Competition Tribunal Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Air Canada*, 2003 Comp. Trib. 5
File no.: CT2001002
Registry document no.: 0135

IN THE MATTER of an application by the Commissioner of Competition under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER of the *Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service*, SOR/2000-324 made pursuant to subsection 78(2) of the *Competition Act;*

AND IN THE MATTER of certain practices of anti-competitive acts by Air Canada.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Air Canada
(respondent)

and

WestJet Airlines Ltd.
(intervenor)

Date of hearing of motion: 20030219
Member: Blais J. (presiding)
Date of reasons and order: 20030225
Reasons and order signed by: Blais J.

REASONS AND ORDER ON RESPONDENT'S MOTION TO READ INTO EVIDENCE EXCERPTS OF AN EXAMINATION FOR DISCOVERY TRANSCRIPT

[1] This is further to a motion brought by the respondent for an order allowing it to introduce, as its own evidence at trial, part of its examination for discovery of the intervenor's employee, Mr. Mark Hill.

I. BACKGROUND

[2] On July 13, 2001, Nadon J., as he then was, at the request of the respondent, issued the Order Arising from the Pre-Hearing Conference on July 11, 2001 (Discovery Issues), (the "Order") stating, at paragraph 9 that:

> The intervenor, WestJet, shall make a representative available to attend at an examination for discovery to answer, to the best of his or her knowledge, information and belief, any proper question relating to the following:
>
> (a) the story of the Hamilton-Moncton Route;
>
> (b) the issue of WestJet's own "avoidable costs"; and
>
> (c) WestJet's views about Air Canada's costs.

[3] It was pursuant to that Order that in July 2001, the respondent examined for discovery Mr. Hill.

[4] Counsel for the respondent has put together a document of about 10 pages of examination for discovery excerpts that she would like to file as an exhibit.

[5] Counsel for the respondent has informed the Competition Tribunal (the "Tribunal") that she sent an e-mail with an attachment to counsel for the intervenor, indicating that she proposed to introduce (read in) the above excerpts. However, counsel for the intervenor did not respond.

[6] Counsel for the applicant opposed the filing of this document on the basis that the *Federal Court Rules*, 1998, SOR/98-106, (the "FCR"), do not allow it.

II. ISSUE

[7] Is the respondent entitled to introduce, as its own evidence at trial, part of its examination for discovery of the intervenor's employee, Mr. Hill?

III. ANALYSIS

[8] Counsel for the applicant suggests that Rule 288 of the FCR allows a party to read in as evidence any part of its examination for discovery of an adverse party. However, it does not allow for the read in as evidence any part of its examination for discovery of a non-party; including, in this case, an intervenor.

[9] Rule 288 of the Rules states:

A party may introduce as its own evidence at trial any part of its examination for discovery of an adverse party or of a person examined on behalf of an adverse party, whether or not the adverse party or person has already testified.	Une partie peut, à l'instruction, présenter en preuve tout extrait des dépositions recueillies à l'interrogatoire préalable d'une partie adverse ou d'une personne interrogée pour le compte de celle-ci, que la partie adverse ou cette personne ait déjà témoigné ou non.

[10] Counsel for the applicant submits that Rule 288 applies to Tribunal proceedings pursuant to subsection 72(1) of the *Competition Tribunal Rules*, SOR/94-290, as amended, (the "Rules"), the so-called "gap rule". Subsection 72 (1) stipulates:

72(1) Where, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the FCR, C.R.C., 1978, c. 663, shall be followed, with such modifications as the circumstances require.	72(1) Les Règles de la Cour fédérale, C.R.C. (1978), c. 663, s'appliquent, avec les adaptations nécessaires, aux questions qui se posent au cours des procédures quant à la pratique ou la procédure à suivre dans les cas non prévus par les présentes règles.

[11] Counsel for the applicant also submits that, during cross-examination of Mr. C. Beddoe, C.E.O. of the intervenor and witness on its behalf, the respondent had the opportunity to present excerpts of the transcript of Mr. Hill's examination for discovery to; which the respondent partly did.

[12] Indeed, the respondent decided not to introduce the other excerpts of the transcript of the examination for discovery of Mr. Hill as evidence during the cross-examination of Mr. Beddoe. It was the position of counsel for the respondent that at the time:

> . . . we are entitled to read them in; and if we have to fight about that later, we will have plenty of time to fight about that later . . .
>
> transcript at 4:657 (3 December, 2002)

[13] I am clueless as to why counsel for the respondent decided not to introduce the other excerpts through Mr. Beddoe's cross-examination on December 2, 2002.

[14] Nevertheless, the respondent is now seeking to file the said excerpts.

[15] Counsel for the respondent vigorously submitted that a Tribunal proceeding is distinct in the sense that it is the Commissioner who brings the application in front of the Tribunal. In the case at bar, the initiator of the proceeding was the intervenor; it filed the complaint that led to this application.

[16] Counsel for the respondent further submitted that WestJet Airlines Ltd., being the complainant in the proceeding, is more than a simple intervenor.

[17] Counsel for the respondent also referred to the Order of Nadon J., cited above, which states that "The intervenor, WestJet, shall make a representative available to attend at an examination for discovery . . . ", pursuant to the FCR.

[18] The respondent had the possibility of having Mr. Hill testify as a witness, thereby being in a position to assess the content of his examination for discovery.

[19] It is not the Tribunal's duty to decide how parties should proceed, what witnesses they should present, and what evidence they should provide. However, in the case at bar and pursuant to the FCR, such decision must be made.

[20] In support of its arguments, counsel for the applicant filed three decisions, each of a different court. I will rely on one of them.

[21] In *Richter Gedeon Vegyészeti Gyar Rt v. Merck & Co. (C.A.)*, [1995] 3 F.C. 330, [1995] F.C.J. No. 1053, Chief Justice Isaac, as he then was, wrote at paragraph 35:

> In making their request, the appellants say that they wish to examine the eight assignors/inventors for two reasons; first, to obtain from them information to enable them to prepare the case they are required to meet and, secondly, to obtain statements for impeachment purposes in the event that any inventor is called as a witness for the respondent at trial. They rightly concede that subsection 494(9) [as am. by SOR/90-846, s. 21] of the Rules prevents them from using any evidence they obtain from these witnesses to prove a fact in issue at trial since the witnesses are not parties to the action. But this does not prevent its admissibility for credibility purposes where section 10 [as am. by S.C. 1994, c. 44, s. 86] of the Canada Evidence Act is engaged . . . [emphasis added]

[22] Subsection 494(9) has been replaced by Rule 288 of the FCR.

[23] Rule 288 is clear. Parts of an examination for discovery of an adverse party or of a person examined on behalf of an adverse party may be introduced as its own evidence at trial by a party.

[24] I have no hesitation in concluding that Mr. Hill, as a witness and an employee of the intervenor, is not included in the above description.

[25] Indeed, counsel for the respondent had the opportunity of presenting the excerpts to Mr. Beddoe, testifying on behalf of the intervenor. She also had the possibility of calling Mr. Hill as a witness and introducing the excerpts during an examination-in-chief.

[26] The argument of fairness submitted by counsel for the respondent should be rejected on the basis that, while it would be fair for the respondent to file the excerpts, it could be prejudicial to both the applicant and the intervenor, who would not be able to cross-examine the witness or respond adequately to the filed document.

[27] During the hearing, the Tribunal heard different statements by witnesses that are the respondent's employees. Those employees had the chance to sit in the witness stand, and the opportunity to respond to questions and to be confronted with their examination for discovery statements. All parties had the opportunity to examine and cross-examine those witnesses regarding their statements. Such is the fair and legal way to proceed.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[28] The objection made by counsel for the applicant is sustained and the present motion is dismissed.

DATED at Ottawa, this 25th day of February, 2003.

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

(s) Pierre Blais

APPEARANCES:

For the applicant:

The Commissioner of Competition

Donald B. Houston
W. Michael G. Osborne
Jeanne L. Pratt

For the respondent:

Air Canada

Katherine L. Kay
Eliot N. Kolers
Danielle K. Royal