigation and Research v. Air Canada (1988), 23 C.P.R. (3d) 160 at 164, 32 Admin. L.R. 157 (Competition Trib.).

4 Rev'd (sub nom. American Airlines, Inc. v. Competition Tribunal) (1988), [1989] 2 F.C. 88 (C.A.), rev'd (sub nom. Air Canada v. American Airlines, Inc.), [1989] 1 S.C.R. 236.

# TAB 4

*Indexed as:*

# Canada (Competition Act, Director of Investigation and Research) v. Bank of Montreal

**Reasons and Order Granting Leave to Intervene**
**IN THE MATTER OF an application by the Director of Investigation and Research under sections 79 and 105 of the Competition Act, R.S.C. 1985, c. C-34;**
**AND IN THE MATTER OF an abuse of dominant position in the supply of shared electronic network services for consumer-initiated shared electronic financial services.**
**Between**
**The Director of Investigation and Research, Applicant, and Bank of Montreal, The Bank of Nova Scotia, Canada Trustco Mortgage Company, Canadian Imperial Bank of Commerce, La Confédération des caisses populaires et d'économie Desjardins du Québec, Credit Union Central of Canada, National Bank of Canada, Royal Bank of Canada, The Toronto Dominion Bank of Canada, Interac Inc., Respondents, and**
**TelPay, A Division of CTI-Comtel Inc., Retail Council of Canada, Canadian Life and Health Insurance Association Inc., Midland Walwyn Capital Inc., Richardson Greenshields of Canada Limited, MacKenzie Financial Corporation and Trimark Investment Management Inc., Applicants for Leave to Intervene**

[1996] C.C.T.D. No. 1

Trib. Dec. No. CT9502/38

Also reported at:66 C.P.R. (3d) 409

Canada Competition Tribunal
Ottawa, Ontario

**Before: McKeown J., Presiding Judicial Member**
**F. Roseman, Lay Member**

Heard: February 2, 1996

Decision: February 6, 1996

(11 pp.)

Counsel for the Applicant:

Director of Investigation and Research

D. Martin Low, Q.C.
Peter A. Vita, Q.C.
John D. Bodrug

Counsel for the Respondents:

Bank of Montreal
The Bank of Nova Scotia
Canada Trustco Mortgage Company
Canadian Imperial Bank of Commerce
La Confédération des caisses populaires et d'économie
Desjardins du Québec
Credit Union Central of Canada
National Bank of Canada
Royal Bank of Canada
The Toronto-Dominion Bank
Interac Inc.

John J. Quinn
Steven G. Thompson

Counsel for Applicants for Leave to Intervene:

TelPay, A Division of CTI-Comtel Inc.

Harold K. Irving, Q.C.

Retail Council of Canada

S. John Page
Frank P. Monteleone

Canadian Life and Health Insurance Association Inc.

James B. Musgrove

Midland Walwyn Capital Inc., Richardson Greenshields of Canada Limited, MacKenzie Financial Corporation and Trimark Investment Management Inc.

Lorie Waisberg, Q.C.
Laura Stuart

. . . . . .

Reasons and Order Granting Leave to Intervene

**1** Five requests for leave to intervene were filed in this proceeding. One of the applicants later amalgamated its request with another group with similar interests represented by the same counsel, leaving four requests to be dealt with at the pre-hearing conference on February 2, 1996. All four requests for leave were granted, with varying degrees of participation, as detailed below. As this is a consent order proceeding, in which the role of intervenors before the Tribunal is a particularly sensitive issue, we are providing some brief reasons for our decision.

**2** A summary description of the various applicants for leave to intervene follows. TelPay, a division of CTI-Comtel Inc. ("TelPay"), currently provides a telephone bill payment service to the customers of some 40 smaller financial institutions, mainly credit unions. The banks provide a similar service to their own customers. TelPay would like to offer a bill payment service to the general public by way of Interac.

**3** The Retail Council of Canada ("RCC") represents approximately 7,000 retailers operating in Canada. The vast majority of individual members are small independents, although mid-sized stores and national chains also participate. Together its members account for over 65% of retail store trade dollars spent in Canada. Nearly all Interac direct payment transactions originate in retail stores. Transactions processed through Interac direct payment more than doubled in number between 1994 and 1995 and the use of direct payment is forecast to continue increasing.

**4** The Canadian Life and Health Insurance Association Inc. ("CLHIA") represents life and health insurance companies operating in Canada. More than 90% of the life and health insurance business in Canada is generated by CLHIA members. Insurance companies are significant players in financial services. They administer 70% of the pension plans registered in Canada and offer a range of products including individual and group insurance and annuities.

**5** Midland Walwyn Capital Inc., Richardson Greenshields of Canada Limited, MacKenzie Financial Corporation and Trimark Investment Management Inc. ("Midland et al.") are, broadly speaking, independent investment companies. They are investment and mutual fund dealers and managers which provide financial services, products, advice and investments to consumers throughout Canada.

**6** The focus of the debate at the hearing of the requests was the scope of the representations that the applicants for leave to intervene would be permitted to address and the nature of their participation rights. All the applicants for leave sought some form of evidentiary participation.

**7** We are of the view that the applicants for leave would each be directly affected should the draft consent order be granted. The application puts in issue the increased opportunity for new services to be offered through Interac under the draft consent order; TelPay is a third party purveyor of such a potential service. The application identifies restrictions on membership and control of Interac and seeks to remedy the situation; the retailers, insurers and investment companies are all potential new participants in Interac, each in a different fashion. In the case of the RCC and CLHIA, it is, of course, their members that would be directly affected rather than the association itself. The associa-

tion provides a convenient and efficient means of representing the many affected persons in a coherent way before the Tribunal. We also consider that each of the intervenors has a unique perspective and that representations from them, when confined to the matters particularly within the scope of their respective interventions will assist the Tribunal in assessing whether to issue the draft consent order or not.

**8** We note that the Director of Investigation and Research ("Director") did not oppose the grant of intervenor status to any of the applicants. He directed his submissions to the extent of their participation. The respondents initially argued that neither TelPay nor the RCC were "directly affected" by the proceeding but did not pursue the issue in oral argument. The respondents recognized that the other applicants were directly affected; again, they took issue with the participation rights to be accorded.

**9** In a consent order proceeding, the scope of participation granted to intervenors assumes critical importance. Conceivably a consent order can be approved without any evidentiary hearing whatsoever, as allowed for by section 105 of the Competition Act. The Tribunal must consider carefully the requests by intervenors to call evidence, in the interests of preventing the proceeding from turning into a "contested" matter and in recognition of the fact that the consent order mechanism can be a valuable part of the overall enforcement of competition law. At the same time, the Federal Court of Appeal and the Supreme Court of Canada decided in the Air Canada case that the specific role of intervenors must be determined "in accordance with fairness and fundamental justice and subject to the requirements of subsection 9(3) that the intervenors' representations must be relevant to [the] proceeding in respect of any matter affecting those intervenors."[1] This is a delicate balancing act. In the end, the Tribunal must be satisfied that the draft consent order meets the test for approval in the face of the views of the intervenors that it will not achieve its goals.

**10** With respect to TelPay, we agree with the parties that the sanctioning of the particular service proposed by TelPay and the consequent amendment of the draft consent order to include explicitly that service is a matter which goes beyond the approval of the draft consent order by the Tribunal. It properly relates to implementation of the order. TelPay's request for leave to intervene, however, also raises questions that go to the adequacy of the very procedure set out in the draft consent order for the approval of new services. To that extent, its proposed representations are relevant. The respondents argued that TelPay's interpretation of the language in the draft consent order is not "reasonable". Clearly, there seems to be an issue here on which argument will be helpful to the Tribunal. Since we were not convinced that evidence was necessary in order for TelPay to make effective representations, we have not allowed it any evidentiary role.

**11** With respect to the three remaining intervenors, it became clear in the course of argument that their primary concerns, and those on which they wish to present evidence, centre around the issue of whether the draft consent order will be effective if only "financial institutions", as defined in the draft consent order, can participate in Interac as card issuers.

**12** The first and most evident aspect of this is that the draft consent order does not mandate the removal of the current restriction on card issuers. What it does do is require Interac to lift its prohibition on access to Interac through "sweep" or "pass-through" accounts. Although the Director argued that the efficacy of sweep accounts was not relevant, the respondents conceded that the participation of the intervenors on that issue was relevant. We agree that whether or not such accounts are workable is a critical element of each intervenor's argument that the draft consent order will not achieve what the Director says it will achieve.

**13** In his reply to the comments filed by each of these intervenors, the Director states that he is "unaware of any evidence that shows that such accounts are not workable or viable." Likewise, the respondents replied that they are "also unaware of any evidence that shows pass-through', sweep' or zero-balance' accounts are not viable or cost effective." In the circumstances, we have decided to allow the intervenors to call evidence on that issue. In our opinion, it would not be fair to restrict the intervenors to argument on this point when the parties take the position that the accounts will work as they say that they will and that there is no evidence to the contrary. The intervenors must be allowed a chance to bring forward the contrary evidence that they maintain exists.

**14** We are cognizant of the need to keep the proceeding focused and manageable and, with the co-operation of the intervenors, have confined them to joint experts on matters which are common to all of them. On the factual issues concerning sweep accounts, on which the insurers and the investment companies may have different experience and perspective, we have allowed separate fact witnesses.

**15** Closely allied to the first issue is the second matter arising out of the restriction on card issuance. As described by counsel for the respondents, the draft consent order increases participation of members in Interac by "opening up the categories of entities who can be acquirers"; it does not alter the existing class of card issuers/financial institutions. The assumption appears to be that other commercial entities can and will participate in Interac as transaction acquirers only. Of the intervenors, this type of participation would most likely come from the retailers.

**16** The RCC challenges the position that "acquirer-only" entry is viable and cites various costs that it maintains will inhibit entry. It seems evident that the failure of the draft consent order to encourage the entry of transaction acquirers would have a significant impact on the overall efficacy of the draft consent order in attracting new participants to Interac. We are of the view that it would be virtually impossible for the RCC to present effective representations on this critical issue, which is directly pertinent to its interests, without some form of evidence. We have therefore granted the RCC leave to call one expert on the issue of the economics of participation in Interac as an acquirer only.

**17** FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

1. (1) TelPay is granted leave to intervene in this proceeding to make representations on the process for approval of a new service set out in the draft consent order and why that process does not assist in curing the alleged substantial lessening of competition.

   (2) TelPay may attend and make argument on matters within the scope of its intervention at all pre-hearing conferences, motions and at the hearing of the application. TelPay shall not have the right to participate in the calling of evidence or the cross-examination of witnesses at the hearing.

2. The RCC is granted leave to intervene to make representations on why the draft consent order does not cure the alleged substantial lessening of competition with respect to:

(a) the ability of entities which do not meet the definition of "financial institution" set out in the draft consent order ("non-financial institutions") to obtain access to Interac services under the terms of the draft consent order, including the efficacy of sweep, pass-through and zero balance accounts in allowing retailers to participate effectively in Interac;
(b) the economics of participation in Interac as an acquirer only;
(c) the adequacy of the definition of services in the draft consent order in facilitating the introduction of new, competitive services through Interac;
(d) the functioning of the provisions of the draft consent order relating to the governance and control of Interac; and
(e) the effect of the existing rules and standards of the Canadian Payments Association on the functioning of the draft consent order.

3. The CLHIA is granted leave to intervene to make representations on why the draft consent order does not cure the alleged substantial lessening of competition with respect to:

(a) the ability of non-financial institutions to obtain access to Interac services under the terms of the draft consent order, including the efficacy of sweep, pass-through and zero balance accounts in allowing insurers to participate effectively in Interac;
(b) the functioning of the provisions of the draft consent order relating to the governance and control of Interac, including the definition of "financial institution" and "demand account" and the role of intervenors in bringing disputes about the interpretation or application of the order to the Tribunal;
(c) the possibility of future Interac by-laws which distinguish between financial institutions and other Interac members in a way that impedes the draft consent order from achieving its goals; and
(d) the effect of the existing rules and standards of the Canadian Payments Association on the functioning of the draft consent order.

4. Midland et al. are granted leave to intervene to make representations on why the draft consent order does not cure the alleged substantial lessening of competition with respect to the ability of non-financial institutions to obtain access to Interac services under the terms of the draft consent order, including the efficacy of sweep, pass-through and zero balance accounts in allowing investment companies to participate effectively in Interac.

5. (1) The RCC, CLHIA and Midland et al. may call the following evidence with respect to the efficacy of sweep, pass-through and zero balance accounts in allowing retailers, insurers and investment companies to participate effectively in Interac:

(a) one joint expert witness on the technical aspects of such accounts;
(b) if the expert witness referred to in (a) is not qualified to address them, a second joint expert witness on the economic issues arising from the use of such accounts;

(c) one fact witness from each of CLHIA and Midland et al. on the use of such accounts as it particularly affects their respective members.

(2) The RCC may call one expert witness on the economics of participation in Interac as an acquirer only.

6. The right of RCC, CLHIA and Midland et al. to cross-examine witnesses at the hearing shall be decided at that time by the panel hearing the application, on the request of the intervenor and upon demonstration that the proposed cross-examination will be within the scope of its intervention and non-repetitive.

7. RCC, CLHIA and Midland et al. may attend and make argument on matters within the scope of their respective interventions at all pre-hearing conferences, motions and at the hearing of the application.

DATED at Ottawa, this 6th day of February, 1996.

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

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

qp/d/lls

1 American Airlines, Inc. v. Competition Tribunal (1988), [1989] 2 F.C. 88 at 101 (F.C.A.), aff'd (sub nom. Air Canada v. American Airlines, Inc.) [1989] 1 S.C.R. 236.

# TAB 5

*Indexed as:*

# Canada (Competition Act, Director of Investigation and Research) v. The D & B Companies of Canada Ltd.

**Reasons and Order Granting Request for Leave to Intervene**
**IN THE MATTER OF an application by the Director of Investigation and Research under section 79 of the Competition Act, R.S.C. 1985, c. C-34;**
**AND IN THE MATTER OF certain practices by The D & B Companies of Canada Ltd.**
**Between**
**The Director of Investigation and Research, Applicant, and**
**The D & B Companies of Canada Ltd., Respondent, and**
**Information Resources, Inc., Intervenor, and**
**Canadian Council of Grocery Distributors, Applicant for Leave to Intervene**

[1994] C.C.T.D. No. 19

Trib. Dec. No. CT9401/112

Canada Competition Tribunal
Ottawa, Ontario

**Before: McKeown J., Presiding Judicial Member**
**F. Roseman, V.L. Clarke, Lay Members**

October 17, 1994

(5 pp.)

Counsel for the Applicant:

Director of Investigation and Research

Donald B. Houston
Bruce C. Caughill

Counsel for the Respondent:

The D & B Companies of Canada Ltd.

John F. Rook, Q.C.
Randal T. Hughes
Lawrence E. Ritchie
Karen B. Groulx

Counsel for the Intervenor:

Information Resources, Inc.

Calvin S. Goldman, Q.C.
Gavin MacKenzie
Geoffrey P. Cornish

Counsel for the Applicant for Leave to Intervene:

Canadian Council of Grocery Distributors

Paul Martin

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. . . . . .

Reasons and Order Granting Request for Leave to Intervene

The Canadian Council of Grocery Distributors ("CCGD") requests leave to intervene in these proceedings. CCGD represents wholesalers, retailers and other distributors of grocery products across Canada. CCGD asks only for limited intervention rights; it seeks to present legal submissions to object to the nature, scope and effect of certain of the orders sought by the Director of Investigation and Research ("Director") in his application. CCGD is not supporting either party to the application.

The Director and the existing intervenor, Information Resources, Inc., oppose the request for leave to intervene; the respondent supports the request.

We are of the view that the request for leave to intervene should be granted. As the Tribunal interpreted subsection 9(3) of the Competition Tribunal Act in a 1992 decision in Director of Investigation and Research v. Air Canada, the potential intervenor must show, among other things, that it is "directly affected" by the proceedings.[1] CCGD has demonstrated to our satisfaction that it is "directly affected" by the matters in issue in this application. Several of its members are currently party to contracts with the respondent for the supply of scanner data. They also claim a proprietary interest in the scanner data. Various features of those contracts have been challenged by the Director as anti-competitive and are the focus of some of the remedies sought in the application. Clearly, the members of CCGD who are party to the contracts would be directly affected by an order on the terms requested by the Director.

Counsel for the Director argues that the CCGD must meet the "directly affected" test in its capacity as an association. In this case, we are of the opinion that it is sufficient that there are mat-

ters in issue that would directly affect the persons represented by the CCGD. Having the association as the sole intervenor is obviously more efficient than requiring each individual retailer to appear independently.

We are also satisfied that the representations to be made by CCGD will be of assistance to the Tribunal, should we be required to consider the question of appropriate remedies. Because it represents the retailers, CCGD has a perspective different from the parties that it can bring to bear on the issue.

Both counsel for the Director and counsel for Information Resources, Inc. point out that the request for leave to intervene was submitted on the eve of the hearing of the application and argue that the request should therefore be denied. They point out that the newly amended rules of procedure of the Tribunal impose a 30-day deadline from the date of publication of a notice in the Canada Gazette for receipt of requests for leave to intervene. That particular rule, however, does not apply to this proceeding, which was commenced under the old rules and the notice in the Canada Gazette did not mention the 30-day limit. While we acknowledge that the timing of the request by CCGD is certainly not ideal, we are of the view that, given the limited scope of the intervention requested by CCGD and the application of the old rules, no significant disruption to the proceedings or prejudice to the parties will result.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT the request for leave to intervene of CCGD is granted but CCGD is limited to making legal arguments addressing the nature, scope and effect of the orders sought by the Director.

DATED at Ottawa, this 17th day of October, 1994.

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

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

d/lls

1 (1992), 46 C.P.R. (3d) 184 at 187, [1992] C.C.T.D. No. 24 (QL).

# TAB 6

(*h*) for preparation for ... a hearing in the Court of Appeal, for each two days of the actual ... hearing or part thereof, up to $250.00;

(*i*) for conduct of a ... hearing in the Court of Appeal, per half day spent in Court, up to $300.00; the taxing officer may allow, in his discretion and for special reasons, a fee for participation by junior counsel, per half day spent in Court, up to $100.00;

I would direct the taxing officer in taxing the respondents' costs on the appeal to increase the amount otherwise allowed under item 1(1)(h) to $1,000 for each two days of the actual hearing or part thereof, to increase the amount otherwise allowed under item 1(1)(i) to $1,000 per half day spent in court by senior counsel and to increase the amount otherwise allowed under that item for participation by junior counsel to $250 per half day spent in court. I am satisfied that these increased amounts fall far short of the respondents' actual cost, and that the participation of junior counsel was required by senior counsel to assist in the conduct of the appeal despite the fact that junior counsel did not actually participate in the argument.

*Disposition*

In summary I would dismiss the appeal and the cross-appeal, each with costs, and would give the foregoing directions to the taxing officer in taxing the respondents' costs to increase the amounts otherwise allowed under items 1(1)(*h*) and (*i*) of Tariff B.

*Appeal and cross-appeal dismissed.*

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## Director of Investigation and Research v. Tele-Direct (Publications) Inc. et al.

[Indexed as: Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.]

Tribunal File No. CT-94/03

*Competition Tribunal, McKeown J.* *March 1, 1995.*

**Competition law — Procedure — Interveners — Competition Tribunal — Whether those seeking intervention in tribunal proceeding are directly affected by proceeding — Scope of participation by interveners — Whether right to participate in discovery process — Access to discovery documents — Expert evidence by intervener — Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), s. 9(3).**

The five applicants were companies involved in or connected with the publication of telephone Directories. Some of the applicants were publishers of Directories, whereas the others were either licensees of Yellow Pages trade marks or were suppliers of subscriber listing information for publication, or acted as an advertising agency for clients wishing to advertise in Yellow Pages

Directories. The companies sought intervener status in the proceedings between the Director of Investigation and Research and Tele-Direct, and also sought various levels of participation in the proceedings.

**Held**, the applications to intervene were granted, subject to terms.

The test for intervention is whether the applicant is directly affected by the proceedings. The two applicants that compete with Tele-Direct as publishers of Directories are directly affected. They also have special knowledge and expertise that may assist the tribunal. Although they support the Director's position, their business interests differ from the public interest that is the concern of the Director. However, the interveners were not entitled to address issues beyond the pleadings as defined by the Director. Further, these interveners were not permitted the right to conduct oral examination for discovery. Even if the respondent, Tele-Direct, were to seek and be granted oral discovery of the interveners, reciprocity for the interveners would not necessarily follow.

Access to discovery documents and transcripts is required in order for interveners to exercise rights granted with respect to expert evidence and possibly factual evidence, in cross-examination of witnesses. However, interveners may not attend the oral discovery and only have access to transcripts. Counsel for the interveners were permitted to attend the examination for discovery of the Director, for the purpose of assisting to answer questions about which the interveners had knowledge. Restricting the interveners to expert reports that were strictly non-repetitive was not practical. With respect to the interveners who requested intervention on extremely limited terms, the rules providing for service of documents and notification to the interveners were abridged to alleviate paper burden.

*Canada (Director of Investigation and Research) v. Air Canada* (1992), 46 C.P.R. (3d) 184, [1994] C.C.T.D. No. 24, **apld**

**Other cases referred to**

*Director of Investigation and Research v. A.C. Nielsen Co. of Canada*, [1994] C.C.T.D. No. 3; *Director of Investigation and Research v. A.C. Nielsen Co. of Canada Ltd.*, [1994] C.C.T.D. No. 15

**Statutes referred to**

*Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 9(3)

**Rules and regulations referred to**

*Competition Tribunal Rules*, SOR/94-290, ss. 31, 32(1)

APPLICATIONS to intervene and participate in proceedings before the Competition Tribunal, granted, subject to terms.

*James W. Leising* and *John S. Tyhurst*, for Director of Investigation and Research.

*Mark J. Nicholson* and *Bonni L. Harden*, for Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc.

*John F. Rook*, Q.C., and *Martha A. Healey*, for applicants for leave to intervene, White Directory of Canada, Inc., NDAP-TMP Worldwide Ltd. and Directory Advertising Consultants Ltd.

*Russell W. Lusk*, Q.C., for applicant for leave to intervene, Anglo-Canadian Telephone Co.

McKEOWN J.:—Five requests for leave to intervene have been received in this proceeding. While Directory of Canada, Inc. ("White") publishes an alphabetical and classified telephone Directory in St. Catharines, Niagara Falls and Fort Erie. The Anglo-Canadian Telephone Company ("Anglo-Canadian"), through its operating division Dominion Directory Company, publishes Yellow Pages Directories in British Columbia for BC Tel and in parts of Quebec for Quebec Tel. Anglo-Canadian licenses the Yellow Pages trade marks from the respondent (referred to collectively as "Tele-Direct"). NDAP-TMP Worldwide Ltd. and Directory Advertising Consultants ("NDAP/DAC") are advertising agencies which provide consulting services to clients who wish to advertise in Yellow Pages Directories published by or for various telephone companies across Canada. They arrange for the preparation and placement of the advertisements in these Directories on behalf of their clients. InfoText Limited ("InfoText"), a subsidiary of Newfoundland Tel, and Thunder Bay Telephone ("TBT") supply subscriber listing information to Tele-Direct for Directory publication, for subscribers in Newfoundland and Labrador and in the city of Thunder Bay, respectively.

The test for granting intervener status is set out in s. 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.):

> 9(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.

The word "affects" has been interpreted in a previous decision of the tribunal to mean "directly affects": *Canada (Director of Investigation and Research) v. Air Canada* (1992), 46 C.P.R. (3d) 184 at p. 187, [1992] C.C.T.D. No. 24.

*White and NDAP/DAC*

Neither party opposes the intervention of White and NDAP/DAC. Since the two requests raise many similar issues, we will deal with them together. We accept that as a publisher of telephone Directories, White is directly affected by these proceedings. The same is true for NDAP/DAC as a competitor or potential competitor to Tele-Direct in the provision of advertising services. We also accept that both interveners have special knowledge and expertise that may assist the tribunal and that, although they support the Director's position generally, their business interests are different from his public interest mandate.

The dispute between the parties centred on whether these interveners should be permitted to direct their representations at certain issues identified in their requests for leave to intervene

which are, arguably, outside the scope of the Director's application. Counsel for Tele-Direct submitted that, in the words of s. 9(3) (quoted above), all representations must be "relevant to the proceedings" and that relevance is defined by the parties' pleadings.

In the case of White, Tele-Direct challenges items (c), (f), (g), (h), (i) and (j) of para. 9 of the request for leave to intervene. In the case of NDAP/DAC, the controversial items are found at (d) and (g) of para. 6 of its request for leave to intervene. Counsel for White and NDAP/DAC argues that while these issues may not have been specifically pleaded by the Director, they are supported by various paragraphs of the notice of application, in particular paras. 65(j), 67(d) and 69(c)(xv) for White, and paras. 65 and 68 for NDAP/DAC. He also argues that the issues are relevant or potentially relevant as matters that affect White and that the respondents should not be permitted to exclude them at this point of the proceedings. The Director supports his position.

We agree with the respondents that interveners are restricted to making representations on issues that are relevant to the proceedings as defined by the pleadings. We do not dispute that all the acts alleged by White and NDAP/DAC might be relevant to the general question of abuse of dominant position; however, if the Director has chosen not to put them in issue in his application, then they are not relevant to the instant proceeding before the tribunal. In fairness to the respondents, the anti-competitive acts on which the Director relies, must be pleaded with sufficient particularity to give adequate notice of the case that will be brought against them.

In our opinion, items (f) and (g) of para. 9 of White's request for leave to intervene are supported by the notice of application, as a specific instance of a practice described more generally in the notice, for example at para. 65(i). The issues raised in items (c), (h), (i) and (j) are somewhat different: they accuse Tele-Direct (or its parent) of spreading allegedly false information about White's activities or its product to the media, advertisers and the public. We find it difficult to conclude that these issues are supported by the general phrases in the notice of application pointed out by counsel which refer to direct or indirect "discrimination" against competing publishers. If the Director wished to allege that Tele-Direct was engaged in a concerted campaign of misrepresentation against White, then he should have been more specific. The nature of this allegation and the type of proof that would have to be brought forward by the respondents to counter it are quite unique.

Item (d) of para. 6 of the request for leave in intervene of NDAP/DAC is clearly supported by para. 65(c) of the notice of application as an example of "providing advertising space to independent advertising agencies on less favourable terms and conditions than to its own sales staff". In item (g), NDAP/DAC alleges that Tele-Direct has threatened to use its market power to put unco-operative agencies out of business. Again, we cannot find anything in the notice of application dealing with such types of threat and must conclude the Director chose not to put them in issue.

Both White and NDAP/DAC requested broad participation rights as interveners, including participation in the discovery of the respondents, access to discovery documents, introduction of expert and factual evidence and cross-examination of witnesses at the hearing. While the Director supported the request, with some restrictions on their participation in oral discovery, the respondents opposed allowing them to do anything more than submit argument. Argument at the hearing of the requests for leave was, however, focused on the question of participation in discovery and the submission of expert evidence.

We have not granted the interveners any right to conduct examination for discovery of the respondents. To date, the tribunal has not allowed an intervener to actively participate in the examination for discovery of a party, although, in a recent case, an intervener was subjected to production of documents and to discovery by one of the parties: *Director of Investigation and Research v. A.C. Nielsen Co. of Canada Ltd.* (June 18, 1994), Court File No. CT9401/22, order regarding affidavits of documents, [1994] C.C.T.D. No. 3 (Q.L.); *Director of Investigation and Research v. A.C. Nielsen Co. of Canada Ltd.* (September 22, 1994), Court File No. CT9401/82, reasons and order regarding matters considered at pre-hearing conference on September 14, 1994; amendment to notice of application, examination for discovery, and production of documents, [1994] C.C.T.D. No. 15 (Q.L.). The tribunal has stated that it would be a "rare" case in which an intervener participated actively in the discovery process, which is primarily the province of the parties: *Canada (Director of Investigation and Research) v. Air Canada*, *supra*, at p. 190. The arguments of the interveners here did not provide us with a compelling reason to allow them to discover the respondents over the respondents' objections. We are reluctant to expand and further complicate the discovery process without cogent reasons why fairness to the intervener demands such an extraordinary

departure. Speculation that Tele-Direct may later seek to examine either or both of these interveners for discovery is not a sufficient reason. Even were it certain that Tele-Direct would seek, and be granted, such discovery, reciprocity for the intervener does necessarily follow.

We accept that some access to discovery documents and transcripts is a practical necessity in order for these interveners to exercise the other rights that they have been granted with respect to expert evidence and, possibly, factual evidence and the cross-examination of witnesses at the hearing. Counsel for the interveners would prefer to attend the discovery of the respondents rather than read the transcripts. The respondents oppose the presence of intervener counsel at their examination. As we have not been convinced that their presence is required for purposes of their intervention, we have allowed them access to the discovery transcripts only.

With respect to the examination for discovery of the Director, counsel for the respondents agreed to the presence of counsel for these interveners for the purpose of assisting the Director's representative to answer questions about which the interveners have firsthand knowledge. It appears to us that this is an efficient way of proceeding and we have, therefore, allowed counsel for these interveners to be present. This presence should also alleviate the concern expressed by counsel for these interveners that the Director might not provide complete and accurate information on the matters pertaining to his clients.

On the question of expert evidence presented by interveners, counsel for the respondents argued persuasively that such evidence has in the past been largely duplicative of the expert evidence submitted by the parties, resulting in a waste of the time and resources of the parties and the tribunal. He suggested that the interveners should file their expert reports after the parties and that the tribunal should require, as with factual evidence, that those reports be strictly non-repetitive. We recognize the validity of this position; expert evidence filed by interveners is not subject to the same stringent requirements as factual evidence and does risk being largely duplicative of the parties' expert evidence. We cannot, however, think that the suggested solution is practical. It seems to us that allowing the interveners to file later than the parties gives them the advantage of having read the parties' expert reports before being required to file their own. No alternative solution having been suggested, we have not included any additional restrictions on expert evidence in the order, but

leave it to the panel hearing the application to control the more obvious instances of duplication in the evidence submitted.

*Anglo-Canadian*

In its request for leave to intervene, Anglo-Canadian suggested that it was affected by five issues arising out of these proceedings and asked to submit argument on all five. In oral argument, counsel for Anglo-Canadian emphasized one of those issues: the potential effect on Anglo-Canadian if the tribunal orders that the Yellow Pages trade marks be licensed to consultants. The Director seeks to limit the participation of Anglo-Canadian to questions of remedy related to possible licensing of the trade mark. We are of the opinion that the interest of Anglo-Canadian is somewhat broader than the terms and conditions of any potential licensing order. We consider that Anglo-Canadian can assist the tribunal with its submissions on all matters related to the possible compulsory licensing of the trade marks, as those matters directly affect it. Anglo-Canadian can validly contribute, for example, to the arguments regarding the respondents' jurisdictional motion in this regard.

With respect to the remaining issues raised in its request for leave to intervene, Anglo-Canadian appears to be largely concerned about the precedential effect of the tribunal's decisions in this proceeding on the other major players in Yellow Pages publishing in Canada. It is evident that the decisions of the tribunal will affect the Director's decisions on whether to proceed against any other potential respondents and may also affect how the industry conducts its business in light of the possibility of further applications. While this may be a more direct effect than the effect on the public at large of a court ruling of general application, we do not think that, in and of itself, it is sufficient to justify intervener status. Therefore, we see no reason to permit Anglo-Canadian to address these issues.

*InfoText and TBT*

InfoText and TBT did not appear at the hearing of the requests for leave to intervene. Nevertheless, with the agreement of the parties, they have been granted leave to intervene on the extremely limited terms they requested. As suppliers of subscriber listing information to Tele-Direct, they certainly appear to be directly affected by the proceeding. They seek only to have their respective requests for leave to intervene accepted as part of the record, which has been ordered. To avoid imposing a burden on

the parties and on the registry, we have abridged certain of our rules that provide for the service of documents on and the notification of interveners. With the filing of their requests for leave to intervene, these interveners have essentially completed their desired participation. We will not require the parties and the registry to provide them with documents and notices they are unlikely to want.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

1. Subject to para. 3 of this order, White is granted leave to intervene in these proceedings to make representations relevant to the proceedings in respect of those matters which directly affect it. Items (c), (h), (i) and (j) of para. 9 of White's request for leave to intervene are not relevant to the proceedings as defined by the parties' pleadings.

2. Subject to para. 3 of this order, NDAP/DAC is granted leave to intervene in these proceedings to make representations relevant to the proceedings in respect of those matters which directly affect it. Item (g) of para. 6 of NDAP/DAC's request for leave to intervene is not relevant to the proceedings as defined by the parties' pleadings.

3. White and NDAP/DAC shall have the participation rights set out in s. 32(1) of the *Competition Tribunal Rules*, and, in addition:

(a) They shall have access to the transcripts of the examinations for discovery conducted by the parties, subject to any order that may be issued by the tribunal restricting the disclosure of portions of the transcripts for reasons of confidentiality. Counsel for White and counsel for NDAP/DAC may attend at the examination for discovery of the representative of the Director of Investigation and Research ("Director") for the purpose of assisting that representative in answering questions put by the respondents' counsel;

(b) They shall be permitted to inspect and make copies of the documents listed in the affidavits of documents of the parties, other than those documents subject to a claim for privilege of which are not within the party's possession, control or power, subject to the same restriction regarding confidentiality as set out in (a) above;

(c) They shall be permitted to introduce relevant expert evidence which is within the scope of their intervention in

accordance with the procedure set out in the *Competition Tribunal Rules*;

(d) They shall be permitted to adduce factual evidence at the hearing, provided that they each demonstrate to the satisfaction of the tribunal that such evidence is relevant and within the scope of the intervention, is not repetitive and that the Director has been asked to adduce the evidence and has refused;

(e) They shall be permitted to cross-examine witnesses after the Director has conducted his cross-examination, provided that they demonstrate to the satisfaction of the tribunal that they have questions pertinent to their intervention which the Director was not willing to ask.

4. Anglo-Canadian is granted leave to intervene in these proceedings to make representations relevant to the proceedings in respect of matters related to the possible compulsory licensing of the Yellow Pages trade marks as those matters directly affect it. Anglo-Canadian shall have only those participation rights set out in s. 32(1) of the *Competition Tribunal Rules*.

5(1) InfoText and TBT are granted leave to intervene for the sole purpose of placing on the record their respective requests for leave to intervene. The documents shall be accepted as filed and shall constitute submissions that will be considered by the panel hearing the application in light of the evidence tendered at the hearing by the parties and other interveners. Subject to further order of the tribunal upon the motion of the interveners, InfoText and TBT shall have no other rights of participation in this proceeding.

(2) The provisions of s. 31 of the *Competition Tribunal Rules* shall not apply to the interventions of InfoText and TBT. In addition, the registry is not required to serve any interlocutory orders issued in this proceeding on either InfoText or TBT.

(3) Counsel for the parties, as agreed, shall serve any notice of motion to be presented by them on InfoText and TBT prior to filing the notice with the tribunal.

(4) The Registrar shall inform InfoText and TBT of the date and place of the hearing of this application.

6. For greater certainty, all interveners except InfoText and TBT may attend and present submissions within the scope of their respective interventions at the hearing of the respondents' motion regarding jurisdiction on March 28, 1995.

*Order accordingly.*

# TAB 7

*Indexed as:*

# Southam Inc. v. Canada (Competition Act, Director of Investigation and Research)

**Reasons and Orders Arising from Pre-hearing Conference on September 17, 1997: Intervention and Amendments to Pleadings**
**IN THE MATTER of an application by Southam Inc. et al. under section 106 of the Competition Act, R.S.C. 1985, c. C-34;**
**AND IN THE MATTER of the direct and indirect acquisitions by Southam Inc. of equity interests in the business of publishing The Vancouver Courier, the North Shore News and the Real Estate Weekly.**
**Between:**
**Southam Inc., Lower Mainland Publishing Ltd., Rim Publishing Inc., Yellow Cedar Properties Ltd., North Shore Free Press Ltd., Specialty Publishers Inc., Elty Publications Ltd., Applicants, and**
**The Director of Investigation and Research, Respondent**

[1997] C.C.T.D. No. 47

Trib. Dec. No. CT9001/343

Also reported at:78 C.P.R. (3d) 315

Canada Competition Tribunal
Ottawa, Ontario

**Before: Noël J., Presiding Judicial Member**

Heard: September 17, 1997
Decision: September 22, 1997

(11 pp.)

Counsel for the Applicants:

Southam Inc.

Lower Mainland Publishing Ltd.
Rim Publishing Inc.
Yellow Cedar Properties Ltd.
North Shore Free Press Ltd.
Specialty Publishers Inc.
Elty Publications Ltd.

Mark J. Nicholson

Counsel for the Respondent:

The Director of Investigation and Research

Stanley Wong

Counsels for the Applicant for Leave to Intervene:

Michael W. Delesalle

Frank P. Monteleone
Catherine C. Grant

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Reasons and Orders Arising from Pre-hearing Conference on September 17, 1997: Intervention and Amendments to Pleadings

**1** At the pre-hearing conference in this matter held on September 17, 1997, the Tribunal heard a request for leave to intervene and two motions to amend the pleadings, one from each party. The following sets out the reasons and orders arising from that pre-hearing conference.

Background

**2** The current application before the Tribunal is brought by Southam Inc. and related companies ("Southam"), pursuant to section 106 of the Competition Act, to vary an order of the Tribunal issued in March 1993. That order arose out of an application brought by the Director of Investigation and Research ("Director") in 1990 to challenge the acquisition by Southam Inc. of various community newspapers in the Lower Mainland region of British Columbia. In June 1992, the Tribunal found that the common ownership by Southam of both the North Shore News[1] and the Real Estate Weekly[2] was likely to lead to a substantial lessening of competition in the market for print real estate advertising on the North Shore.

**3** A special hearing was convened to consider possible remedies arising from this decision. In December 1992, the Tribunal concluded that, in order to remedy the substantial lessening of competition, Southam would have to sell either the North Shore News or the whole of the Real Estate Weekly. After a further hearing, a detailed divestiture order was issued in March 1993. The divesti-

ture order requires Southam to sell one of the two publications, at its option, and sets out the mechanisms by which the divestiture was to be accomplished. Various appeals were launched which proceeded up to the Supreme Court of Canada in the course of which the divestiture order was stayed until all appeals were resolved. The final judgment was rendered in March 1997.

**4** In late July of this year, Southam filed an application to vary the divestiture order "to strike the requirement that the Applicants divest themselves at their option of either the North Shore News or the Real Estate Weekly" and for an order "that Southam divest itself of the North Shore Edition of Real Estate Weekly to the Delesalle partnership." The Director opposes the requested variation.

Request for Leave to Intervene of Michael Delesalle

**5** Mr. Delesalle is a long-time Vancouver businessman with extensive retail experience and some exposure to publishing. He has an "agreement in principle" with Southam to acquire the North Shore edition of the Real Estate Weekly. If the variation application succeeds, Mr. Delesalle plans to combine the North Shore edition of the Real Estate Weekly with The North and West Voice, a relatively new, bi-weekly, magazine-style community newspaper, and move to weekly distribution.

**6** As a preliminary matter to the hearing of his request for leave to intervene, Mr. Delesalle moved to have certain exhibits to the affidavit in support of his request declared confidential and to file a supplementary affidavit. As the Director did not oppose either motion, they are granted.

**7** Mr. Delesalle seeks leave to intervene in the variation application on the grounds that, as a bona fide, willing purchaser of the North Shore edition of the Real Estate Weekly, he is directly affected by the matters in issue in the proceedings. He notes that he is, in fact, the only person who has requested leave to intervene in the application. He further submits that he has relevant evidence to present and legal submissions to make that will assist the Tribunal and that his participation will not unduly complicate the process as the issues he will address are limited and the requested participation rights restricted.

**8** During oral argument, counsel for Mr. Delesalle handed up a detailed outline of the issues Mr. Delesalle would like to address as an intervenor and the participation he requests. Mr. Delesalle would like to adduce factual evidence, cross-examine witnesses with leave of the Tribunal, submit expert evidence and make legal arguments with respect to the following issues: (1) the agreement in principle to purchase the North Shore edition of the Real Estate Weekly; (2) his managerial, operational and financial capability to compete effectively in the relevant market and to operate the Real Estate Weekly North Shore edition; (3) the agreement in principle to acquire majority interest in The North and West Voice; and (4) his proposed business plans for a niche publishing venture in the North Shore area. Southam supports the request for leave to intervene; the Director opposes it.

**9** The Director raises a number of questions which he says go to whether Mr. Delesalle has satisfactorily proven that he is indeed "directly affected" by these proceedings. He points out that there is no documented confirmation from Southam that it has an agreement with Mr. Delesalle, albeit contingent on the result of the variation application. He further notes that the affidavit material relating to Mr. Delesalle's current and possible future "interest" in The Voice is less than clear. He submits that on the documentation currently before the Tribunal, it has not been established that Mr. Delesalle "has acquired a financial interest" in The Voice. The Director does not, however, challenge Mr. Delesalle's good faith in presenting his intervention request nor the truthfulness of his stated intentions.

**10** While the supporting evidence presented by Mr. Delesalle is not as complete as it might have been, he has put forth a letter of intent and outlined the essential features of his proposed purchase. I am satisfied on the basis of the evidence that he has a financial interest in The Voice as matters presently stand and, as his proposed acquisition of the North Shore edition of the Real Estate Weekly is conditional upon Southam succeeding in its application, he is by necessity directly affected by these proceedings.

**11** Nevertheless, the Director argues that Mr. Delesalle should not be granted intervenor status because there is nothing that he can add to the proceedings beyond what Southam will have to put forward in order to succeed in its application. In this respect, the Director stresses that it is the existence of Mr. Delesalle and his offer to purchase the North Shore edition that are pleaded by Southam as the changed circumstances which would justify a variation of the original order. His proposed plan is presented as one which effectively deals with the problem identified by the Tribunal back in 1992.

**12** This application is indeed most unusual in that the interests of the intervenor and of Southam are entirely the same. Both will seek to establish that Mr. Delesalle's plans provide for an effective remedy and that the Tribunal which heard the original application would not have made the order which it made if the current remedy had been before it at the time. I do not believe that the rules respecting intervention contemplate that an intervenor be called upon to make the very case that an applicant is called upon to make.

**13** In this instance, Southam, as the applicant, bears the burden of proving every element necessary to support the variation application, failing which it will fail. It cannot delegate this task to someone else in whole or in part. Intervenors are intended to supplement the case of a party by bringing to the Tribunal their own and distinct perspective of the subject matter in dispute. Here nothing of the sort would be achieved by granting Mr. Delesalle intervenor status as Southam has already assumed the task of providing the Tribunal with Mr. Delesalle's contribution to the matter in issue.

**14** With respect to the confidentiality concerns which Mr. Delesalle may have, I accept that if the application succeeds, he will become a competitor of Southam's. However, the pleadings of Southam in the main application are based on it having at the relevant time full knowledge of Mr. Delesalle's interest in the matter and the details of his plans with the result that confidentiality issues as between Southam and Mr. Delesalle are unlikely to arise. If however such concerns should arise, I do not see how these cannot be dealt with through the usual means.[3]

**15** The application for intervention is accordingly denied.

Requested Amendments to the Pleadings

**16** Both parties wish to amend their respective pleadings. Southam seeks to add several paragraphs to its application alleging various facts related to a real estate advertising publication that the Real Estate Board of Greater Vancouver is contemplating producing. The Director does not oppose the amendment. The amendment is therefore granted as set out in the order below.

**17** The Director requests leave to amend his response to incorporate an additional ground of opposition to the application to vary. Southam opposes the amendment. The paragraphs which the Director seeks to add read as follows:

14. In the event that the Tribunal concludes that a partial divestiture of the Real Estate Weekly through the sale of the North Shore edition of that publication would be an adequate remedy, it ought not to approve the sale to Mr. Delesalle as proposed by Southam because Southam had not complied, as it ought to have, with s. 8 of the Divestiture Order to ensure that all potential purchasers have had a fair opportunity to purchase the North Shore edition of the Real Estate Weekly.
15. Accordingly, the Director requests that the application under s. 106 to vary the Divestiture Order be dismissed.

**18** Southam opposes the amendment on a number of grounds. Southam submits that the proposed amendment reflects an incorrect interpretation of the divestiture order, that any discussion of the adequacy of Southam's compliance with the divestiture order is irrelevant to the variation application and that granting the amendment will create unnecessary expense for Southam and will complicate and prolong the Tribunal's processes as it will require amended pleadings by Southam, further production of documents and oral discovery and additional areas for evidence and argument at the hearing.

**19** The Director argues that if and when the Tribunal determines that there has been a "change in circumstances" such as to trigger the application of section 106, the Tribunal will then have to decide if it is appropriate to issue the order requested by Southam. According to the Director, the fact that, in identifying Mr. Delesalle, Southam may have ignored the "open process" contemplated by paragraph 8 of the divestiture order, may be relevant to the exercise of the discretion to grant or not to grant the requested order.

**20** It is evident that there are legal issues between the parties as to the interpretation, relevance and effect of paragraph 8 of the divestiture order. The general rule, as set out in rule 420 of the Federal Court Rules, is that the court will allow amendments to pleadings as are necessary to determine the real questions in controversy between the parties, on such terms as are just. The Director has brought the request to amend his pleadings in a timely manner and in good faith. The question which he wishes to raise is prima facie relevant and I have not been convinced that the resulting prejudice to Southam, if any, would justify a refusal of the amendment.

**21** FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

1. Exhibits B, C and D to the affidavit of Michael W. Delesalle sworn September 3, 1997 in support of the request for leave to intervene are confidential and shall not be placed in the public record.
2. The further affidavit of Michael W. Delesalle sworn September 15, 1997 in support of the request for leave to intervene is permitted to be filed.
3. The request for leave to intervene is denied.
4. The unopposed motion by Southam to amend the statement of grounds and material facts, appended as Schedule A to the notice of application, is granted. The amended statement of grounds and material facts, titled Schedule A-1, which was served and filed as part of the motion material, shall replace Schedule A to the notice of application.
5. The motion by the Director to amend his response is granted. The amended response, which was served and filed as part of the motion material, shall replace the response dated August 11, 1997 and filed on August 12, 1997.

DATED at Ottawa, this 22nd day of September, 1997.

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

(s) Marc Noël Marc Noël

qp/d/lls

1 A North Shore community newspaper with a real estate supplement.

2 A publication devoted to real estate advertising with editions throughout the Lower Mainland including the North Shore.

3 Restricted disclosure, confidentiality agreements, orders and the like.

# TAB 8

*Case Name:*

# Canada (Commissioner of Competition) v. Canadian Real Estate Assn.

**Reasons and Order Denying Mr. Dale's Motion for Leave to Intervene**
**IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended;**
**AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the Competition Act;**
**AND IN THE MATTER OF certain rules, regulations and policies of the Canadian Real Estate Association;**
**Between**
**The Commissioner of Competition (applicant), and**
**The Canadian Real Estate Association (respondent), and**
**Lawrence Mark Dale (applicant for leave to intervene)**

[2010] C.C.T.D. No. 11

[2010] D.T.C.C. no 11

2010 Comp. Trib. 11

File No.: CT-2010-002

Registry Document No.: 0062

Canada Competition Tribunal
Ottawa, Ontario

**Before: Simpson J. (Chairperson)**

Heard: June 30, 2010.
Decision: July 8, 2010.

(18 paras.)

**Appearances:**

For the applicant: the Commissioner of Competition: Andrew D.

Little, Roger Nassrallah.

For the respondent: The Canadian Real Estate Association: Katherine L. Kay, Mark E. Walli.

For the applicant for leave to intervene: Lawrence Mark Dale, Mark Nicholson, Chris Hersli.

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**REASONS AND ORDER DENYING MR. DALE'S MOTION FOR LEAVE TO INTERVENE**

**1** Mr. Lawrence Mark Dale is moving for leave to intervene in proceedings commenced by the Commissioner of Competition (the "Commissioner") against the Canadian Real Estate Association ("CREA") pursuant to section 79 of the *Competition Act,* R.S.C. 1985, c. C-34.

## I. BACKGROUND

**2** In her application filed on February 8, 2010, the Commissioner alleges that CREA is abusing its dominant position in the market for residential real estate brokerage services. CREA owns the Multiple Listing Service ("MLS"), which provides CREA's members with a comprehensive computerized listing of homes for sale across Canada. CREA also owns the MLS & Design trademarks (together the "MLS and Related Trademarks").

**3** The Commissioner further asserts that CREA imposes exclusionary restrictions on the use of the MLS and Related Trademarks when it licences them to its member real estate boards. These restrictions, according to the Commissioner, lessen or prevent competition substantially by excluding competition from brokers and others wishing to offer a reduced set of services to their customers including "mere postings" or "MLS-only listing" services. The Commissioner seeks an order from the Tribunal prohibiting CREA from directly or indirectly imposing such restrictions.

**4** CREA denies the Commissioner's allegations. It asserts, *inter alia,* that its rules allow for a range of options for residential real estate brokerage services, including the ability to contract for minimal service offerings, discounted commission rates and fee-for-service products.

**5** Mr. Dale, the applicant for intervenor status, is a co-founder of Realtysellers (Ontario) Limited ("Realtysellers") and was involved in its senior management. He is also a former member of CREA. Although he is a lawyer, he has indicated that he will be represented by counsel if he is permitted to intervene.

**6** The Commissioner has referred to Realtysellers in paragraph 44 of her Notice of Application:

> The MLS Restrictions have caused at least one broker to exit the relevant market. In November 2006, Realtysellers of Toronto suspended its operations in anticipation of the introduction of the MLS Restrictions. Prior to that time, Realtysellers offered differentiated service packages to consumers, including an "MLS-only listing" service.

**7** Mr. Dale states in his motion for leave to intervene that he "faced concerted efforts by CREA and its members" to drive Realtysellers out of business. If the Tribunal grants the relief sought by the Commissioner, Mr. Dale deposes that he intends to re-enter the industry with non-traditional

brokerages offering services in a number of areas that will compete directly with members of CREA.

**8** Mr. Dale supports the Commissioner's position generally and he asks to be allowed to participate in the proceeding as follows: (i) participate in the proceedings by attending and making representations at motions, pre-hearing conferences and the hearing of the application; (ii) review the discovery transcripts and access discovery documents; (iii) inspect and make copies of the documents listed in any affidavit of documents, (iv) adduce his own factual evidence at the hearing after the Commissioner; (v) cross-examine witnesses after the Commissioner, and (vi) make oral and written final arguments and submissions.

**9** The Commissioner does not oppose Mt. Dale's motion for leave to intervene, but takes issue with the extent of his proposed participation. CREA opposes the request. CREA asserts that Mr. Dale is not directly affected by the matters at issue and that he has no unique or distinct perspective on the matters at issue that would assist the Tribunal.

**10** CREA submits, in the alternative, and the Commissioner agrees, that Mr. Dale's participation should be restricted because Realtysellers and Mr. Dale have a protracted history of litigation against CREA and the Toronto Real Estate Board. However, in view of the Tribunal's decision to deny leave, it is not necessary to set out the restrictions which CREA and the Commissioner have suggested.

## II. THE LAW

**11** Subsection 9(3) of the *Competition Tribunal Act,* R.S.C. 1985, c. 19 (2nd Supp.), reads as follows:

> Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act,* to make representations relevant to those proceedings in respect of any matter that affects that person.

**12** The Tribunal held in *Commissioner of Competition v. Canadian Waste Services Holdings Inc.,* 2000 Comp. Trib. 10, that it must be satisfied that all of the following elements are met in order to grant the status of intervenor:

(a) The matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate (see *Director of Investigation and Research v. Air Canada* 1992 CanLII 2035 (C.T.), (1992), 46 C.P.R. (3d) 184 *at* 187, [1992], C.C.T.D. No. 24 (QL)).

(b) The person seeking leave to intervene must be directly affected. The word "affects" has been interpreted *in Air Canada,* ibid., to mean "directly affects".

(c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (see *Tele-Direct,* cited above in s. [2]).

(d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the

issues before it (see *Washington v. Director of Investigation and Research,* [1998] C.C.T.D. No. 4 (QL) (Comp. Trib)).

## III. DISCUSSION

**13** The material filed by Mr. Dale does not satisfy the Tribunal that he has unique or distinct perspective that will assist the Tribunal to decide this case. He merely says that he has a different interest in and perspective on the case because he is a businessman in the private sector and the Commissioner is a public servant with a focus on the public interest. This bald statement is not sufficient to meet part (d) of the test described above. Mr. Dale also acknowledges that he is generally supportive of the Commissioner's case and provides no examples of topics on which their positions differ.

**14** In any event, the Tribunal will have the benefit of Mr. Dale's evidence. During oral argument, counsel for Mr. Dale and counsel for the Commissioner indicated that the Commissioner will be calling Mr. Dale as a witness.

**15** In all these circumstances, the Tribunal has exercised its discretion to deny Mr. Dale's request to intervene.

**FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:**

**16** Mr. Dale's request for leave to intervene is dismissed.

**17** There is no order as to costs.

**18** Mr. Dale's witness statement may include evidence from a business perspective about the effectiveness of the Commissioner's proposed order.

DATED at Ottawa, this 8th day of July, 2010.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

cp/e/qlaim/qlhbb

# TAB 9

*Indexed as:*

# Canada (Director of Investigation and Research, Competition Act) v. A.C. Nielsen Company of Canada Limited

**Reasons and Order Denying Request for Leave to Intervene**
**IN THE MATTER OF an application by the Director of Investigation and Research under section 79 of the Competition Act, R.S.C. 1985, c. C-34;**
**AND IN THE MATTER OF certain practices by A.C. Nielsen Company of Canada Limited.**
**Between**
**The Director of Investigation and Research, Applicant, and**
**A.C. Nielsen Company of Canada Limited, Respondent, and**
**Information Resources, Inc., Intervenor, and**
**Richard Janda, Daniel Martin Bellemare, Applicants for Leave to Intervene**

[1994] C.C.T.D. No. 9

Trib. Dec. No. CT9401/44

Canada Competition Tribunal
Ottawa, Ontario

**Before: Noël J., Presiding Judicial Member**
**F. Roseman, Lay Member**

July 7, 1994

(4 pp.)

**Appearances:**

Counsel for the Applicant:

Director of Investigation and Research

David Wolinsky

Counsel for the Respondent:

A.C. Nielsen Company of Canada Limited

Randal T. Hugues

Counsel for the Intervenor:

Information Resources, Inc.

Geoffrey P. Cornish

Applicants for Leave to Intervene:

Richard Janda
Daniel Martin Bellemare

Represented themselves

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. . . . . .

Reasons and Order Denying Request for Leave to Intervene

The applicants for leave to intervene are both lawyers and members of the Bar of Quebec. Richard Janda is also the Director of the Centre of the Study of Regulated Industries at McGill University, which sponsors research and lectures in areas relating to the regulation of business activities, including competition law. Daniel Bellemare holds a Master's degree in law from McGill University. The applicants seek leave to file written submissions in the form of an amicus curiae brief to address, in general terms, the importance of linking anti-competitive conduct to market structure when interpreting section 79 of the Competition Act. Both parties to the application are opposed to the request for leave to intervene. The existing intervenor, Information Resources, Inc., takes no position regarding the request.

We are of the view that the request for leave to intervene should be denied. First, the applicants for intervenor status have not made any allegation or demonstration that there are matters involved in this proceeding that "affect" them in any manner. Second, it is doubtful that the subject matter of the representations proposed to be raised by the applicants would assist the Tribunal in determining this application. Finally, while as lawyers the applicants for intervenor status have demonstrated a particular interest in the competition law area, this is not in and of itself a ground for granting leave to intervene.

FOR THESE REASONS the request for leave to intervene of Richard Janda and Daniel Martin Bellemare is denied.

DATED at Ottawa, this 7th day of July, 1994.

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

(s) Marc Noël Marc Noël

# TAB 10

*Indexed as:*

# American Airlines, Inc. v. Canada (Competition Tribunal) (F.C.A.)

**IN THE MATTER OF an Appeal from the Competition Tribunal Between**
**American Airlines, Inc., Appellant, and**
**Competition Tribunal, Air Canada, Air Canada Services Inc., PWA Corporation, Canadian Airlines International Ltd., Pacific Western Airlines Ltd., Canadian Pacific Airlines, Limited, 154793 Canada Ltd., 153333 Canada Limited Partnership, The Gemini Group Automated Distribution Systems Inc., The Director of Investigation and Research Wardair Canada Inc., Consumers' Association of Canada and The Attorney General of the province of Manitoba, Respondents**

[1988] F.C.J. No. 1049

[1988] A.C.F. no 1049

[1989] 2 F.C. 88

[1989] 2 C.F. 88

54 D.L.R. (4th) 741

89 N.R. 241

33 Admin. L.R. 229

23 C.P.R. (3d) 178

13 A.C.W.S. (3d) 64

Action No. A-851-88

Federal Court of Appeal
Ottawa, Ontario

**Iacobucci C.J., Heald and Stone JJ.**

Heard: October 25, 1988
Judgment: November 10, 1988

*Practice -- Parties -- Intervention -- Competition // Construction of statutes -- Competition -- "Representations".*

Colin L. Campbell, for the Appellant.
N.J. Shultz and Janet Yale, for Consumers' Association of Canada.
C. Marshall and E. Rothstein, for Air Canada Ltd., 153333 Canada Limited Partnership, Air Canada Services Inc.
Jo'Anne Strekaf, for PWA Corporation, Canadian Airlines International Ltd., Pacific Western Airlines Ltd., Canadian Pacific Air Lines, Limited, 154793 Canada Ltd., 153333 Canada Limited Partnership, Air Canada Services Inc.
John Rook and Trevor Whiffen, for The Director of Investigation and Research.
No one appearing, for the Attorney General of the Province of Manitoba.
No one appearing, for Wardair Canada Inc.

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The judgment of the Court was delivered by

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

The proceeding in question was instituted by the application of the Director of Investigation and Research ("Director") for, amongst other things, an order under section 64 of the Competition Act, R.S.C. 1970 c.C-23, as amended, and for an interim order under section 76 of the Competition Act, [Footnote: The Director's application was subsequently amended by order of the Competition Tribunat to include a prayer for relief under sections 64(1)(e)(iii), 77 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 section 64 of the Competition Act, in the provision of computer reservation system services to airlines, travel agents and consumers in Canada.

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.

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 section 1203 of the Federal Court Rules. It is noteworthy that the Director supports the arguments of the appellant and other interveners for an increased role in their intervention.

The appellant argues in short that Strayer, J. erred in law in his interpretation of section 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, [Footnote: 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.].

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.

At the outset I think it appropriate to refer to Section 9 of the Competition Tribunal Act, which provides as follows:

> 9. (1) The Tribunal is a court of record and sun 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

Strayer, J. interpreted "representations" in section 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:

> Subsection 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 presenter des observations". The term "observations" is most commonly applied to the presentation of comments or argument before a court or tribunal. [Appeal Book, pages 14-15].

Strayer, J. said that this interpretation of section 9(3) was strengthened by reference to sections 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: "...presenter des observations et des preuves..." in section 97, and "...presenter des observations et soumettre des elements de preuve..." in section 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 sections 97 and 98 of the Competition Act "representations" do not include the presentation of evidence, so it should be in section 9(3) of the Competition Tribunal Act, namely, that "making representations" should not include the calling of evidence.

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 parti es 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 merge r since the only action contemplated is one taken by the Director.

Strayer, J. also found that the general implied authority of a court to permit interventions on terms it thinks fit was restricted by the limiting language of section 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 section 9(3). In this respect, he said:

> 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 subsection 9(3) to this erred 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 setting the matter (subject to the approval of the Tribunal should a consent order be required). [Appeal Book, pages 22-23].

Strayer, J. also pointed to section 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 section 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:

> 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. [Appeal Book, page 28].

ISSUE BEFORE THE COURT

With this background and review of the reasons of Strayer, J., the issue before us focusses on the meaning of section 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 section 9(3), the Tribunal would have implied authority to permit interveners to call evidence and cross-examine witnesses. The issue then is whether section 9(3) restricts interveners in the manner held by Strayer, J. or whether, as contended by the appellants, section 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

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 masters 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 dearly articulated by this Court in the Fishing Vessel Owners' Association case:

> "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 staute or by the rules of Court, Fishing Vessel Owners' Association of British Columbia et al v.Canada (1985) 57 N.R. 376, at 381 (F.C.A.). [Emphasis added].

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 sections 8, 9(1), 16 of the Competition Tribunal Act, [Footnote: Section 8(1) gives the Tribunal jurisdiction to hear applications under Part VII of the Competition Act and related matters and section 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 section 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.

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 section 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 section 9(3) is dearly expressed to eliminate the Tribunal's inherent authority or discretion in the manner found by Strayer, J.

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.

In the Shorter Oxford Dictionary, "representation" is stated to mean, among other things, the following, which I find applicable to section 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].

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).

But it is important to note that section 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 argliment or reasons are supported by facts that they have had the chance to prove in evidence.

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.

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 su-

pervision 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.

My conclusion on this meaning of "representations" for the purpose of section 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.

The purpose of the Competition Act as shown in section 1.1 thereof is extremely broad:

> 1.1 The purpose of this Ad 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.

It is evident from the purpose clause that the effects of anti-competitive 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 proce edinp in order to inform the Tribunal of the ways in which maners 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 section 9(3) could in some cases run counter to the effective handling of disputes coming before the Tribunal.

At issue in the case before us is, among other things, an order for dissolution, pursuant to section 64 of the Competition Act, of the merger of computer reservadon 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 pers ons attaining intervener status under section 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.

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.

Fairness is a relevant consideration because section 9(2) of the Competition Tribunal Act expressly requires that proceedings before the Tribunal be dealt with as informally and as expedi-

tiously 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 section 9(2).

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 sections 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 section 9(3) of the Competition Tribunal Act.

I do not dispute his finding the statutes in pari materia; however, I do not accept that the choice of words in sections 97 and 98 of the Competition Act dictates their meaming in section 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; sections 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 section 17 of the Competition Tribunal Act which 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 "representation" 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 section 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 sections 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 shoul d not apply to the section in issue before the court. The point made about sections 97 and 98 is, after all, a rule of interpretation that can be rebutted, and in this case has been, by more persuasive arguments.

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

Mindful of the ordinary dictionary meaning of "representations" as discussed above, and of the recognition in section 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 section 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 section 9(3) that the interveners' representations must be relevant to this proceeding in respect of any matter affecting those interveners.

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 address ed to it in this regard. However, I am of the view that the question of costs should be dealt with.

Secti on 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, it seems clear that an award of costs is in the complete discretion of the Court. Subsection (3) of Rule 344 sets out a number of maners that the Court is endtled 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 subsection (3), when they are related to the circumstances of this appeal, do not persuade me otherwise.

I should add that, were it not for the provisions of section 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:

> 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.

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 section 13 supra, I think Rule 344(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.

IACOBUCCI C.J. HEALD J.:-- I concur.

STONE J.:-- I agree.

File No. **CT-2011-003**

**THE COMPETITION TRIBUNAL**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

- and -

**THE TORONTO REAL ESTATE BOARD**

**Respondent**

# BRIEF OF AUTHORITIES OF THE COMMISSIONER

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