File No. CT 2003 008

THE COMPETITION TRIBUNAL

IN THE MATTER OF an Application for rescission of the Order Granting Leave to Barcode Systems Inc. pursuant to Section 103.1 of the *Competition Act*, RSC 1985 c. C-35, as amended, to commence an Application pursuant to Section 75 of the *Competition Act*.

BETWEEN:

SYMBOL TECHNOLOGIES CANADA ULC

Applicant ,

- and –

BARCODE SYSTEMS INC. and PRICEWATERHOUSECOOPERS INC. as INTERIM RECEIVER of BARCODE SYSTEMS INC.

Respondents.

MEMORANDUM OF FACT AND LAW OF SYMBOL TECHNOLOGIES CANADA ULC

In Respect Of The Motion Of Symbol Technologies for Summary Disposition

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FACTS

1. On January 15, 2004, Lemieux, J. sitting as the presiding judicial member of the Competition Tribunal ("the Tribunal") [Tribunal File No. 2003 008] issued an Order granting leave to Barcode Systems Inc. ("BSI") to make an application under Section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "*Act*") to seek an Order requiring the Applicant, Symbol Technologies Canada ULC ("Symbol") to accept BSI as a customer on the "usual trade terms".

2. As discerned from the reasons of Lemieux, J. issued on January 15, 2004, the material factual circumstances as advanced by BSI at the time when Lemieux J. granted leave were as follows:

(a) Symbol had refused to supply BSI with barcode scanners after Symbol terminated its ten year relationship with BSI;

(b) Symbol's refusal to supply, either directly or by preventing Symbol's distributors or Symbol resellers from doing so, had caused a substantial loss of revenues to the point where it, if continued, would force BSI out of business;

(c) Pursuant to an order issued on December 19, 2003 by Mr. Justice Schulman of the Manitoba Court of Queen's Bench, in File No. CI 03-01-36054, PricewaterhouseCoopers Inc. ("PWC") was appointed as Interim Receiver in respect "of all property, assets and undertakings" of BSI (the "PWC appointment Order"). Paragraph 11 of the PWC appointment Order granted PWC the authority to initiate and continue all legal and administrative proceedings on behalf of BSI.

Exhibit "B" to the Affidavit of Michael Reid sworn Feb. 11, 2005 (the "Feb. 11, 2005 Reid affidavit")

3. BSI had previously commenced a civil action on March 19, 2003 against Symbol and it's parent corporation, Symbol Technologies, Inc. in Manitoba Court of Queens' Bench, File No. CI 03-01-32071. BSI assigned this civil action to BSI's principal, David Sokolow, on November 8, 2003 - prior to PWC being appointed as Interim Receiver. In this civil action BSI initially sought damages for alleged breaches of an agreement, claiming, *inter alia* that :

(a) the Defendants failed to provide BSI with additional sales help and assistance and marketing support in addition to Channel Marketing Programs as called for in a January 27, 1998 letter agreement;

(b) the Defendants allowed its own sales people to directly compete with BSI for new customers as well as for new opportunities with BSI's existing customers which BSI said was contrary to the January 27, 1998 letter agreement;

(c) the Defendants failed to provide BSI with 'top level pricing" (sic) contrary to the January 27, 1998 letter agreement;

(d) the Defendants did not process marketing assistance fund approvals and payments on a timely basis as BSI said was called for in accordance with the January 27, 1998 letter agreement; and

(e) the Defendant did not provide BSI with pricing exceptions on a timely basis, contrary to what BSI said was called for in the January 27, 1998 letter agreement.

CHANGE IN CIRCUMSTANCES

4. On the very same day that the Tribunal was issuing the Order granting leave to commence the s. 75 application, PWC, in their capacity as Interim Receiver of BSI, was in the Manitoba Court of Queen's Bench obtaining an Order from Justice Schulman compelling Symbol to:

(a) supply the Interim Receiver of BSI with product for the purpose of resale by the Interim Receiver to end-users on such terms and conditions as Symbol would ordinarily provide to one of its authorized distributors;

(b) direct its authorized dealers to supply the Interim Receiver with product for the purpose of resale by the Interim Receiver to BSI's customers upon such terms and conditions as such distributor would ordinarily provide to one of its authorized dealers; and

(c) compel Symbol to provide such customers of BSI with such support and to honour such warranties as Symbol does in the ordinary course to end-users who have purchased Symbol products from authorized Symbol dealers.

Feb. 11, 2005 Reid affidavit, par. 5-9
Ex. "E" to the Feb. 11, 2005 Reid affidavit (the "Manitoba Supply Order")

5. In support of its application for the Manitoba Supply Order it was explained by the Interim Receiver that it was likely that the Interim Receiver's ability to sell BSI as a going concern would be greatly impaired in the event that it was not able to sell to BSI's customers in the ordinary course. "In such event, it will also be difficult to maintain Barcode's sales force (all of whom the Interim Receiver had hired), the loss of which would further impair the ability to sell the business as a going concern."

Feb. 11, 2005 Reid affidavit, par. 6-8 and Ex. "D"

6. Symbol supplied the Interim Receiver in accordance with Manitoba Supply Order.

Par. 11 of the Feb. 11, 2005 Reid affidavit

7. Subsequent to obtaining the Manitoba Supply Order, the Interim Receiver marketed BSI for sale as a going concern and subsequently sold its assets, including

its intangible assets such as customer lists, supplier lists, and copies of accounting records, quotes, proposals and such files relating to the operation of BSI as may be reasonably necessary to enable the purchaser to carry on its business. Court approval of this sale was given by the Manitoba Court of Queen's Bench on February 26, 2004. The sale concluded and the business of BSI which had been continued by the Interim Receiver was then continued by the purchaser of BSI's business, **q.data inc**.

Par. 14 - 25 of the Feb. 11, 2005 Reid affidavit and exhibits referred to therein

8. Following the acquisition by **q.data inc.** of BSI assets from the Interim Receiver, Symbol has continued to supply **q.data inc.,** thereby servicing BSI's former customers.

Par. 25 of the Feb. 11, 2005 Reid Affidavit

9. Subsequent to issuing the Order granting leave on January 15, 2004, Justice Lemieux granted two further Orders in his capacity as presiding judicial member of the Tribunal:

(a) On May 19, 2004, the Tribunal issued an order setting some timelines for the filing and serving of the Notice of Application and Response and also ordered that style of cause be amended to show Price Waterhouse Coopers as Receiver and Manager for Barcode Systems Inc. (sic) as the applicant;

(b) On June 15, 2004, the Tribunal issued an Order staying the proceeding before the Tribunal until further Order of the Tribunal.

10. In a judgment issued on October 7, 2004 involving an appeal from the decision granting leave to BSI in CT 2003 008, the Federal Court of Appeal held that the Tribunal is to take into account each and every one of the statutory elements in

Section 75(1) (a) – (e) of the *Act* when considering an Application for Leave pursuant to Section 103.1.

Tab A

11. In addition, the Federal Court of Appeal held, at paragraph 23 that:

> "...the purpose of the *Competition Act* is to maintain and encourage competition in Canada. It is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition. That is the obvious reason for paragraph 75(1)(e)." **Tab A**

12. Applying the correct legal test, the Federal Court of Appeal considered evidence put forward by BSI in respect of the various statutory elements in sub-section 75(1) and in particular, whether there was evidence that Symbol's refusal to deal with BSI is likely to have an adverse effect on competition in the market. The Federal Court of Appeal then went on, at paragraph 29, to infer:

> "for leave to apply purposes, that there are reasonable grounds to believe that Barcode had somewhat of a presence in the Western Canadian market for the supply and servicing of Symbol's products. Its difficult financial situation reflected by its receivership could be likely to impede its ability to be an effective competitor in that market, thereby having an adverse effect on competition in that market. The evidence may not be strong but I think it is sufficient to constitute reasonable grounds to believe that Symbol's alleged refusal to deal could be the subject of an Order under Sub-section 75(1)".
>
> **Tab A**

13. In the result, the Federal Court of Appeal dismissed the appeal.

14. Subsequent to the Federal Court of Appeal judgment (rendered October 7, 2004) neither PWC nor BSI proceeded with the Section 75 application. Instead, David Sokolow, as assignee of the Manitoba Queen's Bench civil action initially brought by BSI on March 19, 2003, Queens' Bench File No. CI 03-01-32071 (assigned to Sokolow prior to the appointment of PWC as Interim Receiver for BSI) amended that civil action on November 5, 2004. The amendments added the allegation that it was a further term of the January 27, 1998 letter agreement that

Symbol was obligated to maintain ongoing business relations with BSI and to execute standard Symbol Agreements with BSI in 1998 and subsequent years - seemingly in perpetuity, unless BSI became bankrupt, insolvent, filed for creditor protection, or that Mr. Sokolow ceased to remain a 'primary shareholder' of BSI. These amendments also added a claim for damages for loss of BSI as a going concern.

Par. 9, 10, 13 and 15 of Ex. "R" of the Feb. 11, 2005 Reid affidavit

The Law - Application for Recession pursuant to section 106

15. Section 106(1) of the *Act* provides, in part:

> 106. (1) The Tribunal may rescind or vary ... an order made under this Part ... on application by the ... person against whom the order was made, if the Tribunal finds that
>
> > (*a*) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the ... order would not have been made or would have been ineffective in achieving its intended purpose; or ...

16. In dealing with the issue of identifying the relevant circumstances in a Section 106 Application, it is submitted that the statement made by Hugessen J.A. in *Canada (Director of Investigation and Research) v. Air Canada* [1994] 1 F.C. 154 at paragraph 14 (Fed. C.A) is instructive:

> In my view, there is no warrant in the language of section 106 itself or in the scheme of the statute generally for reading the words "the circumstances that led to the making of the order" in other than their ordinary grammatical sense. This involves a determination by the Tribunal of the existence of a simple causal relationship between the circumstances and the order, but no more. It is not necessary that such relationship be "direct" or "demonstrable" other than in the very limited sense that the Tribunal must be satisfied that it exists. Nor is it necessary to relate the circumstances to the purposes sought to be achieved by the order, although it is of course always legitimate to look to such purposes as a guide to identifying some of the circumstances leading to it.
>
> **Tab B**

17. Thus, it is submitted that in order to bring itself within the ambit of subsection 106(1)(a) the Applicant must establish:

(a) that the circumstances which caused the Tribunal to make the initial order granting leave have changed; and

(b) in the circumstances that exist now, the order:

(i) would not have been made; **or**

(ii) would have been ineffective in achieving its intended purpose.

ARGUMENT

No adverse effect on competition

18. It is submitted that the circumstances that led to the making of the Tribunal's Order dated January 15, 2004 have changed materially.

19. As of January 15, 2004, the date on which the Tribunal granted leave, BSI's business undertaking had not been supplied with product from Symbol for a number of months.

20. Subsequent to January 15, 2004, BSI's undertaking was supplied with product from Symbol pursuant to the Manitoba Supply Order granted in the Manitoba Court of

Queen's Bench in File No. CI 03-01-36054 which granted essentially the same relief which is being sought in the Tribunal proceedings CT 2003 008.

Par. 11 of the Feb. 11, 2005 Reid Affidavit

21. Following the sale of the business assets of BSI to **qdata. inc.**, **qdata inc.** has continued to operate BSI's business and this business is continuing to be supplied by Symbol, thereby servicing BSI's former customers. In this regard **qdata. inc.** has merely replaced BSI in the Western Canadian market.

Par. 25 of the Feb. 11, 2005 Reid Affidavit

22. There is simply no evidence, whatsoever, that Symbol's refusal to supply BSI has had any adverse effect on competition in the Western Canadian market subsequent to Symbol complying with the Manitoba Supply Order being granted by Justice Schulman on January 15, 2004.

23. Thus, it is submitted that the Order of the Tribunal granting leave would not now be made under these changed circumstances since there is no evidence to fulfill requirement contained in s. 75(1)(e), that Symbol's refusal to supply BSI had any adverse effect on competition in that market.

24. In addition, it is submitted that under these changed circumstances the Order of the Tribunal granting leave would be ineffective in achieving its intended purpose. The intended purpose of the Order must be in accordance with the *Competition Act* in general. As noted earlier, the Federal Court of Appeal has stated that:

> "...the purpose of the *Competition Act* is to maintain and encourage competition in Canada. It is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition. That is the obvious reason for paragraph 75(1)(e)."

Tab A, par. 23

25. With no adverse effect on competition in evidence, it is submitted that granting an Order to pursue the S. 75 application would be ineffective in achieving its intended purpose as it would be contrary to the purpose of the *Competition Act*.

Not able to meet Symbol's usual trade terms

26. Further, the changed circumstance provide another reason why an Order granting leave to BSI would not now be made. One of the express statutory requirements is found in Sub-section 75(1)(c) which requires evidence that BSI would be able to meet Symbol's usual trade terms.

> (c) the person referred to in paragraph (a) [in this case said to be BSI] is willing and able to meet the usual trade terms of the supplier or suppliers of the product

27. Shortly after the issuance of the Tribunal Order granting leave on January 15, 2004, all of the business assets of BSI were sold to **qdata. inc**. by the Interim Receiver. Thus, it is readily apparent that there is no business entity being operated by BSI at this time at all.

28. This is only confirmed by the fact that in November of 2004, Mr. Sokolow, as assignee of the rights of BSI's civil action against Symbol, amended his claim to now include a claim for damages for the loss of BSI as a going concern.

29. With no business entity being operated by BSI at this time and Mr. Sokolow claiming damages for the loss of BSI as a going concern as a result of an alleged breach of specific contractual terms, there is simply no evidence that BSI would be able to meet Symbol's usual trade terms. Thus, an Order granting leave to BSI would not now be made given that there is no evidence to satisfy the requirements of s.75(1)(c).

30. It is also submitted that under these changed circumstances, an Order by the Tribunal granting leave to BSI at this point in time for the purpose of pursuing an

Order ordering Symbol to supply BSI would be ineffective in achieving its intended purpose. With no known assets or means of carrying on business, there is no BSI business left to supply other than the business which PWC effectively sold to **qdata inc.,** which Symbol is already supplying. Thus, granting leave to allow BSI to pursue its Section 75 application would serve no practical purpose.

31. Thus, it is submitted that the application for rescission ought to be granted. In the circumstances that exist at the time of the rescission application, the order granting leave would not have been made. It is also submitted that in the circumstances that exist at the time of the rescission application the order would have also been ineffective in achieving its intended purpose.

No opposition on part of Interim Receiver

32. As noted at paragraph 2(c) infra, the PWC appointment Order issued December 19, 2003 not only appointed PWC as Interim Receiver in respect "of all property, assets and undertakings" of BSI, it also granted PWC the authority to initiate and continue all legal and administrative proceedings on behalf of BSI. The authority reads as follows:

> 11. This Court Orders that the Receiver is hereby fully authorized and empowered, but not obligated, to initiate, prosecute and continue the prosecution of any and all actions, applications, administrative hearings, arbitrations or proceedings as may in its judgment be necessary or desirable to properly receive, manage, operate, preserve, protect or realize upon the Property and to secure payment of rent and accounts from the Property, to defend all applications, proceedings, actions, administrative hearings or arbitrations now pending or hereafter instituted against the Respondent [BSI] or the Receiver, the prosecution or defence of which will, in the judgment of the receiver, be necessary to properly receive, manage, operate, protect, preserve or realize on the Property or to protect the administration by the Receiver of the property, and to settle or compromise nay such actions, applications, proceedings, administrative hearings or arbitrations which, in the judgment of the Receiver should be settled or compromised. The authority hereby bestowed shall extend to such appeals or applications for judicial review as the Receiver shall deem proper and advisable in respect of any order or judgment pronounced in any such application, proceeding or action, administrative hearing or arbitration.

33. In recognition of PWC's authority, the Tribunal issued an order on May 19, 2004 which, among other matters, ordered that style of cause be amended to show Price Waterhouse Coopers (sic) as Receiver and Manager for Barcode Systems Inc. as the applicant.

34. PWC, the party with the authority to initiate and continue all legal and administrative proceedings on behalf of BSI subsequent to December 19, 2003 has chosen to not file a response in opposition to the application to rescind brought by Symbol.

35. In all of the circumstances, it is accordingly submitted that the Tribunal ought to rescind the Order issued on January 15, 2004 in CT 2003 008 granting leave to BSI/PWC to commence a Section 75 application against Symbol.

SUMMARY DISPOSITON

36. Upon filing the Application for Recession the office of the Tribunal suggested that counsel might consider making a motion to have the application for rescission dealt with by way of Summary Disposition by the Tribunal.

37. Section 9(4) of the *Competition Tribunal Act* provides that on a motion from a party to an application made under Part VIII of the *Competition Act*, a judicial member may hear and determine the application in a summary way, in accordance with any rules on summary dispositions.

38. The Tribunal Order of January 15, 2004 granting Leave was made under Part VII of the *Competition Act* and accordingly, this is a matter which can be dealt with by way of Summary Disposition.

39. It is submitted that the Recession Application made by Symbol is appropriate to be dealt with by way of Summary disposition given that the Order sought to be

rescinded was granted by the Judicial member of the Tribunal, sitting on his own, based on affidavit evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

this 9th day of August , 2005

HILL ABRA DEWAR

Dave Hill

Steven Field
Counsel for the Applicant Symbol
Technologies Canada ULC

LIST OF AUTHORITIES

Case Name:

Barcode Systems Inc. v. Symbol Technologies Canada ULC

Between
Symbol Technologies Canada ULC, appellant (respondent),
and
Barcode Systems Inc., respondent (applicant)

[2004] F.C.J. No. 1657
2004 FCA 339
Docket A-39-04

Federal Court of Appeal
Winnipeg, Manitoba
Richard C.J., Létourneau and Rothstein JJ.A.

Heard: September 28, 2004.
Judgment: October 7, 2004.
(30 paras.)

Trade regulation — Competition tribunal — Decisions, standard of review — Competition — Unfair competition.

Appeal by Symbol Technologies Canada from a decision of the Competition Tribunal granting leave to the respondent Barcode Systems to make an application to the Tribunal against Symbol. Barcode stated that Symbol was engaging in the reviewable restrictive trade practice of refusal to deal. It sought an order requiring Symbol to accept Barcode as a customer. Symbol had informed Barcode that it would not accept any purchase orders from Barcode. Symbol stated that the Tribunal erred in refusing to consider whether Symbol's alleged refusal to deal was likely to have an adverse effect on competition in a market.

HELD: Appeal dismissed. The standard of review was correctness. The Tribunal erred in refusing to consider whether the alleged refusal to deal was likely to have an adverse effect on competition in a market. However, based on the evidence, there were reasonable grounds to infer that Barcode's ability to be an effective competitor in the Western Canadian market was affected by Symbol's refusal to deal, thereby having an adverse effect on competition in that market.

Statutes, Regulations and Rules Cited:

Competition Act, R.S.C. 1985, c. C-34, ss. 1.1, 75, 75(1), 77, 103.1(1), 103.1(7).

Competition Tribunal Act, R.S.C., 1985, c. 19, s. 13(1), 13(2).

Appeal from a decision of the Competition Tribunal dated January 15, 2004, [2004] C.C.T.D. No. 1.

Counsel:

Steven Field and Dave Hill, for the appellant (respondent).

Lindy Choy, for the respondent (applicant).

[Editor's note: An amendment was released by the Court on April 19, 2005. The changes were not indicated. This document contains the amended text.]

The judgment of the Court was delivered by

ROTHSTEIN J.A.:—

INTRODUCTION

¶ 1 This is an appeal by Symbol Technologies Canada ULC (Symbol) from a decision of the Competition Tribunal under subsection 103.1(7) of the Competition Act, R.S.C. 1985, c. C-34 granting leave to the respondent Barcode Systems Inc. (Barcode) to make an application to the Tribunal against Symbol. In its leave application to the Tribunal, Barcode alleged that Symbol was engaging in the reviewable restrictive trade practice of "refusal to deal" within the meaning of section 75 of the Act.

¶ 2 Barcode's application before the Tribunal is for an order under subsection 75(1) of the Competition Act requiring Symbol to accept Barcode as a customer.

¶ 3 In this appeal, Symbol says that the Tribunal member who granted leave erred in law by refusing to take into account statutory requirements and that the decision to grant leave should be quashed by this Court.

FACTS

¶ 4 The facts are taken from the affidavit of David Sokolow, the President of Barcode. There has been no cross-examination on that affidavit. Symbol is the Canadian subsidiary of Symbol Technologies Inc. (Symbol US). Symbol US is the largest single manufacturer of bar code equipment in the world. Symbol sells and distributes Symbol US products in Canada. In or about 1994, Barcode took over Symbol's distribution in Western Canada.

¶ 5 In or about January 2003, Symbol informed Barcode that it could no longer buy parts for Symbol products. In April 2003, Symbol informed Barcode that it would not accept purchase orders from Barcode. Barcode says that since May 1, 2003, Symbol has refused to deal with Barcode.

RELEVANT STATUTORY PROVISIONS

¶ 6 Until 2002, only the Commissioner of Competition could bring an application before the Competition Tribunal in respect of reviewable restrictive trade practices described in Part VIII of the Competition Act, e.g. refusal to deal (section 75) and tied selling (section 77). By amendments to the Competition Act, 2002, c. 16, ss. 11.1-11.3, private applicants were given the opportunity to bring applications to the Tribunal, subject to the Tribunal granting them leave to do so. Subsection 103.1(1) of the Competition Act provides:

> 103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.
>
> * * *
>
> 103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75 ou 77. La demande doit être accompagnée d'une déclaration sous

serment faisant état des faits sur lesquels elle se fonde.

¶ 7 The considerations the Tribunal is to take into account in determining a leave application are set out in subsection 103.1(7). To grant leave, the Tribunal must have reason to believe that the applicant is directly and substantially affected in its business by a reviewable restrictive trade practice that could be the subject of a Tribunal order under sections 75 or 77 of the Competition Act. Subsection 103.1(7) provides:

> (7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.
>
> * * *
>
> (7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

¶ 8 The reviewable restrictive trade practice relied on by Barcode is refusal to deal. Subsection 75(1) provides:

> 75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
>
> (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
>
> (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
>
> (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
>
> (d) the product is in ample supply, and
>
> (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,
>
> the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.
>
> * * *

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

b) que la personne mentionnée à l'alinéa a) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

c) que la personne mentionnée à l'alinéa a) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

THE ALLEGED ERROR OF LAW

¶ 9 Symbol submits that the Competition Tribunal member who granted leave refused to take account of all the elements of the reviewable practice of refusal to deal set out in subsection 75(1) and therefore erred in law by not taking account of statutory requirements. Symbol's main argument is that the member refused to consider whether Symbol's alleged refusal to deal was likely to have an adverse effect on competition in a market as required by paragraph 75(1)(e).

¶ 10 Indeed, in his reasons, the member specifically finds that on an application for leave, the Tribunal is not to have regard to whether the refusal to deal is likely to have an adverse effect on competition in a market. At paragraphs 8 and 10, the member states:

8. What the Tribunal must have reason to believe is that Barcode is directly and substantially affected in its business by Symbol's refusal to sell. The Tribunal is not required to have reason to believe that Symbol's refusal to deal has or is likely to have an adverse effect on competition in a market at this stage.

10. As I read the Act, adverse effect on competition in a market is a necessary element to the Tribunal finding a breach of section 75 and a necessary condition in order that the Tribunal make a remedial order under that section. It is not, however, part of the test for the Tribunal's granting leave or not.

STANDARD OF REVIEW

¶ 11 Subsection 13(1) of the Competition Tribunal Act, R.S.C., 1985, c. 19 (2nd Supp.), s. 13; 2002, c. 8, s.

130, provides for a statutory right of appeal to the Federal Court of Appeal from any decision or order whether final, interlocutory or interim of the Competition Tribunal as if it were a judgment of the Federal Court. The unrestricted right of appeal (except in the case of appeals on questions of fact under subsection 13(2)) is an indication of a correctness standard of review.

¶ 12 Whether to grant leave under subsection 103.1(7) is a discretionary decision of the Tribunal. However, the question at issue here is whether, in exercising its discretion, the Tribunal is required to consider all the elements of the restrictive trade practice of refusal to deal set out in subsection 75(1). That is a question of law, a straight question of statutory interpretation. It is the task of the Court to determine whether the Tribunal has exercised its discretionary power within the constraints imposed by Parliament. See Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 at paragraph 38.

¶ 13 This question of statutory interpretation does not engage any particular expertise of the Tribunal. Economic and commercial considerations are not part of the analysis of whether, on a leave application, all the elements listed in subsection 75(1) must be considered. That expertise is not engaged on the question of statutory interpretation at issue here therefore points to the correctness standard.

¶ 14 The basic purpose of the Competition Act as described in subsection 1.1 is "to maintain and encourage competition in Canada" and the purpose of section 75 is in furtherance of that objective. When economic and commercial considerations are being considered, deference may be called for. But these considerations are not at issue in the present appeal.

¶ 15 Weighing these pragmatic and functional considerations, I conclude that the standard of review in this appeal is correctness. ANALYSIS

The legal test in an application under subsection 103.1(7)

¶ 16 In National Capital News Canada v. Canada (Speaker House of Commons) (2002), 23 C.P.R. (4th) 77, Dawson J., in her capacity as a member of the Competition Tribunal, reviewed the test for the granting of leave under subsection 103.1(7). After citing authorities on the term "reasonable grounds to believe" she stated at paragraph 14 of her reasons:

> Accordingly on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.

I agree with Dawson J. and adopt her analysis and conclusion as to the test for granting leave under subsection 103.1(7).

¶ 17 The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a bona fide belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.

¶ 18 However, it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under subsection 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1). These elements are

conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in subsection 75(1) on the leave application, it could not conclude, as required by paragraph 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under subsection 75(1).

¶ 19 The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding under section 103.1. As long as it is apparent that each element is considered, the Tribunal's discretionary decision to grant or refuse leave will be treated with deference by this Court. But the Tribunal's discretion to grant leave is not unfettered. The Tribunal must consider all the elements in subsection 75(1).

¶ 20 The words of subsection 103.1(1) support this interpretation of the requirements of subsection 103.1(7). Subsection 103.1(1) requires that the application for leave be accompanied by an affidavit setting out the facts in support of the application under subsection 75(1). That affidavit must therefore contain the facts relevant to the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1). It is that affidavit which the Tribunal will consider in determining a leave application under subsection 103.1(7). While the standard of proof on the leave application is lower than when the case is considered on its merits, nonetheless, the same considerations are relevant to both and must be taken into account at both stages.

¶ 21 The respondent says that the words in subsection 103.1(7) "that the applicant is directly and substantially affected in the applicant's business" are essentially the words in paragraph 75(1)(a) and because there are no words similar to those in paragraphs 75(1)(b) to (e) in subsection 103.1(7), Parliament did not intend that each element in paragraphs (b) to (e) need be taken into account on a leave application.

¶ 22 I do not think that is correct. Because subsection 103.1(1) says that "any person may apply", it is theoretically possible for someone other than a person substantially and directly affected to bring a private application. However, Parliament clearly intended to limit private applications to persons who themselves are directly and substantially affected in their businesses by the alleged reviewable practice. I think that is the reason for the use of words in subsection 103.1(7) that are substantially similar to those in paragraph 75(1)(a). However, the use of these words does not imply that the statutory elements in paragraphs 75(1)(b) to (e) need not be considered on a leave application. That is because, on a leave application, the Tribunal must consider whether the practice that is alleged could be subject to an order under subsection 75(1); and it cannot reach that conclusion without considering all the elements of refusal to deal set out in that subsection.

¶ 23 Counsel for Symbol argued that on a purposive interpretation, it should be clear that on a leave application, the Tribunal must have regard to all the statutory elements in subsection 75(1). I agree. The purpose of the Competition Act is to maintain and encourage competition in Canada. It is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition. That is the obvious reason for paragraph 75(1)(e). The threshold at the leave stage is low, but there must be some evidence by the applicant and some consideration by the Tribunal of the effect of the refusal to deal on competition in a market.

Application of the test for leave to the facts

¶ 24 Having determined the correct legal test on an application seeking leave to apply for an order under subsection 75(1), the question is whether this matter should be remitted to the Tribunal for redetermination or whether this Court should dispose of it. Barcode has pointed out that a leave application is intended to be a summary screening process. There is no right of cross examination on the affidavit filed in support of the application for leave, there is no provision for the respondent to file affidavit evidence and the time limits in section 103.1 are short, consistent with leave applications being dealt with summarily. For these reasons, I think the appropriate course of action in this case would be for this Court to resolve the matter without further delay.

¶ 25 Is there credible evidence to support a finding that there are reasonable grounds to believe that Symbol's

refusal to supply Barcode could be subject to an order under subsection 75(1)? There is evidence that Barcode is substantially affected in its business due to its inability to obtain Symbol's products. Barcode's evidence is that it cannot obtain these products either directly from Symbol or from other Symbol distributors. Barcode says it is willing and able to meet Symbol's usual trade terms and that Symbol's products are in ample supply.

¶ 26 The only real controversy is whether there is evidence that Symbol's refusal to deal is likely to have an adverse effect on competition in a market.

¶ 27 On this point, paragraph 75(1)(e) has not been interpreted by the Tribunal or this Court and a leave application is not the appropriate occasion to do so. Therefore, if there are any facts in its affidavit that might meet the requirements of paragraph 75(1)(e), the benefit of any doubt should work in favour of granting leave in order not to finally preclude Barcode from its day before the Tribunal.

¶ 28 The evidence of Barcode is that in or about 1994, it took over Symbol's distribution in Western Canada and that by 2002 its annual revenues were in excess of $20 million. Symbol US is the largest single manufacturer of bar code equipment in the world. Barcode's evidence is that if Symbol continues to refuse to supply, Barcode will be forced into receivership, and indeed, the Tribunal member found that on December 19, 2003, Barcode was petitioned into receivership.

¶ 29 From Barcode's evidence, I think it may be inferred, for leave to apply purposes, that there are reasonable grounds to believe that Barcode had somewhat of a presence in the Western Canadian market for the supply and servicing of Symbol's products. Its difficult financial situation reflected by its receivership could be likely to impede its ability to be an effective competitor in that market, thereby having an adverse effect on competition in that market. The evidence may not be strong but I think it is sufficient to constitute reasonable grounds to believe that Symbol's alleged refusal to deal could be the subject of an order under subsection 75(1).

CONCLUSION

¶ 30 For these reasons I would dismiss the appeal with costs.

ROTHSTEIN J.A.
RICHARD C.J.:— I agree.
LÉTOURNEAU J.A.:— I agree.

QL UPDATE: 20041019
cp/e/qw/qlaim/qlhbb

Indexed as:

Canada (Director of Investigation and Research) v. Air Canada (C.A.)

The Director of Investigation and Research, PWA Corporation and Canadian Airlines International Ltd. (Appellants)
(Respondents)
v.
Air Canada, The Gemini Group Limited Partnership, The Gemini Group Automated Distribution System Inc., Covia Canada Corp. and Covia Canada Partnership Corp. (Respondents) (Respondents)
and
Consumers' Association of Canada, American Airlines, Inc., Attorney General of Manitoba, Alliance of Canadian Travel Associations, Bios Computing Corporation, IBM Canada Ltd., Via Rail Canada Inc., Unisys Canada Inc., Council of Canadian Airlines Employees and Attorney General of Alberta
(Respondents) (Intervenors)

[1994] 1 F.C. 154
[1993] F.C.J. No. 721
Court File No. A-302-93

Federal Court of Canada - Court of Appeal
Heald, Hugessen and MacGuigan JJ.A.

Heard: Ottawa, July 12, 13, 14, 15, and 16, 1993.
Judgment: July 30, 1993.

Competition — Appeal and cross-appeal from Competition Tribunal decision dismissing application to vary earlier consent order under Competition Act, s. 92 — Merger of computer reservations systems by Air Canada, Canadian said to reduce competition in airline industry — Tribunal refusing to vary consent order as no change in circumstances — Words in Act, s. 106(a) must be given ordinary grammatical sense — Policy of Act explained — Imminent failure of Canadian change in circumstances leading to original order.

These were an appeal and a cross-appeal from a decision of the Competition Tribunal dismissing an application by the Director of Investigation and Research to vary an earlier consent order of the Tribunal dated July 7, 1989. By that consent order, the Director withdrew his challenge to the merger of the computer reservations systems of Air Canada and Canadian Airlines International Ltd. In this application, he sought to vary the consent order by the addition of a term permitting early termination of the hosting contract between the merged entity Gemini, and Air Canada and Canadian. In its decision of April 22, 1993, the Tribunal determined that it had the authority, under the Competition Act, paragraph 106(a), to terminate a contract if necessary to prevent any substantial lessening of competition and that, if the variations now sought were not granted, Canadian would likely fail, which would create a substantial lessening of competition in passenger airline service in Canada. However, the majority of the Tribunal concluded that there was no change in the "operative circumstance" which led to the consent order, and that the Tribunal was therefore unable to make the variation order requested. The issue was whether the Tribunal erred in interpreting restrictively the provisions of

paragraph 106(a) so as to encompass only a change in the circumstances that had directly and demonstrably led to the original order being issued.

Held (MacGuigan J.A. dissenting in part), the appeal should be allowed, the cross-appeal dismissed and the matter returned to the Tribunal for reconsideration.

Per Hugessen J.A.: The Competition Tribunal erred in giving too narrow and confining an interpretation to the words of paragraph 106(a) of the Competition Act. There is no warrant in the language of section 106 itself or in the scheme of the statute generally for reading the words "the circumstances that led to the making of the order" in other than their ordinary grammatical sense. The Tribunal had to determine the existence of a simple causal relationship between the circumstances and the order, but no more. It was an error for the Tribunal, having recognized that the existence of a strong duopoly in the airline business was an important feature of the landscape in which the previous order had been made, not to find that a drastic change in the financial position of one of the members of that duopoly and its imminent failure were not changes in the circumstances that led to the making of the order and that, in the present circumstances, the order would not have been made.

A statutory power to vary an order vested in the tribunal which has made that order is necessarily constrained by the same limits as were imposed on the power to make the order in the first place. Where the order sought to be varied was made under paragraph 92(1)(e) of the Act and resulted from a consent, the Tribunal has no powers beyond those with which it was originally vested at the time of the Director's first application. On the application to vary, it is open to the Tribunal to rescind the order or to direct the dissolution of the merger or the divestiture of shares or assets. It may also, under subparagraph 92(1)(e)(iii), make an order directing any person "to take any other action" but only with the consent of such person and of the Director. The power to vary given by section 106 of the Act is an "independent" power as without it the Tribunal could not act. But the consent is the very source of its jurisdiction to make an order to vary; without it, the Tribunal may only order dissolution or divestiture, or rescind its original order. To limit the power to vary under section 106 by reference to the power to make the original order under section 92 is a question of policy. The policy of the Act, and more particularly of the provisions relating to mergers, is to favour solutions which the parties and the Director, with the guidance and consent of the Tribunal, fashion for themselves and to that end to do everything to encourage them to negotiate. It is also a matter of simple practicality where, for instance, parties to a merger and third parties have undertaken obligations, contractual or otherwise, on the basis of a consent order. The Tribunal does not, absent consent, have the statutory power to order compensation for persons who suffer damages as a result of that order. The Court should refrain from making the order proposed by the Tribunal and requested by the appellants, but return the matter to the Tribunal for reconsideration.

Per Heald J.A. (concurring with Hugessen J.A.):

Fulfilment of the conditions precedent for intervention under paragraph 106(a) does not confer upon the Tribunal unrestricted powers to amend or modify an existing order. In applications to vary pursuant to section 106, the Tribunal's powers are the same as they were when the Director's original section 92 application was being considered. This approach establishes a balance between the reliance of parties (and third parties) on an existing order and the public interest in the furtherance of competition. This high threshold for intervention imposed by the scheme of the statute is necessary to clothe existing orders with an acceptable degree of stability and certainty and to ensure that the integrity of the consent order process will be maintained. The Tribunal did not have the jurisdiction to issue the order proposed by it, given its power to intervene pursuant to paragraph 106(a) of the Act.

Per MacGuigan J.A. (dissenting in part): The Tribunal's interpretation of the phrase "the circumstances that led to the making of the order have changed" in paragraph 106(a) of the Competition Act to mean circumstances that directly and demonstrably caused the change is not supported by the text of the Act. The words "that led to" imply that the circumstances had to be at least causative of the change, but the language of the statute makes it hard to go much beyond that. The final causality emphasized by the various respondents, being the narrowest construction possible, was unwarranted. The phrase in issue includes all of the facts and

conditions that were relevant to the making of the order, which gives support to material and formal causality in the Aristotelian sense, as well as efficient and final causality. The question of law as to the meaning of the power to "rescind or vary" the original order is a policy debate, one which Parliament has already resolved by its adoption of the unrestricted word "vary". A judicially imposed limitation on the power to vary in section 106 would be a total construct, without statutory warrant. The Tribunal's power is discretionary, not mandatory.

With respect to the first requirement of section 106, a change in causative circumstances, the fact of hosting, which the Tribunal found to exist, was a matter of relevance and concern. It was because of the hosting contract in the context of the duopoly that the Director was moved to seek, and the Tribunal to grant, the consent order. The facts found by the majority of the Tribunal established a change in causative circumstances, as Air Canada and Canadian were the dominant airlines in Canada, in vigorous competition with each other and there was no indication whatsoever that Canadian's financial condition would deteriorate to the point where its continued existence would be threatened. As to whether the order would not have been made or would have been ineffective, the best evidence that this test is satisfied in law was provided by the Tribunal's alternative findings of fact that Canadian was no longer financially viable. There was ample evidence that Air Canada and Canadian were the dominant carriers in Canada and that the failure of Canadian would result in a substantial lessening of competition. The Tribunal's conclusions were not based on wrongly admitted evidence and they were amply supported by evidence that was uncontroverted as to its admissibility. The Tribunal was correct in ruling that it could not make compensatory awards as compensation is not within its jurisdiction.

Statutes and Regulations Judicially Considered

Competition Act, R.S.C., 1985, c. C-34 (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 19), ss. 1.1 (as enacted idem), 70 (as am. idem, s. 41), 75 (as am. idem, s. 45), 76 (as am. idem), 77 (as am. idem), 79 (as enacted idem; as am. by S.C. 1990, c. 37, s. 31), 81 (as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 45), 83 (as enacted idem), 84 (as enacted idem), 86 (as enacted idem; as am. by S.C. 1990, c. 37, s. 32), 87 (as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 45), 91 (as enacted idem), 92 (as enacted idem), 97 (as enacted idem), 105 (as enacted idem), 106 (as enacted idem).
Competition Tribunal Act, R.S.C., 1985 (2nd Supp.), c. 19, Part I, ss. 5, 8, 9, 12.
Federal Court Act, R.S.C., 1985, c. F-7, s. 52.
Interpretation Act, R.S.C., 1985, c. I-21, s. 12.

Cases Judicially Considered

Distinguished:

Re Merrens et al. and Municipality of Metropolitan Toronto, [1973] 2 O.R. 265; (1973), 33 D.L.R. (3d) 513 (Div. Ct.);
Bakery and Confectionery Workers International Union of America, Local No. 468 et al. v. White Lunch Ltd. et al., [1966] S.C.R. 282; (1966), 56 D.L.R. (2d) 193; 55 W.W.R. 129.

Considered:

American Airlines, Inc. v. Canada (Competition Tribunal), [1989] 2 F.C. 88; (1988), 54 D.L.R. (4th) 741; 33 Admin. L.R. 229; 23 C.P.R. (3d) 178; 89 N.R. 241 (C.A.);
Chrysler Canada Ltd. v. Canada (Competition Tribunal), [1992] 2 S.C.R. 394; (1992), 92 D.L.R. (4th) 609; 42 C.P.R. (3d) 353; 138 N.R. 321;
Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 1 S.C.R. 1722; (1989), 60 D.L.R. (4th) 682; 38 Admin. L.R. 1; 97 N.R. 15;
Jasper Park Chamber of Commerce v. Governor General in Council, [1983] 2 F.C. 98; (1982), 141 D.L.R. (3d) 54; 44 N.R. 243 (C.A.);
Rowley v. Petroleum and Natural Gas Conservation Board, [1943] 1 W.W.R. 470 (Alta.

S.C.).

Referred to:

Canada (Director of Investigation and Research, Competition Act) v. Imperial Oil Limited [[1990] C.C.T.D. No.1 (QL)];
Consumers' Association of Canada v. Attorney General of Canada, [1979] 1 F.C. 433; (1978), 87 D.L.R. (3d) 33 (T.D.);
Dayco (Canada) Ltd. v. CAW-Canada, [1993] 2 S.C.R. 230;
Stein et al. v. The Ship "Kathy K" et al., [1976] 2 S.C.R. 802; (1975), 62 D.L.R. (3d) 1; 6 N.R. 359;
Canada (Director of Investigation and Research, Competition Act) v. Palm Dairies Ltd. (1986), 12 C.P.R. (3d) 540 (Comp. Trib.).

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APPEAL and CROSS-APPEAL from a decision of the Competition Tribunal ([1993] C.C.T.D. No. 14 (QL)) dismissing an application by the Director of Investigation and Research to vary an earlier consent order of the Tribunal ((1989), 44 B.L.R. 154 (Comp. Trib.)). Appeal allowed, cross-appeal dismissed.

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of Canadian Airlines Employees.

The following are the reasons for judgment rendered in English by

¶ 1 **HEALD J.A.**:— I have had the privilege of reading the detailed reasons for judgment herein prepared by my colleagues Hugessen J.A. and MacGuigan J.A.

¶ 2 I agree with both of my colleagues that the Competition Tribunal (the Tribunal) erred in the restrictive interpretation that it gave to the provisions of paragraph (a) of section 106 of the Competition Act, R.S.C., 1985, c. C-34, as amended [R.S.C., 1985 (2nd Supp.), c. 19, s. 19], (the Act). [See Note 1 below] I agree with MacGuigan J.A. that in interpreting the phrase "the circumstances that led to the making of the order have changed" in paragraph 106(a) [as enacted idem, s. 45] so as to encompass only changed circumstances that directly and demonstrably caused the order to be issued, the learned judicial member of the Tribunal imposed an unwarranted restriction on that phrase. I agree also with Hugessen J.A. [infra, at page 166] that the phrase in issue must be given its "ordinary grammatical sense" which "involves a determination by the Tribunal of the existence of a simple causal relationship between the circumstances and the order, but no more." The financial viability of the initial parties to the Gemini merger on June 1, 1987, namely Air Canada and Canadian, was clearly an important component of the rationale for the 1989 consent order. In its current financial position, Canadian would not have agreed to the Gemini merger. Accordingly, no consent merger order would have been made pursuant to the provisions of section 92 [See Note 2 below] [as enacted idem] of the Act.

Note 1: S. 106 reads:

106. Where, on application by the Director or a person against whom an order has been made under this Part, the Tribunal finds that

(a) the circumstances that led to the making of the order have changed and, in the circumstances that exist at the time the application is made under this section, the order would not have been made or would have been ineffective to achieve its intended purpose, or

(b) the Director and the person against whom an order has been made have consented to an alternative order,

the Tribunal may rescind or vary the order accordingly.

Note 2: S. 92 reads:

92. (1) Where, on application by the Director, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(a) in a trade, industry or profession,

(b) among the sources from which a trade, industry or profession obtains a product,

(c) among the outlets through which a trade, industry or profession disposes of a product, or

(d) otherwise than as described in paragraphs (a) to (c),

the Tribunal may, subject to sections 94 to 96,

(e) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Director, to take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Director, ordering the person to take any other action

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

¶ 3 While my two colleagues are in agreement that the Tribunal erred in its interpretation of the conditions precedent imposed by paragraph 106(a) of the Act, they have a fundamental disagreement as to the extent of the power to vary conferred on the Tribunal pursuant to paragraph 106(a). In the result, they do not agree as to the appropriate remedy.

¶ 4 I agree with Mr. Justice Hugessen that fulfilment of the conditions precedent for intervention pursuant to paragraph 106(a) does not confer upon the Tribunal unrestricted powers to amend or modify an existing order. The Tribunal's power is subject to the same limitations as were imposed on its jurisdiction to make the original order. Here, we have a consent order issued pursuant to section 105 [as enacted idem] of the Act following an application by the Director of Investigation and Research (the Director) pursuant to section 92 of the Act which was converted to a consent proceeding in April of 1989. My brother, Hugessen J.A., relies on the provisions of subparagraph 92(1)(e)(iii) as the basis for the Tribunal's jurisdiction to make a wide range of orders in relation to mergers. I do not think it necessary to determine whether the Tribunal's power emanates specifically from subparagraph 92(1)(e)(iii) or from the more general powers conferred on the Tribunal pursuant to the provisions of section 105 of the Act. [See Note 3 below] In my view, when section 106 is read in context with section 92, and, having regard to the scheme of Part VIII of the Act, it is apparent, in the absence of the consent of all parties to the merger order, that the Tribunal's powers are limited to ordering dissolution of the merger or divestiture of its assets provided it has been proven that the merger or proposed merger "prevents or lessens, or is likely to prevent or lessen, competition substantially."

Note 3: S. 105 reads:

> 105. Where an application is made to the Tribunal under this Part for an order and the Director and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal may make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested.

¶ 5 In applications to vary pursuant to section 106, the Tribunal's powers are the same as they were when the Director's original section 92 application was being considered. In situations where the parties have consented to a modification or an alternative order, the Tribunal has the jurisdiction, pursuant to paragraph 106(b) to vary the order accordingly. Such an alteration or variation is subject to the condition, as would be the case under section 105, that the amended order redress the anti-competitive effects of the merger. This represents the consensual or negotiated solution to changed circumstances. Where, as in this case, consensus is not likely, paragraph (a) of section 106 may be engaged. [See Note 4 below] Under paragraph 106(a) the Tribunal's jurisdiction is limited to ordering divestiture or dissolution (as was the case under section 92, in the absence of consent) and then only when the Tribunal decides that the merger, operating under the terms of the existing order, will lead to a substantial lessening of competition. Put another way, the same stark choice between continuation and dissolution of the merger exists and applies in all non-consensual scenarios whether the Tribunal's source of jurisdiction is section 92 or paragraph 106(a). Likewise, the same test for intervention by the Tribunal applies in both cases.

Note 4: Hugessen J.A. is of the view that the policy of the Act and more particularly, the merger provisions therein, favour negotiated solutions which are fashioned by the parties and the Director, "with the guidance and consent" of the Tribunal. I would agree that the "all or nothing" result mandated by the statutory scheme in the absence of consent creates a strong impetus for the parties to arrive at "finely-tuned" solutions through negotiation. However, in the case at bar, an agreement was not reached, hence s. 106(a) application. In the circumstances of this case, an agreement seems unlikely. Contrary to the usual scenario accompanying a s. 92 application, one of the parties to the merger (Canadian) wants the merger dissolved. Air Canada does not wish the merger dissolved. In the vast majority of s. 92 applications, neither the parties nor the Director would be supporting dissolution or divestiture. In this case, due to the intransigence of at least two of the parties, I fear that negotiations between the parties may be unproductive, given the existing atmosphere.

¶ 6 This approach establishes a balance between the reliance of parties (and third parties) on an existing order and the public interest involved in the furtherance of competition. The high threshold for intervention imposed by the scheme of the statute is necessary in order to clothe existing orders with an acceptable degree of stability and certainty. Such a high threshold ensures that the integrity of the consent order process will be maintained, a desirable objective, in my view.

¶ 7 To summarize, it is my conclusion that the Director or any person against whom an order has been made under Part VIII may apply for variation of that order, pursuant to paragraph 106(a), absent consent amongst the parties to modification of that existing order. If the conditions precedent for the Tribunal's exercise of power under paragraph 106(a) are met, the Tribunal may order dissolution or divestiture of the merger where it has been established that the merger operating pursuant to the existing order will lead to a substantial lessening of competition. If it has not been so established to the Tribunal's satisfaction, the status quo should remain. To emphasize-the merger must be the cause of the anti-competitive effects in issue since the Tribunal's powers under Part VIII of the Act are restricted to redressing the effects of specific types of behaviour, one of which is mergers. The Tribunal's powers pursuant to Part VIII do not extend, for example, to issues relating to the economic regulation of airline markets. This regulatory area is encompassed by the mandate of the National Transportation Agency.

¶ 8 In conclusion, and for the reasons stated herein, I agree with Mr. Justice Hugessen that the Tribunal does not have the jurisdiction to issue the order proposed by it, given its power to intervene pursuant to paragraph 106(a) of the Act.

¶ 9 Accordingly, I would allow the appeal, set aside the decision of the Tribunal and return the matter to the Tribunal for reconsideration on the basis that the condition precedent to the exercise of the power to rescind or vary has been met, but that the power to rescind or vary may only be exercised in accordance with the provisions of section 92 of the Act. I would dismiss the cross-appeal. I would make no order as to costs in respect of either the appeal or the cross-appeal.

* * *

The following are the reasons for judgment rendered in English by

¶ 10 **HUGESSEN J.A.**:— I have had the benefit of reading the reasons for judgment prepared for delivery by my colleague MacGuigan J.A. I am in agreement with him that the Competition Tribunal erred in law in its interpretation of the conditions precedent imposed by paragraph 106(a) of the Competition Act [See Note 5 below] upon the exercise by it of the power to vary a previous order. I disagree with him, however, as to the manner of the exercise of that power, and its extent, once those conditions have been met. In the result, I arrive at a different disposition of the appeal.

Note 5: R.S.C., 1985, c. C-34.

¶ 11 MacGuigan J.A. has fully set out the background and the facts and since it is clearly in the public interest as well as in the commercial interest of the individual parties that the matter be resolved as quickly as possible, it is neither necessary nor desirable for me to repeat them. For the same reasons I think it appropriate that I state as briefly as possible my reasons for concluding as I do.

¶ 12 In my view, the Tribunal erred in giving too narrow and confining an interpretation to the words of section 106 of the Competition Act and particularly to paragraph (a) thereof. That section reads:

> 106. Where, on application by the Director or a person against whom an order has been made under this Part, the Tribunal finds that
>
> (a) the circumstances that led to the making of the order have changed and, in the circumstances that exist at the time the application is made under this section, the order would not have been made or would have been ineffective to achieve its intended purpose, or
>
> (b) the Director and the person against whom an order has been made have consented to an alternative order,
>
> the Tribunal may rescind or vary the order accordingly.

¶ 13 This provision appears in Part VIII of the Act, "Matters Reviewable by Tribunal". Part VIII covers sections 75 to 107 [R.S.C., 1985 (2nd Supp.), c. 19, s. 45] and contains provisions dealing with various restrictive trade practices (refusal to deal, consignment selling, exclusive dealing, etc.) specialization agreements and mergers, and empowers the Tribunal to make specific types of orders in each of these areas. Part VIII concludes with a short subdivision entitled "General" dealing with interim and consent orders, evidence, and, in section 106, the power to vary.

¶ 14 In the present case, the Tribunal was dealing with an application by the Director seeking the variation of an order previously given by the Tribunal on consent in accordance with the terms of section 92 relating to mergers. It is, in my view, clear that the Tribunal's restrictive interpretation of its power to vary was in some measure coloured by the fact that it was being called upon to impose changes in an order which the parties had previously negotiated amongst themselves and consented to. I shall have more to say later about this aspect of the matter but, for the moment, it is enough to indicate that, while the Tribunal's concern was quite legitimate, the course it chose as a means of solving the difficulty was inappropriate. The restrictive interpretation given by the Tribunal to the words of paragraph 106(a) results not only in making involuntary interference with consent orders difficult, a desirable result in my view, but also in rendering it almost impossible to make any variation in any of the other kinds of orders envisaged in Part VIII, a much less happy consequence. In my view, there is no warrant in the language of section 106 itself or in the scheme of the statute generally for reading the words "the circumstances that led to the making of the order" in other than their ordinary grammatical sense. This involves a determination by the Tribunal of the existence of a simple causal relationship between the circumstances and the order, but no more. It is not necessary that such relationship be "direct" or "demonstrable" other than in the very limited sense that the Tribunal must be satisfied that it exists. Nor is it necessary to relate the circumstances to the purposes sought to be achieved by the order, although it is of course always legitimate to look to such purposes as a guide to identifying some of the circumstances leading to it.

¶ 15 Dealing with the particular facts of this case, I think it was an error for the Tribunal, having recognized that the existence of a strong duopoly in the airline business was an important feature of the landscape in which the previous order had been made, not to find that a drastic change in the financial position of one of the members of that duopoly and its imminent failure were not changes in the circumstances that led to the making of the order and that, in the present circumstances, the order would not have been made.

¶ 16 In my view, however, a conclusion that the conditions of paragraph (a) of section 106 have been met, as I believe they have, does no more than open the door to the possibility of the Tribunal making a new order; it does nothing to tell us what that new order can or should be. The empowering words of the section are not found in the paragraphs setting out the conditions precedent to the exercise of the power, but rather in the body of the section: "the Tribunal may rescind or vary the order". It is to them that I now turn.

¶ 17 I start from the proposition which I take to be self-evident that a statutory power to vary an order vested in the tribunal which has made that order is necessarily constrained by the same limits as were imposed on the power to make the order in the first place. Put another way, a tribunal cannot invoke a power to vary its earlier order as a justification for making an order which it did not have the power to make the first time.

¶ 18 In the present case, the Tribunal has been asked to vary an order made with respect to a merger. The powers of the Tribunal in such cases are set out in subsection 92(1):

> 92. (1) Where, on application by the Director, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially:
>
> (a) in a trade, industry or profession,
>
> (b) among the sources from which a trade, industry or profession obtains a product,
>
> (c) among the outlets through which a trade, industry or profession disposes of a product, or
>
> (d) otherwise than as described in paragraphs (a) to (c),
>
> the Tribunal may, subject to sections 94 to 96,

(e) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Director, to take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Director, ordering the person to take any other action.

¶ 19 Of particular relevance here, since at the time of the Director's original application, the Tribunal was dealing with a completed merger, are the words of paragraph 92(1)(e). That paragraph is rather unusual in my experience, for in addition to the very precise and limited powers which it gives in subparagraphs 92(1)(e)(i) and (ii), it goes on in subparagraph (iii) to open up the possibility of a virtually unlimited range of orders if the Director and the person against whom it is made consent. Paragraph 92(1)(e) also differs in this respect from the other provisions of Part VIII. Under those provisions, and in particular by sections 75, 76, 77, 79 [as am. by S.C. 1990, c. 37, s. 31], 81, 83, 84, 86 [as am. idem, s. 32] and 87, the Tribunal is empowered to make specific orders of the various types described. Those orders may, of course, be the result of contested proceedings or they may come into being because the parties have consented to them. Section 105 (which as previously noted is in the "general" subdivision of Part VIII) provides for consent orders as follows:

105. Where an application is made to the Tribunal under this Part for an order and the Director and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal may make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested.

¶ 20 In my view, this provision does nothing to expand the nature or content of the orders the Tribunal may make; it simply provides that the Tribunal may rely on consent to make orders of the kind it is otherwise empowered to make and without the necessity of hearing evidence. Thus, in a proceeding for abuse of dominant position a consent by the relevant person would allow the Tribunal to make one or more of the orders described in subsections 79(1) and (2):

> 79. (1) Where, on application by the Director, the Tribunal finds that
>
> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
>
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
>
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.
>
> (2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

It could not, however, make any other type of order.

¶ 21 Subparagraph 92(1)(e)(iii) by contrast allows the consent of the parties to expand the type of order that the Tribunal can make in merger cases. The power of the Tribunal to make the expanded order, however, is conditioned by and dependent upon the consent. Without consent, the Tribunal is limited to ordering the dissolution of the merger (subparagraph (i)) or the divestiture of assets or shares (subparagraph (ii)). These are important and even drastic powers, but in the hands of either the Director or the Tribunal, they constitute a rather blunt instrument for the implementation of Canada's competition policy. Indeed it is the very bluntness of that instrument and the all-or-nothing nature of the orders that can be given under subparagraphs (i) and (ii) which no doubt give subparagraph (iii) its vitality and increase its utility. Both the Director and the parties to a merger may find unpalatable the prospect of the Tribunal on the one hand finding that the necessary degree of harm has not been shown (i.e. that the merger does not or is not likely to "prevent or lessen competition substantially") or, on the other hand, having found such a harm, ordering the dismantling of the entire commercial structure which was the subject of the merger. This is likely to make both sides readier to engage in constructive negotiations and to agree upon an order which may contain a vast range and number of fine-tuned provisions designed to satisfy the requirements both of public interest and commercial reality.

¶ 22 It is against this background that the power to vary given by section 106 must be read. Where, as is the case here, the order sought to be varied is one which was given under paragraph 92(1)(e) and resulted from a consent, the Tribunal has no powers beyond those with which it was originally vested at the time of the Director's first application. On the application to vary, therefore, it is open to the Tribunal to rescind the order or to direct the dissolution of the merger or the divestiture of shares or assets. It may also make an order directing any person "to take any other action" but only with the consent of such person and of the Director. On the application to vary, just as was the case on the original application, the parties are given the same incentives to

negotiate a consent order which will respond sensitively to both public and commercial interests in the light of the changed circumstances; they are likewise subject to the same dangers of an all-or-nothing order should they fail to do so.

¶ 23 The Director takes issue with this view of the Tribunal's powers. He argues that the word "vary" is wide in scope and confers an independent and unlimited power upon the Tribunal to impose new terms in what was previously a consent order. He cites the decision of the Ontario Divisional Court in Re Merrens et al. and Municipality of Metropolitan Toronto, [1973] 2 O.R. 265 and the decision of the Supreme Court of Canada in Bakery and Confectionery Workers International Union of America, Local No. 468 et al. v. White Lunch Ltd. et al., [1966] S.C.R. 282. In my view, neither of those cases is of any assistance to him for in neither was there any question of the Board or Tribunal giving an order on an application to vary which it did not have the power to give the first time around. Nor does any other case that I know of suggest such a power. I repeat that when a power to do a thing and the power to vary that thing are both vested in the same body, the first necessarily conditions the second else the latter is without limit.

¶ 24 Indeed, it is the Director's position, if I understood it correctly, that where the original consent order is a "behavioural" order, the only limitation on the Tribunal's power to vary is that the new order should also be behavioural and should be designed to address the substantial lessening of competition resulting from the merger. In my view, that cannot be the case. At the most basic level, subparagraph 92(1)(e)(iii) allows for the making of an order against a person who is not a party to the impugned merger provided that person consents; if consent is no longer to be a prerequisite when it comes to the variation of that order, there would be nothing to prevent the Tribunal directing the new order against some other person, also not a party to the merger, but without that person's consent. That surely is too extravagant a claim for a simple power to vary.

¶ 25 Indeed, the very limitation which the Director concedes in the case of an application to vary, that is to say that the new terms should be designed to remove the substantial lessening of competition caused by the merger, can only have their source in section 92 (see subsection 92(1) supra). This surely is a recognition of the fact that Parliament intended to deal exhaustively in section 92 with the Tribunal's powers in matters relating to mergers. I accept, of course, that the power to vary given by section 106 is an "independent" power in the sense that without it the Tribunal could not act. But the consent which must underlie an order made under subparagraph 92(1)(e)(iii) is more than merely an authority for the Tribunal to act; [See Note 6 below] it is the very source of its jurisdiction to make that kind of order at all; without it the Tribunal is limited to ordering dissolution or divestiture. Likewise on the application to vary: absent consent the Tribunal may only order dissolution or divestiture, or rescind its original order.

Note 6: As it would be, for example, in a consent variation pursuant to s. 106(b) with regard to an order originally made under any of the provisions of Part VIII other than s. 92(1)(e)(iii). Such consent would also, of course, do away with need for satisfying the other conditions imposed by s. 106(a).

¶ 26 This brings me to the more fundamental question of policy. The Director submits that to limit the power to vary under section 106 by reference to the power to make the original order under section 92 (or under whichever of the other sections in Part VIII were in play the first time around) is to frustrate the purposes of the Act. I think not.

¶ 27 In the first place, the Director's view must postulate, as he says, an implied consent by the parties to a consent order to having that order varied by the Tribunal against their wills. If that is truly to be the case, I think that parties will hesitate long before entering into consent orders. Of what value are arduous negotiations, difficult trade-offs, delicate compromises and finely-tuned terms if changed circumstances are to give warrant to the Tribunal to ride rough-shod through the whole intricate structure? The Tribunal already plays an activist and interventionist role in the making of consent orders, and it is entirely right that it should; it has always

accepted, however, that in the final analysis it is the parties who must give their consent and, if they fail to do so, the Tribunal's role is limited to saying yea or nay-to granting or refusing the order sought. [See Note 7 below]

Note 7: For an example of just how far the Tribunal is prepared to go, see Canada (Director of Investigation and Research, Competition Act) v. Imperial Oil Limited (January 26, 1990), No. CT8903/390 (Comp. Trib.) ([1990] C.C.T.D. No. 1 (QL)).

¶ 28 In the second place, it is also my view that the policy of the Act, and more particularly of the provisions relating to mergers, is to favour solutions which the parties and the Director, with the guidance and consent of the Tribunal, fashion for themselves and to that end to do everything within reason to encourage them to negotiate. That, as I see it, is the rationale for what I have described as the "blunt instrument" of subparagraphs 92(1)(e)(i) and (ii) which are designed to lead to the sophisticated solutions of subparagraph 92(1)(e)(iii). The interpretation of sections 106 and 92 which I propose, and the interplay between them, is such as to drive the parties on an application to vary back to the bargaining table and to encourage precisely the sort of result which Parliament has favoured. While a view of section 106 as giving the Tribunal an unlimited power to vary consent orders without consent does not prevent the parties from coming to an agreement, it is I think very much less likely to encourage them to do so.

¶ 29 My third reason for thinking that the purposes of the Act are best served by requiring that on an application to vary the Tribunal be free to exercise the same powers, no more but also no less, as those available to it at the time of the original application is a matter of simple practicality. Where, as in the present case, the Tribunal has made a consent order allowing a merger to go ahead, both the parties to the merger and third parties will have undertaken obligations, contractual or otherwise, on the basis of the order. If that order is then subject to be changed by the Tribunal acting without consent, difficult questions are bound to arise regarding indemnification for the injury thus caused. In my view, the Tribunal does not, absent consent, have the statutory power to order such compensation [See Note 8 below] and it is very doubtful that there is any recourse in any court for persons who suffer damages as a result of the Tribunal's order.

Note 8: The only statutory basis that was suggested was s. 8(2) of the Competition Tribunal Act, R.S.C., 1985 (2nd Supp.), c. 19, Part I:

> 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.

¶ 30 On the view I take of the Tribunal's powers, these problems largely disappear. If the Tribunal orders dissolution or divestiture, that can only be on the basis that the merger prevents or lessens competition, i.e. that it is contrary to public policy, and there can be no claim for damage by the parties to the merger; innocent third parties, on the other hand, who have dealt in good faith with the merger, will be in the same position as anyone else who has dealt with a corporation or partnership which is subsequently dissolved and will retain whatever rights the law gives them in those circumstances. If, however, the parties to an application to vary can agree on a consent order pursuant to subparagraph 92(1)(e)(iii), there is simply no limit to the kind of "other action" the Tribunal can order with a view to achieving a just and fair resolution of commercial relationships, both within the merger and between the merger and others.

¶ 31 Accordingly, it is my view, for the reasons stated, that while the appellants are right in contending that the Tribunal erred in too narrowly construing the provisions of paragraph 106(a), the cross-appellants are also right in their view that the Tribunal could not make the alternative order that it said it would have made if it thought it had the power to do so. [See Note 9 below] In the result, the appeal should be allowed but the Court should refrain from making the order proposed by the Tribunal and requested by the appellants.

Note 9: Technically, of course, the cross-appeal is ill founded and unnecessary. It is trite law that an appeal only goes to the disposition of the impugned decision and not to the reasons. Once the Tribunal had determined that the conditions of s. 106(a) had not been met, it had disposed of the case; everything else in the decision is, strictly speaking, obiter. Nothing turns on the point since the order I propose can properly be made on the main appeal and this is not a case for costs.

¶ 32 Instead, it is my view that this is a proper case for returning the matter to the Tribunal for reconsideration. The Director's original application to vary contained an alternative conclusion seeking the dissolution of the Gemini merger. That conclusion, although it was not pressed with vigour (or apparently at all once the hearing got under way) [See Note 10 below] was never formally abandoned and was indeed specifically reserved both at the Tribunal and on appeal. None of the parties, however, appear to have addressed it in any great detail either in their evidence or in their submissions. Nor, obviously, did they address the possibility of the Tribunal's exercise of its powers under subparagraphs 92(1)(e)(i) and (ii) nor the desirability, clearly in my view fostered by the language of the statute, of attempting to negotiate a new consent order in the light of that possibility. Having misconceived the nature of the stick, they were perhaps less sensitive to the attractions of the carrot. It would be both fair and consistent with the policy of the statute to allow them to reconsider their positions now.

Note 10: This is hardly surprising since the Tribunal had already, in the reasons given in support of the consent order herein, publicly taken the position that its power to vary was not limited by s. 92.

¶ 33 The Tribunal, as it was constituted for the hearing, heard a great deal of evidence and argument. The additional material required to be added to the case in order to dispose of the matter correctly should be relatively slight, if any. Since a reconsideration in accordance with an order of this Court is, in my view, a continuation of the same "matter" within the meaning of subsection 5(4) of the Competition Tribunal Act, [See Note 11 below] the Tribunal may think it expedient to have the same panel continue and complete the hearing.

Note 11: 5. . . .

(4) A person may continue to act as a member of the Tribunal after the expiration of his term of appointment in respect of any matter in which he became engaged during the term of his appointment.

¶ 34 One final point. There was some suggestion during the hearing that the limitation imposed by section 97 of the Competition Act [See Note 12 below] might in some way be an impediment to the Tribunal's examining the possibility of ordering the dissolution of Gemini. I think not. By its terms, section 97 only applies to an application under section 92; the Director's application is not made under section 92, but under section 106 and the fact that the Tribunal's powers are limited by the text of section 92 does not have the effect of importing the section 97 limitation period.

Note 12: 97. No application may be made under section 92 in respect of a merger more than three years after the merger has been substantially completed.

¶ 35 I would allow the appeal, set aside the decision of the Tribunal, and return the matter to the Tribunal for reconsideration on the basis that the condition precedent to the exercise of the power to rescind or vary has been met, but that the power to vary may only be exercised in accordance with the provisions of section 92. I would dismiss the cross-appeal. I would make no order as to costs.

* * *

The following are the reasons for judgment rendered in English by

¶ 36 **MACGUIGAN J.A.** (dissenting in part):— This is an appeal from a decision of the Competition Tribunal (the Tribunal) of April 22, 1993 [[1993] C.C.T.D. No. 14 (QL)], which dismissed an application of the Director of Investigation and Research (the Director) appointed under subsection 7(1) of the Competition Act (the Act), R.S.C., 1985, c. C-34. The application of the Director was to vary an earlier consent order (the consent order) of the Tribunal of July 7, 1989 [(1989), 44 B.L.R. 154 (Comp. Trib.)].

¶ 37 By the consent order the Director withdrew a challenge he had earlier made to the merger of the computer reservations systems (CRS's) of Air Canada and Canadian Airlines International Ltd. (Canadian). [See Note 13 below] In the present application the Director sought to vary the consent order by the addition of a term permitting the early termination of the hosting contract [See Note 14 below] entered into between the merged entity, The Gemini Group Limited Partnership and The Gemini Group Automated Distribution Systems Inc. (collectively "Gemini"), and Air Canada and Canadian. In its decision of April 22, 1993, the Tribunal determined that it may vary the terms of a consent order without the consent of all of the parties thereto and that it has the authority to terminate a contract if necessary to prevent any substantial lessening of competition. The Tribunal further found that if the variations now sought were not granted, Canadian would likely fail and there would be a substantial lessening of competition in passenger airline service in Canada.

Note 13: Canadian was joined in this action by its parent corporation PWA Corporation (PWA). I designate both collectively as "Canadian".

Note 14: Hosting is the management of carriers' internal reservations and seat inventory, internal operations and passenger processing systems.

¶ 38 However, Strayer J., the Judicial Member of the Tribunal, concluded that the Tribunal may grant the variation sought by the Director only if it finds that the circumstances which directly caused it to issue the 1989 consent order have changed. [See Note 15 below] On the basis of this view of the law, the majority of the Tribunal was of the view that there was no change in the "operative circumstance" which led to the consent order, and that the Tribunal was therefore unable to make the variation order requested. Dr. Roseman, in dissent, concluded there were changes in relevant circumstances which would permit the Tribunal to vary the consent order as sought by the Director.

Note 15: By s. 12(1)(a) of the Competition Tribunal Act "questions of law shall be determined only by the judicial members sitting

in those proceedings."

¶ 39 Part VIII of the Act deals with "Matters Reviewable by Tribunal." The relevant provisions of this Part are as follows:

Mergers

91. In sections 92 to 100, "merger" means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

92. (1) Where, on application by the Director, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(a) in a trade, industry or profession,

(b) among the sources from which a trade, industry or profession obtains a product,

(c) among the outlets through which a trade, industry or profession disposes of a product, or

(d) otherwise than as described in paragraphs (a) to (c),

the Tribunal may, subject to sections 94 to 96,

(e) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Director, to take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Director, ordering the person to take any other action.

. . .

General

. . .

105. Where an application is made to the Tribunal under this Part for an order and the Director and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal may make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested.

106. Where, on application by the Director or a person against whom an order has been made under this Part, the Tribunal finds that

(a) the circumstances that led to the making of the order have changed and, in the circumstances that exist at the time the application is made under this section, the order would not have been made or would have been ineffective to achieve its intended purpose, or

(b) the Director and the person against whom an order has been made have consented to an alternative order,

the Tribunal may rescind or vary the order accordingly.

I

¶ 40 At all relevant times Air Canada was the largest and Canadian the second largest airline in Canada. Before June 1, 1987, each maintained its own in-house CRS, Reservec II and Pegasus 2000 respectively. On June 1, 1987, the two airlines agreed to merge their CRS systems via a limited partnership, which later became known as Gemini. Each would become 50% shareholders of the partnership, which was to last until the end of 2069. Each would transfer its CRS assets to the partnership and use Gemini exclusively to maintain or "host" its own internal reservation system and to distribute information about its fares, flights, seat availability, etc., to travel agents who could then issue tickets for flights on each carrier.

¶ 41 On March 3, 1988, the Director filed an application pursuant to section 92 of the Act to dissolve the Gemini partnership on the basis of concerns about the effect of the merger on competition in CRS markets and in airline markets. Air Canada and Canadian were said already to control 56% and 37% respectively of the scheduled airline passenger market. The use of a CRS was said to be one of the most important ways in which airlines compete with one another, and the existing dominance of these airlines, coupled with the vertical integration of Gemini with them, would ensure that Gemini alone would be able to provide the most complete, accurate and timely information, including last seat availability, on virtually all Canadian carriers of interest to

Canadian travel agents, since they and their affiliated and aligned carriers were hosted only on Gemini, and other CRS's had no direct-access links to these carriers. The merger was alleged to be likely to entrench the dominant position of Air Canada and Canadian in the airline industry in Canada, thereby reducing competition in Canadian airline markets.

¶ 42 Negotiations followed, and in April, 1989, on the eve of the hearing, the Director amended his application to seek a consent order, filing a statement of agreed facts, a consent order impact statement and a draft consent order.

¶ 43 Following a hearing, the Tribunal on July 7, 1989, issued a 16-page consent order, supplemented by 14 pages of Computer Reservation System Rules, and 70 pages of reasons for the consent order. In the course of the reasons for the order, the presiding judicial member, Reed J. said (at pages 196-198):

> It is clear that the Tribunal's constituent legislation does not contemplate that the Tribunal will be a mere rubber stamp. The legislation, for example, does not provide for the automatic filing, by the Director, of settlements which he reaches with respondents so that they automatically become orders of the Tribunal. This type of procedure is found, for example, in the Canadian Human Rights Act; the filing of an order of a Human Rights Tribunal in the Registry of the Federal Court constitutes it an order of that Court for the purpose of enforcement. The Tribunal is composed of judicial members and of non-judicial members who have special expertise in areas relevant to the work of the Tribunal. It is required to sit in panels of three, even for the purpose of granting consent orders. It is clear that Parliament intended the Tribunal to exercise an independent judgment with respect to such orders.
>
> At the same time, the legislation sends a very clear message to the Tribunal that it is not anticipated that the Tribunal should take a detailed role in the crafting of consent orders. Section 105 of the Competition Act [formerly s. 77, as enacted S.C. 1986, c. 26, s. 47] provides:
>
> . . .
>
> And s. 92 [formerly s. 64, as enacted by S.C. 1986, c. 26, s. 47] provides:
>
> . . .
>
> Thus, s. 92 provides that, apart from the remedies of dissolution and divestiture of shares or assets, the Tribunal cannot impose terms on a respondent unless both the respondent and the Director agree to those terms. Similarly, in s. 105 the Tribunal may make "the" order which is sought on consent. Applications by the Director for variation of an order pursuant to s. 106 are different. Under that provision, the Director can seek the imposition of terms and conditions on a respondent without the respondent's consent.
>
> . . .
>
> The Tribunal accepts the Director's argument that the role of the Tribunal is not to ask whether the consent order is the optimum solution to the anticompetitive effects which it is assumed would arise as a result of the merger. The Tribunal agrees that its role is to determine whether the consent order meets a minimum test. That test is whether the merger, as conditioned by the terms of the consent order, results in a situation where the substantial lessening of competition, which it is presumed will arise from the merger, has, in all likelihood, been eliminated. In Director of Investigation and Research v. Palm Dairies Ltd.

(1986), 12 C.P.R. (3d) 540 (Competition Trib.), at 548 the test was expressed:

> "It is incumbent on the tribunal to satisfy itself that the order sought meets a critical threshold of effectiveness, namely, that of eliminating the likely prevention or lessening substantially of competition that gave rise to the application for the order."

The order imposes behavioural constraints on the respondents. The Tribunal is aware that there has been some discussion that its decision in Director of Investigation and Research v. Palm Dairies, supra, stands for the proposition that the Tribunal is not prepared to issue behavioural type orders. Such an interpretation is a misreading of that decision.

¶ 44 Among the behavioural constraints in the consent order was clause 16, which responded to the fear of collusive behaviour, as expressed by the Tribunal (at pages 179-180):

> Collusion
>
> It is generally accepted that where there are only two major competitors in a market, there is increased opportunity to engage in collusive behaviour.
>
> While the Gemini merger does not increase the incentives for Air Canada and Canadian to collude, with respect to the airline market, the existence of Gemini does allow for exchanges of data which make collusion easier to engage in and more difficult to detect.

As noted by the Tribunal, this concern was addressed by the consent order in clause 16. The Tribunal stated (at pages 181-182):

> The original clause [16] has been redrafted, in response to a number of suggestions made in the course of the hearing before the Tribunal, to read as follows:
>
> > "16. AND IT IS FURTHER ORDERED that the respondents and each and every one of their respective directors, officers, managers, servants, employees, agents, or any of them, shall not share or exchange commercially sensitive airline information through the operations of Gemini, including, but not limited to, seat inventory information in respect of individual carriers to a greater extent than such information is accessible by Gemini subscribers, where such sharing or exchange would facilitate agreement to share markets or fix the level of prices between AC, including its affiliated airlines, on the one hand and PWAC, Wardair and CDN, including its affiliated airlines, on the other."
>
> In addition, it was always contemplated that the order would require the officers of Air Canada, Canadian, PWA Corporation, Wardair and Gemini to report each year to the Director indicating that this provision, as well as the other CRS rules had been complied with.

¶ 45 In its reasons the Tribunal anticipated that the Covia Canada Partnership Corp. and Covia Canada Corp. (collectively "Covia"), wholly owned subsidiaries of a CRS operating in the United States with its computer center in Denver, would become a one-third partner (at page 157), and went so far as to suggest that, if it did not, the Director would have grounds to move for a variation under section 106 (at page 179):

It is the Tribunal's view that if Gemini does not in the near future acquire a third owner, given that this expectation formed the basis of so much of the argument before the Tribunal, it would be open to the Director to seek a modification of the Tribunal's order pursuant to s. 106 (formerly s. 78) of the Competition Act, on the ground that the circumstances in existence at the time of the making of the order had changed.

¶ 46 In fact, Covia did become a one-third owner of Gemini on June 30, 1989, in a restated partnership agreement, with the term of the partnership now expiring on December 31, 2067. On the same day, Gemini entered into a CRS agreement with Covia, and the long-term hosting relationship of Air Canada and Canadian with Gemini was continued by a new agreement.

¶ 47 By the restated partnership agreement the first window period for a partner to leave the partnership was in 1997, in which case the separate hosting contract would terminate two years later (if the departing partner were a party to that contract).

¶ 48 However, since the consent order was issued in 1989, the financial condition of Canadian has deteriorated to the point that it cannot survive on its own. A search for investors revealed only two interested parties, Air Canada and American Airlines, Inc. (American) or its parent corporation, AMR Corporation (AMR). [See Note 16 below] Negotiations with Air Canada have not continued. American agreed to invest $264 million in Canadian and to provide it with a package of services which are revenue-enhancing and cost-saving, conditional on Canadian's moving its hosting from Gemini to American's CRS, Sabre. Air Canada has refused a commercial settlement which would allow Canadian to move its hosting to Sabre.

Note 16: I refer to the latter two entities indifferently as "American".

¶ 49 On November 5, 1992, the Director filed an application under section 106 to vary the consent order to provide for early termination of Canadian's hosting relationship with Gemini, or, alternatively to dissolve the Gemini merger. [See Note 17 below]

Note 17: I have not found the related insolvency proceedings now before the Ontario courts of any relevance to the case at bar and so I make no further reference to them.

II

¶ 50 It was not disputed by the respondents that, there being no privative clause, the Tribunal must correctly interpret the statutory criteria in section 106 in order to be insulated from judicial interference with its order. The interpretation by Strayer J. of the questions of law before the Tribunal was as follows:

B. Questions of Law

In the view of the Tribunal, paragraph 106(a) of the Act must be interpreted as a whole to allow the Tribunal to vary an earlier order only where the purposes for which the order was sought and made can no longer be adequately served by that order.

Firstly, Parliament provides that a variation may be ordered only where "the circumstances that led to the making of the order" have changed. If a change in any

background circumstance were sufficient, Parliament would presumably have used language such as "circumstances existing at the time of the making of the order have changed . . . . (The French version uses the expression les circonstances ayant entraîné l'ordonnance . . . which appears equally to imply a causal connection between the circumstances and the order made.) By using instead the words that led to , Parliament must have intended there to be a direct causal link between the existence of certain circumstances and the decision of the Tribunal, and not merely the logical relevance of some background condition existing at that time.

Secondly, by paragraph 106(a) the Tribunal must, in order to vary an order, also find that the change in those circumstances is such that today, in the changed circumstances, "the order would not have been made or would have been ineffective to achieve its intended purpose". This phraseology appears to focus on the cause or purpose of the original order just as do the words "circumstances that led . . . ." Thus, the Tribunal cannot vary an earlier order only because that order might today look less than perfect: the order can only be changed if it would not today properly serve the purpose for which it was made or would seriously impair the achievement of that purpose.

Thus, as a matter of law, the circumstances whose change would permit adding terms to an earlier order must be those circumstances that demonstrably were taken into account by the Tribunal at the time of, and directly caused, the making of the order in question. Further, assuming such changed circumstances to exist, the order should still not be changed unless it has become useless or inadequate to its intended purpose of solving the problem as identified in the relevant circumstances that led to the original order being made. (See also Jasper Park Chamber of Commerce v. Governor-General in Council, [1983] 2 F.C. 98 at 115, (1982), 141 D.L.R. (3d) 54 at 66-67 (C.A.), for the proposition that a power to "vary" can only be exercised in respect of the "same type or kind of order" as the original order.)

A further question of law has been raised as to the authority given the Tribunal by the closing words of section 106 to "rescind or vary the order accordingly" where a consent order is involved. A number of arguments have been presented, by those opposed to the present application, concerning the limitations said to be imposed on the Tribunal as to the kind of order which can be made under section 106. It was argued that we could rescind a consent order without consent, where the conditions of paragraph 106(a) were met, but that we could not vary an order without the consent of all parties under paragraph 106(b). This was said to flow from the fact that the power to make any kind of an order under section 92, pursuant to the original application, would have been limited to dissolution and divestiture in the absence of the consent of all parties. Further, the order which was made under section 105 in settlement of the proceedings brought under section 92, being a consent order, had by definition to be with the agreement of all par;ties. It was argued therefore that section 106 must mean that a consent order can only be varied by consent and that the power to "vary" must be taken to apply only to orders coming within the condition imposed in subparagraph 106(b). It was argued by one party that as paragraph 106(a) refers to orders which would not have been made or would have been ineffective to achieve their intended purpose, the closing words authorizing the Tribunal to "rescind or vary . . . accordingly" must be taken to refer respectively to: the rescission of an order that would not have been made in current circumstances; and the variation of an order which has become ineffective to achieve its intended purpose. Reliance was placed on the word "accordingly" at the end of the section as if it meant "respectively".

Neither of these arguments appears tenable. If such distinctions were to be made, Parliament would surely have stated them specifically. Further, the structure of the French version of the section which at its outset gives the Tribunal the power to rescind or vary, does not accord with the view that the word "accordingly", which has no counterpart in the French

version, was intended to mean "respectively".

> This Tribunal has already expressed the view, admittedly in obiter dicta (in its Reasons for Consent Order Dated July 7, 1989 in the present matter: supra, note 11 at 64), that the Tribunal can impose terms and conditions under section 106 without the consent of all respondents. This would appear to be most consistent with the phraseology of section 106 which does not expressly limit either the power to rescind or vary consent orders to situations where all original parties consent. It is obvious that section 106 permits the rescission or variation of any orders made under Part VIII, many of which would not be consent orders: the general phraseology of the section is clearly appropriate for changes in those orders. Parliament would certainly have been more specific if it intended the variation or rescission of consent orders to be treated in a different way. [Underlining added.]

¶ 51 What is at stake in the "questions of law" is the relationship between section 92, the provision that governed the original consent order, and section 106, which allows the rescission or variation of such an order, and is therefore at play in the case at bar.

¶ 52 The first legal issue decided by the Tribunal was as to the meaning of the phrase "the circumstances that led to the making of the order have changed" in paragraph 106(a). The judicial member of the Tribunal interpreted this to mean circumstances that directly and demonstrably caused the change, a gloss for which I find no warrant in the text of the Act. It should be noted at the outset that on the view thus taken by the majority it would not have been possible for the Director to have sought a modification of the consent order for Covia's failure to enter Gemini, contrary to the original Tribunal's expressed view of the law.

¶ 53 Contrary to Canadian's argument, to my mind the words "that led to" imply that the circumstances had to be at least causative of the change, but on the language of the statute it is hard to go much beyond that.

¶ 54 Aristotle in his Physics, II, 3, distinguished four kinds of causes: the material cause, the matter from which something came; the formal cause, the substantial form or essence of a change; the efficient cause, the agent by which a change was brought about; and the final cause, the purpose or end of the change.

¶ 55 In the case at bar the various respondents emphasized final causality, stressing the explicit purpose the Tribunal (clearly the agent or efficient cause) appeared to have in mind in making the consent order. This is the narrowest construction possible, and seems to me unwarranted.

¶ 56 Section 12 of the Interpretation Act, R.S.C., 1985, c. I-21 provides that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." The present Act states in its very first substantive words that "[t]he purpose of this Act is to maintain and encourage competition in Canada" (section 1.1 [as enacted idem, s. 19]). This Court in American Airlines, Inc. v. Canada (Competition Tribunal), [1989] 2 F.C. 88, at page 98 (per Iacobucci C.J.) referred to this purpose as "extremely broad," and in that case and in the Chrysler Canada Ltd. v. Canada (Competition Tribunal), [1992] 2 S.C.R. 394, both courts gave a broad interpretation to the companion legislation, the Competition Tribunal Act. Gonthier J., in Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 1 S.C.R. 1722, at page 1756 emphasized that courts must "avoid sterilizing these powers [of regulatory authorities] through overly technical interpretations of enabling statutes."

¶ 57 Webster's Third New International Dictionary (1981) defines "circumstances" as "the total complex of essential attributes and attendant adjuncts of a fact or action." In my view, the words "the circumstances that led to the making of the order" include all of the facts and conditions that were relevant to the making of the order. [See Note 18 below] In that sense, the kind of causality involved includes material and formal causality in the Aristotelian sense, as well as efficient and final causality. Of course, the Director cannot simply assert that any earlier circumstance was relevant to the making of the earlier order. He must establish it to the satisfaction of the Tribunal on a balance of probabilities.

Note 18: In Jasper Park Chamber of Commerce v. Governor General in Council, [1983] 2 F.C. 98 (C.A.) this Court held that the Cabinet, in exercising a power of variation, could not add an irrelevant provision, dealing with subject matter different from the original order, under the guise of a variation. The key concept, as I emphasize, is that of relevance. It is relevance that determines whether it is "the same type or kind of order."

¶ 58 The consent order must therefore be taken in its full contextual amplitude, which obviously includes the pivotal role of the hosting contract in the arrangement. The fact that neither Gemini nor Air Canada breached the consent order will not alone be enough to save it, since it cannot be limited to the specific means of competition on which it was directly focussed, if under the new set of circumstances "the order would not have been made or would have been ineffective to achieve its intended purpose." The Director must, of course, bear the burden of establishing this.

¶ 59 The determination of this second issue gives rise to the further question of law as to the meaning of the power to "rescind or vary" the original order, which has in my respectful opinion been correctly resolved by Strayer J. It was strenuously argued before us, particularly by Air Canada, that the Tribunal could have only as great power on reconsideration of a consent order as on original consideration. [See Note 19 below] The first time around, the Tribunal can only dissolve a completed merger, disposing of its assets or shares, or make an additional order "with the consent of the person against whom the order is directed." It is illogical, it was said, to allow on later reconsideration not only the power of rescission but also an untrammelled power to vary, which could include making a further order against the will of a person to whom it is directed. "Vary" must therefore mean only with consent, as in section 92.

Note 19: The other respondents did not accept the argument of the respondent Gemini that the power to vary consent orders found in s. 106 is based on the power in relation to consent orders found in s. 105, and I do not pursue this argument because it seems evident to me that s. 105 is an exclusively evidentiary provision.

¶ 60 But this, it seems to me, is a policy debate, one which Parliament has already resolved by its adoption of the unrestricted word "vary." As it was put by Macdonald J. in Rowley v. Petroleum and Natural Gas Conservation Board, [1943] 1 W.W.R. 470 (Alta. S.C.), at page 476 (and followed by Gibson J. in Consumers' Association of Canada v. Attorney General of Canada, [1979] 1 F.C. 433 (T.D.), at page 440, "The word 'vary' in its ordinary use as well as in legal phraseology is quite comprehensive in meaning and I see no sound reason for restricting its meaning." However, if we were to consider policy, it would be easy enough to make a case that on reconsideration of a possibly long-established merger different factors were in play than on the original consideration: for example, it might be more desirable to require a small variation to be made than to raise the spectre of dissolution. Moreover, it would not be unreasonable to suppose that the parties to a merger were aware of the possibility of an involuntary variation down the road, at the instigation of the Director, acting for the public interest, or even at that of another party to the merger. Finally, Gonthier J. referred, with apparent approval, in the Chrysler Canada case at page 407 to the Tribunal's power to rescind or vary its orders upon request:

> Parliament, in order to provide for the supervision of the orders of the Tribunal, has given the Tribunal at s. 106 CA a power to rescind or vary its orders upon request from the Director or a person against whom the order has been made.

To my mind, a judicially imposed limitation on the power to vary in section 106 would be a total construct, without statutory warrant.

¶ 61 I therefore adopt as my own the concluding words of Strayer J., supra:

> It is obvious that section 106 permits the rescission or variation of any orders made under Part VIII, many of which would not be consent orders: the general phraseology of the section is clearly appropriate for changes in those orders. Parliament would certainly have been more specific if it intended the variation or rescission of consent orders to be treated in a different way.

The Tribunal's power is discretionary not mandatory. The restraint upon variation, the proper circumstances being established, is therefore the good sense of the Tribunal not to cause needless disruption or expense to the parties who for some considerable time have been relying on a merger. In the light of its other heavy responsibilities, this should not prove to be an unduly onerous task to impose on the Tribunal.

III

¶ 62 Given the erroneous legal basis on which the Tribunal majority assessed the facts, and the fact that even Dr. Roseman in dissent was legally constrained to follow the legal member's interpretation of the law, it is not possible simply to accept the factual framework established by the Tribunal. Nevertheless, it is, I believe, possible to discover among the facts found by the Tribunal sufficient findings to resolve the case.

¶ 63 With respect to the first requirement of section 106, a change in causative circumstances, let me note at the beginning that the majority is entirely right in the following analysis:

> The Consent Order does not require that Air Canada and Canadian be hosted on Gemini nor does it mention, much less approve or disapprove, the hosting contract that the Director now seeks to modify. The fact that Air Canada and Canadian were hosted in Gemini (through Reservec and Pegasus) was considered only in a treatment of the background to the consent order proceeding.

However, since I have interpreted the law so as to eliminate the majority's distinction between background and foreground, the fact of hosting, which the Tribunal found to exist, therefore becomes a matter of relevance and concern.

¶ 64 After reviewing the principal documents before the first Tribunal, the majority stated:

> Throughout these documents and the Agreed Statement of Facts filed in support of the consent order application, the existing duopoly in the Canadian airline market, and the hosting of the two major airlines in Gemini, are noted but not identified as causes for making the order. Instead, the principal concern articulated was vertical integration by the two dominant airlines with a single CRS and how this might be used to produce anti-competitive results in both the CRS and airline markets. It is difficult to see why the same analysis might not have applied to a vertical integration between a single airline with over 90 per cent of the Canadian airline market and a previously independent CRS operating in Canada. It was therefore not the existence of an airline duopoly as such which was the operative circumstance leading to the 1989 Consent Order.

¶ 65 It seems to me that the above passage says it all. "[T]he existing duopoly in the Canadian airline market, and the hosting of the two major airlines in Gemini" were relevant circumstances at the time of the making of the consent order. They were not, in the Tribunal's view, principal concerns, the principal concerns in their view focussing on the airlines' CRS's, rather than on the airlines themselves. But given the Director's mandate under paragraph 92(1)(a) to make an application to the Tribunal when he "finds that a merger or

proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a trade, industry or profession", and his expressed concern in his initial application (Appeal Book, XXXV, at page 8744) that "this merger will likely entrench the dominant position" of Air Canada and Canadian "in the airline industry in Canada", it is evident that it was because of the existence of the hosting contract in the context of the duopoly that the Director was moved to seek, and the Tribunal to grant, the consent order. As the Director put it in his application (Appeal Book, XXXV, at page 8746):

> The use of a CRS is one of the most important ways in which airlines compete with one another. This merger eliminates this element of competition as between . . . the two major airlines in Canada.

Perhaps the only respect in which the broader relationship between the airlines came to the fore was with respect to the danger of collusive behaviour and the special clause inserted to prevent it, but in fact the whole merger was a public policy concern because it involved a key element of competition (i.e., the hosting of CRS's) in a duopolistic industry. Hosting was not precluded from being an integral part of the merger merely because the Air Canada-Canadian relationship was put on a separate piece of paper after the entry of Covia into Gemini.

¶ 66 On the basis of the law as I have interpreted it, I believe the facts found by the majority establish a change in causative circumstances. These circumstances included above all, the fact that Air Canada and Canadian were the dominant airlines in Canada, in vigorous competition with each other, and the absence of any indication whatsoever that Canadian's financial condition would deteriorate to the point where its continued existence would be threatened.

¶ 67 This result is, not surprisingly, clearer in Dr. Roseman's dissent:

> What then are the circumstances that led to the order? An examination of the order shows that they clearly include the concerns regarding CRS and airline markets identified by the majority. But the order also includes a provision directed at preventing Air Canada and Canadian from using Gemini to exchange certain information and, thus, to facilitate collusion between them. Since we cannot say that this term is any less important than the others, we cannot ignore the circumstance that led to its inclusion. The circumstance that led to the insertion in the order of the "collusion" provision was the possible use of Gemini by Air Canada and Canadian to lessen competition substantially in airline markets. This is a concern with competition within airline markets that is not related to the operation of a travel agency CRS but to the fact that Air Canada and Canadian were both hosted in Gemini. The particular method for lessening competition that was foreseen was the exchange of information through Gemini. [Underlining added.]

¶ 68 The second factual issue is whether in the present circumstances the order would not have been made or would have been ineffective. The best evidence that this test is satisfied in law is provided by the Tribunal's alternative findings of fact, made in the event that it was found to be in error on the question of jurisdiction. The majority said:

> We recognize, however, that the legislation is relatively new and that a novel point of jurisdiction has been raised before us. Given the importance of this case we have little doubt that appeals will be launched. In case a different view is taken of our jurisdiction on appeal, we therefore feel it essential to make the findings of fact which would be necessary, should we have jurisdiction, to issue an order. Otherwise, the vast efforts of counsel and the costs of 22 days of hearings would be lost. For the assistance of appellate courts we will also indicate what remedies we believe could and should be ordered if the Tribunal has jurisdiction to do so.

We will therefore proceed to consider what the consequences would be for Canadian of continuation of the hosting agreement, the possible impact on airline competition if Canadian fails and the impact on Gemini and on CRS competition generally if Canadian fails or if it were released from the hosting contract. We will then describe the remedies we consider would be permissible and appropriate if we had the jurisdiction to vary the Consent Order.

¶ 69 In its alternative findings, the Tribunal found that Canadian was no longer financially viable:

F. Conclusion

PWA and Canadian were financially viable in mid-1989 when the Consent Order was issued. Today, they operate only at the forbearance of their creditors. As a practical matter the AMR deal is currently the only transaction available to save PWA and Canadian. Without the cash equity injection from AMR, the risk that the debt restructuring will not be completed is very high and PWA and Canadian are likely to fail. AMR will not complete that transaction without a transfer of hosting to Sabre.

From this conclusion on financial viability, the Tribunal proceeds to one on competition:

G. Conclusion

After considering the initial reduction in competition that would follow Canadian's failure and the competition remaining and likely to arise, it is the Tribunal's conclusion that the end result of that failure would undoubtedly be a substantial lessening of competition in most if not all airline passenger markets on southern routes in Canada. Even in high-density markets where entry is most likely to occur, travellers are unlikely to enjoy competition with respect to matters that are important to them, including frequency of service, range of service and frequent flyer points. Moreover, even for travellers for whom price is of primary importance, it cannot be concluded that they will not be hurt by Canadian's exit from high-density markets. The two trunk carriers do compete with each other on price. Both trunk carriers also respond to the inroads of other carriers offering low price options and each of their responses affects the other trunk carrier. [Underlining added.]

¶ 70 The remaining factual question was whether, with a shift of Canadian's hosting from Gemini to Sabre, Gemini would fail, and whether in any event Sabre would be in a dominant position, thus lessening competition in CRS markets. On this the Tribunal found:

G. Conclusion

Gemini is unlikely to fail financially in the foreseeable future, even if Canadian transfers its hosting to Sabre. The long run effect on Gemini of such a shift depends primarily on the losses in its market share that would result. Other effects on Gemini are either short run (downsizing costs and lease commitments until 1995) or are too uncertain (loss of economies of scope) to allow any conclusions to be drawn. For reasons that have been discussed at length the CRS market share losses predicted by the respondents' experts resulting from predisposition are not credible. While the agencies doing a large volume of business with Canadian might well change to Sabre, the fact that ApG is comparable to Sabre with respect to functionality means that earlier gains made by Sabre should be eroded as agents that do a large volume of business with Air Canada move back to Gemini. If Sabre and Gemini are comparable in other respects then predisposition favours Gemini, not Sabre, since the airline associated with Gemini (Air Canada) has a larger share of most domestic airline markets than

> the airline associated with Sabre (Canadian). There is no good market reason why there should not be two strong CRS networks available in Canada in the event Canadian shifted its hosting to Sabre. Even if Gemini does not succeed in putting its early painful past behind it and becoming a full effective competitor, market conditions should cause Air Canada or Covia, singly or together, to provide a successor organization to Gemini in the event that it does not meet their needs.

¶ 71 It was only because of its different view of the law that the Tribunal majority was able to come to an explicitly different view on the facts. It itself admitted:

> As indicated below, we find that the Director has demonstrated that Canadian is likely to fail and that the most probable result of that failure will be either a merger with Air Canada or the accession by Air Canada to most of Canadian's market. It is true that the anti-merger application of 1988 would not have been brought in these precise terms under such circumstances because there the merger had to do with a combination by two major airlines of their CRS resources by means of the Gemini merger.

It seems to me that the key conclusion is the one the majority has just enunciated, viz., that under these new circumstances the same anti-merger application would not have been brought. Of course, the majority went on to add that "it cannot be said that the Consent Order would not have been made or would have been ineffective to achieve its intended purpose if it were made today essentially for the same purpose as was present in 1989." But this is now a hypothetical order that is being discussed, one concerned only with the use by airlines of their CRS's for anti-competitive purposes. It is only of this narrow hypothetical order that the majority comments are true.

IV

¶ 72 The cross-appeal by the respondents was brought against what I have referred to as the Tribunal's alternative factual conclusion, viz., its finding, in obiter dicta that its failure to vary the consent order would result in Canadian's demise, which in turn would result in a substantial lessening of competition in Canadian airline markets.

¶ 73 The Tribunal further concluded that, if it had jurisdiction under section 106 to vary the consent order, given the effects of Canadian's likely demise in Canadian airline markets, it would have granted the Director's request for an amendment to the hosting contract to allow Canadian to terminate the contract on certain terms, including a requirement that it compensate Gemini for certain costs incurred in connection with its dehosting from Gemini.

¶ 74 Although there could be a serious issue as to whether the respondents/cross-appellants can appeal against what is in effect the reasons of the Tribunal rather than its decision, I accept, for purposes of argument, without deciding the point, that they can do so. Nevertheless, after hearing the respondents/cross-appellants on the cross-appeal, the Court found it unnecessary to hear general submissions by the appellants/cross-respondents on the factual issues.

¶ 75 It was decided by a majority of the Supreme Court in the Chrysler Canada case, supra, at page 406 (per Gonthier J.) of this very Tribunal that "Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII CA, since it involves complex issues of competition law, such as abuses of dominant position and mergers." The deferential approach required of the courts in review of factual decisions by such bodies is well established. As La Forest J. put it for the majority of the Court in Dayco (Canada) Ltd. v. CAW-Canada, [1993] 2 S.C.R. 230, at page 251, where a tribunal is acting within its "home territory," judicial review must be only to a standard of patent unreasonableness.

¶ 76 Of course, this is an appeal rather than a judicial review, for which the normal standard of appellate intervention is "palpable and overriding error": Stein et al. v. The Ship "Kathy K" et al., [1976] 2 S.C.R. 802, at page 808. However, there is comparatively little difference in result when the appeal is a statutory one from a specialized administrative tribunal, as Gonthier J. pointed out in the Bell Canada case, supra, at pages 1745-1746 S.C.R.:

> It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal.
>
> However, within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise.
>
> . . .
>
> [I]t does not follow that its decisions can only be reviewed if they are unreasonable. However the principle of specialization of duties justifies curial deference in such circumstances.

¶ 77 On such a standard of curial deference, it appeared clear to us that the Tribunal did not ignore any evidence, and made all its findings after weighing the evidence before it and assessing the credibility of the witnesses. The fact that its conclusions were not the only possible ones that could be drawn from the evidence, even if true, is not sufficient to impeach the Tribunal's findings.

¶ 78 However, we did request full argument on the issue raised by Air Canada as to the Tribunal's reliance on certain statistics referred to as the Air Canada Statistics and the Statistics Canada information. The part of the reasons for decision objected to was as follows, and most particularly footnotes 55 and 57:

> Out of the top 205 city-pairs in 1990, Canadian and Air Canada and their affiliates accounted for at least 95 per cent of passengers travelling on scheduled carriers in all but 16 markets. The overall share for the two systems was 96 per cent. [See Note 55 below] At that time three independent carriers were participating in southern scheduled services (Intair, City Express, First Air); none are present today.
>
> The charter carriers are present on a number of long-haul, high-density city-pairs. For the top 20 city-pairs, charter carriers accounted for more than one per cent of the passengers [See Note 56 below] on only eight city-pairs in 1990 and 11 city-pairs in 1991, with their shares ranging from 2.4 per cent to 20.5 per cent in 1990 and from 1.6 per cent to 19.5 per cent in 1991. Their largest shares were on the Toronto-Vancouver, Calgary-Toronto, Montreal-Vancouver and, in 1991, Edmonton-Toronto routes. Throughout the country charter carriers were responsible for 3.7 per cent of domestic traffic in 1991. [See Note 57 below]

Note 55: Exhibit A-1-31. In final argument, counsel for Air Canada objected to the use of the statistics contained in this exhibit as evidence of market share. The statistics were compiled for Air Canada's internal use. In the circumstances, we see no reason to doubt their accuracy or reliability and, in any event, we would be inclined to admit them under section 69 of the Act.

Note 56: The passengers referred to are those whose origin and destination are the city-pairs in question. Connecting passengers, who on average are about 25 per cent of the total passengers carried, are excluded. Virtually all connecting passengers are on scheduled carriers.

Note 57: Exhibit A-1-42. This information is taken from a Statistics Canada report, the admissibility of which was challenged by counsel for Air Canada. We are persuaded that the report is admissible under subsection 70(1) of the Act. In this case, the Director was not required to file a certificate pursuant to subsection 70(4) to prove the authenticity of the report since authenticity was admitted by Air Canada. Notice was properly given under section 72.

¶ 79 Despite Air Canada's objection that these two sets of statistics were not proven, I am rather inclined to the contrary view. The Air Canada statistics were taken from Air Canada documents provided by Air Canada to the Director, and then produced by the Director on discovery. Their authenticity was admitted by Air Canada, and it seems to me that they are admissible against it as an admission against interest.

¶ 80 The Statistics Canada information was from Statistics Canada documents, the authenticity of which was admitted. I do not interpret subsection 70(4) [as am. idem, s. 41] of the Act, which provides that "a certificate purporting to be signed by the Chief Statistician of Canada . . . is evidence of the facts alleged therein without proof of the signature or official character of the person by whom it purports to be signed", as requiring that any evidence from that source be accompanied by a certificate. Rather, I view that provision as a way of avoiding the attendance of the Chief Statistician in any special circumstances in which it might otherwise be required. Subsection 70(1) provides that any statistical record "prepared or published under the authority of . . . the Statistics Act" is admissible in evidence in any proceedings before the Tribunal. In my opinion for any information printed in an official Statistics Canada publication that should be sufficient authorization. The Competition Tribunal Act, after all, provides in subsection 9(2) that "[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit."

¶ 81 In any event, there is in my opinion ample other evidence that Air Canada and Canadian are the dominant carriers in Canada, and that the failure of Canadian would result in a substantial lessening of competition. This additional evidence includes: (1) expert affidavit evidence that in 1991, including their affiliates, Air Canada had 55% and Canadian 39% of the scheduled domestic market (Appeal Book, XLV, at page 11274); (2) expert evidence that overall domestic capacity in Canada is divided 52% to 43% between Air Canada and Canadian (Transcript of the Proceedings, XVI, at page 3076); (3) the evidence of Air Canada's Chairman Emeritus that if Canadian failed, Air Canada would be rid of the "big competition" (ibid., at page 3076); (4) expert evidence that if Canadian failed, there would be a substantial lessening of competition in domestic airline markets in the absence of new entrants (ibid., at page 2966) and that in the case of Canadian's failure, Air Canada would be left as the dominant carrier on all domestic routes in Canada (ibid., at page 2976). Although most of this evidence is national rather than route-specific, particularly in the light of the last-mentioned witness' testimony there was a factual basis for the Tribunal's applying the same statistics to all of the major intercity routes.

¶ 82 I can conclude only that the Tribunal's conclusions were not based on wrongly admitted evidence and that in addition they were amply supported by evidence that is uncontroverted as to its admissibility.

¶ 83 We also requested the parties to develop to the full their positions on the Tribunal's remedial powers. Much of the argument in this respect focussed on whether the Tribunal is to be limited under section 106 to what were referred to by the Director as the "sledgehammer remedies" available under section 92, or whether its power to "vary" an order under section 106 should be given its normal extension. I have already ruled on that aspect of the remedies question.

¶ 84 As to its jurisdiction to make compensatory awards, the Tribunal said:

> There is no jurisprudence to guide the Tribunal on the nature and scope of our power, in varying orders, to impose terms that modify contractual obligations. We start with the premise that our role is to protect the public interest in competition, and not to provide contractual remedies for private parties a matter clearly left to the courts. It seems consistent with

> Parliament's grant of authority to the Tribunal to interfere in a proper case with contracts that have an anti-competitive effect, that we may thereby render such contracts unenforceable. It is also reasonable to assume that Parliament did not intend the Tribunal to provide for compensation when acting in the public interest it deliberately ruptures private contracts. Therefore, we do not believe we would have authority to award compensation for the loss by Gemini or others of future benefits that would have arisen under the hosting contract had it not been terminated under authority of a Tribunal order. Whether private law contractual remedies might nevertheless be available in the superior courts of the provinces is not for us to determine.
>
> We would think it reasonable, however, that in pursuit of the public interest the Tribunal can, in allowing a private party unilaterally and to its own commercial advantage to terminate its contract, impose conditions which will both facilitate that termination and make it less harmful to the other parties. Taking this approach we would regard it within our implicit powers, and to represent a fair balance between public and private interests, to order that Canadian, if allowed to terminate the hosting contract, be obliged to pay certain of Gemini's costs arising from the termination and dehosting. Those costs are described below. At the same time, Gemini would be required to take the necessary steps to enable Canadian to achieve dehosting.

¶ 85 I wholly agree that the Tribunal's viewpoint should be that of the public interest and not that of the private parties involved. In fact, I believe the Tribunal majority erred earlier in the reasons when it failed adequately to distinguish the public perspective of the Director from that of a private party, when it wrote:

> At the core of this issue is the extent of the right that should be accorded to any party to a consent order, including the Director, to resile from a settlement of litigation because that settlement has turned out, for reasons unforeseen at the time, to be less advantageous than expected to the interests of a party of the public. In short, how much risk should parties to a settlement by consent order be expected to bear? In 1989 the parties here agreed to, and the Tribunal approved, an arrangement which implicitly permitted, but did not require, the continuation of the Gemini partnership until at least 1997 and the continuation of the hosting of both airlines in Gemini until 1999. At about the time of the issuance of the Consent Order, and one must assume in reliance on the terms of that order, the two airlines voluntarily entered into a new hosting contract which again involved a commitment to hosting in Gemini until at least 1999. These commitments involved business risks which the commercial parties assumed without any reference to the Tribunal. To what extent should the Tribunal now be at liberty, against the will of other parties to these contracts, to rescue the Director from his own assessment of the risks to the public interest, or Canadian from its assessment of its business risks?

The first-cited passage is a healthy corrective to the immediately above view.

¶ 86 Air Canada agreed with the Tribunal's lack of jurisdiction to make compensatory awards, but found that the relief the Tribunal would provide by ordering Canadian to pay certain of Gemini's costs arising from the termination and dehosting to be inconsistent with that premise as a partial compensatory award.

¶ 87 In my view, the Tribunal was correct in ruling that it could not make compensatory awards as such. However, the terms it would have established with respect to the transition of Canadian's hosting from Gemini to Sabre would not be made as compensatory awards but in order to achieve the object of the variation. These terms were not all in the form of payments, but included setting the appropriate notice period, and requiring Gemini to cooperate in the transition (at Canadian's expense), as well as requiring Canadian to pay Gemini's actual costs of downsizing and actual unsheddable costs attributable to the hosting of Canadian. These terms

were to my mind within the Tribunal's mandate, and in accordance with what the Tribunal itself had assumed in Canada (Director of Investigation and Research, Competition Act) v. Palm Dairies Ltd. (1986), 12 C.P.R. (3d) 540 (Comp. Trib.), as interpreted by Reed J. in her reasons for the consent order, supra.

¶ 88 Compensation as such, however, is not within the Tribunal's jurisdiction, and so it does not have the authority to impose the additional terms proposed by IBM Canada Ltd. (IBM) as such, although to the extent that the leases and financial payments for which Gemini is contractually obligated to pay IBM could turn out to be unsheddable costs no longer necessary to Gemini after the dehosting of Canadian, they might be indirectly covered.

V

¶ 89 The appeal should therefore be allowed with costs and the order of the Competition Tribunal dated April 22, 1993, varied pursuant to the powers vested in this Court by subparagraph 52(c)(i) of the Federal Court Act [R.S.C., 1985, c. F-7] to give the decision that should have been given by the Tribunal. The hosting contract should be varied so as to allow Canadian to dehost from Gemini on the following terms and conditions: (1) that Canadian be required to give at least twelve months' notice of termination to Gemini; (2) that Canadian be required to reimburse Gemini for any costs incurred by Gemini in the dehosting process and any cash costs incurred by Gemini in meeting, and terminating as soon as reasonably possible, expenditures no longer necessary after the shift in the hosting of Canadian to Sabre; (3) that Gemini be required to cooperate in the transfer of Canadian's hosting to Sabre; (4) that in the event of disagreement as to the amounts to be paid by Canadian, any party may apply to the Tribunal for a determination of the amount. The cross-appeal should be dismissed, with no additional costs.

QL Update: 960415
d/nnb

Competition Act

CHAPTER C-34

An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

SHORT TITLE

Short title

1. This Act may be cited as the *Competition Act*.
R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19.

PART I
PURPOSE AND INTERPRETATION

Purpose

Purpose of Act

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

R.S., 1985, c. 19 (2nd Supp.), s. 19.

Interpretation

Definitions

2. (1) In this Act,

"article" «*article*»

"article" means real and personal property of every description including

(*a*) money,

(*b*) deeds and instruments relating to or evidencing the title or right to property or an interest, immediate, contingent or otherwise, in a corporation or in any assets of a corporation,

(*c*) deeds and instruments giving a right to recover or receive property,

(*d*) tickets or like evidence of right to be in attendance at a particular place at a particular time or times or of a right to transportation, and

(*e*) energy, however generated;

"business" «*entreprise*»

"business" includes the business of

(*a*) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and

(*b*) acquiring, supplying and otherwise dealing in services.

It also includes the raising of funds for charitable or other non-profit purposes.

"Commission" [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 20]

"Commissioner" « *commissaire* »

"Commissioner" means the Commissioner of Competition appointed under subsection 7(1);

"Director" [Repealed, 1999, c. 2, s. 1]

"merger" [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 20]

"Minister" «*ministre*»

"Minister" means the Minister of Industry;

"monopoly" [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 20]

"product" «*produit*»

"product" includes an article and a service;

"record" «*document*»

"record" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy or portion thereof;

"service" «*service*»

"service" means a service of any description whether industrial, trade, professional or otherwise;

"supply" «*fournir*» *ou* «*approvisionner*»

"supply" means,

(*a*) in relation to an article, sell, rent, lease or otherwise dispose of an article or an interest therein or a right thereto, or offer so to dispose of an article or interest therein or a right thereto, and

(*b*) in relation to a service, sell, rent or otherwise provide a service or offer so to

provide a service;

"trade, industry or profession" «*commerce, industrie ou profession*»

"trade, industry or profession" includes any class, division or branch of a trade, industry or profession;

"Tribunal" «*Tribunal*»

"Tribunal" means the Competition Tribunal established by subsection 3(1) of the *Competition Tribunal Act*.

Affiliated corporation, partnership or sole proprietorship

(2) For the purposes of this Act,

(*a*) one corporation is affiliated with another corporation if one of them is the subsidiary of the other or both are subsidiaries of the same corporation or each of them is controlled by the same person;

(*b*) if two corporations are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other; and

(*c*) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person.

Subsidiary corporation

(3) For the purposes of this Act, a corporation is a subsidiary of another corporation if it is controlled by that other corporation.

Control

(4) For the purposes of this Act,

(*a*) a corporation is controlled by a person other than Her Majesty if

(i) securities of the corporation to which are attached more than fifty per cent of the votes that may be cast to elect directors of the corporation are held, directly or indirectly, whether through one or more subsidiaries or otherwise, otherwise than by way of security only, by or for the benefit of that person, and

(ii) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation;

(*b*) a corporation is controlled by Her Majesty in right of Canada or a province if

(i) the corporation is controlled by Her Majesty in the manner described in paragraph (*a*), or

(ii) in the case of a corporation without share capital, a majority of the directors of the corporation, other than *ex officio* directors, are appointed by

(A) the Governor in Council or the Lieutenant Governor in Council of the province, as the case may be, or

(B) a Minister of the government of Canada or the province, as the case may be; and

(*c*) a partnership is controlled by a person if the person holds an interest in the partnership that entitles the person to receive more than fifty per cent of the profits of the partnership or more than fifty per cent of its assets on dissolution.

R.S., 1985, c. C-34, s. 2; R.S., 1985, c. 19 (2nd Supp.), s. 20; 1992, c. 1, s. 145(F); 1995, c. 1, s. 62; 1999, c. 2, s. 1, c. 31, s. 44(F).

...

PART VIII
MATTERS REVIEWABLE BY TRIBUNAL

Restrictive Trade Practices

Refusal to Deal

Jurisdiction of Tribunal where refusal to deal

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(*a*) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(*b*) the person referred to in paragraph (*a*) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(*c*) the person referred to in paragraph (*a*) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(*d*) the product is in ample supply, and

(*e*) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other

persons who are able to obtain adequate supplies of the article in Canada.

When article is a separate product

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

Definition of "trade terms"

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Inferences

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.
R.S., 1985, c. C-34, s. 75; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 11.1.

...

General

Leave to make application under section 75 or 77

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.

Notice

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75 or 77 is sought.

Certification by Commissioner

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(*a*) is the subject of an inquiry by the Commissioner; or

(*b*) was the subject of an inquiry that has been discontinued because of a

settlement between the Commissioner and the person against whom the order under section 75 or 77 is sought.

Application discontinued

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(*a*) or (*b*) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75 or 77.

Notice by Tribunal

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

Representations

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

Granting leave to make application under section 75 or 77

(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75 or 77 must be made. The application must be made no more than one year after the practice that is the subject of the application has ceased.

Decision

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

Limitation

(10) The Commissioner may not make an application for an order under section 75, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7), if the person granted leave has already applied to the Tribunal under section 75 or 77.

Inferences

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

Inquiry by Commissioner

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

2002, c. 16, s. 12.

...

Rescission or variation of consent agreement or order

106. (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or 104.1 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

(*a*) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(*b*) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

Directly affected persons

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 14.

Consent agreement -- parties to a private action

106.1 (1) If a person granted leave under section 103.1 makes an application to the Tribunal for an order under section 75 or 77 and the terms of the order are agreed to by the person in respect of whom the order is sought and consistent with the provisions of this Act, a consent agreement may be filed with the Tribunal for registration.

Notice to Commissioner

(2) On filing the consent agreement with the Tribunal for registration, the parties shall serve a copy of it on the Commissioner without delay.

Publication

(3) The consent agreement shall be published without delay in the *Canada Gazette*.

Registration

(4) The consent agreement shall be registered 30 days after its publication unless a third party makes an application to the Tribunal before then to cancel the agreement or replace it with an order of the Tribunal.

Effect of registration

(5) Upon registration, the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

Commissioner may intervene

(6) On application by the Commissioner, the Tribunal may vary or rescind a registered consent agreement if it finds that the agreement has or is likely to have anti-competitive effects.

Notice

(7) The Commissioner must give notice of an application under subsection (6) to the parties to the consent agreement.

2002, c. 16, s. 14.

Competition Tribunal Act

R.S., 1985, c. 19 (2nd Supp.)

An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof

Short title

1. This Part may be cited as the *Competition Tribunal Act*.

Interpretation

Definitions

2. In this Part,

"judicial member" «*juge*»

"judicial member" means a member of the Tribunal appointed under paragraph 3(2)(*a*);

"lay member" «*autre membre*»

"lay member" means a member of the Tribunal appointed under paragraph 3(2)(*b*);

"Minister" «*ministre*»

"Minister" means the Minister of Industry;

"Tribunal" «*Tribunal*»

"Tribunal" means the Competition Tribunal established by subsection 3(1).
R.S., 1985, c. 19 (2nd Supp.), s. 2; 1992, c. 1, s. 145(F); 1995, c. 1, s. 62.

...

Court of record

9. (1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.

Proceedings

(2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

Interventions by persons affected

(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.

Summary dispositions

(4) On a motion from a party to an application made under Part VII.1 or VIII of the *Competition Act*, a judicial member may hear and determine the application in a summary way, in accordance with any rules on summary dispositions.

Decision

(5) The judicial member may dismiss the application in whole or in part if the member finds that there is no genuine basis for it. The member may allow the

application in whole or in part if satisfied that there is no genuine basis for the response to it.

R.S., 1985, c. 19 (2nd Supp.), s. 9; 1999, c. 2, s. 42; 2002, c. 16, s. 18.

Proceedings

Questions of law, fact, mixed law and fact

12. (1) In any proceedings before the Tribunal,

(*a*) questions of law shall be determined only by the judicial members sitting in those proceedings; and

(*b*) questions of fact or mixed law and fact shall be determined by all the members sitting in those proceedings.

Where there are differing opinions

(2) In any proceedings before the Tribunal,

(*a*) in the event of a difference of opinion among the members determining any question, the opinion of the majority shall prevail; and

(*b*) in the event of an equally divided opinion among the members determining any question, the presiding member may determine the question.

Where member unable to take part in judgment

(3) Where a member of the Tribunal is unable to take part in the giving of judgment in any proceedings or has died, the other members sitting in those proceedings may, whether or not they include a judicial member or a lay member, give judgment and, for that purpose, shall be deemed to constitute the Tribunal.