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Commissioner's Temporary Order Power Struck

Air Canada v. Canada (Attorney General) [2003] Q.J. No. 21 (C.A.)

After Air Canada's takeover of Canadian Airlines in late 1999, Parliament amended the *Competition Act* to give the Commissioner the power to make temporary orders against airlines suspected of abuse of dominant position. In January 2003, the Quebec Court of Appeal struck down this power.

Section 104.1 creates the temporary order power. It allows the Commissioner to order a domestic airline not to do anything that could, in the Commissioner's opinion, constitute an anti-competitive act, or to take steps that the Commissioner considers necessary to prevent injury to competition or harm to another person. Before making such an order, the Commissioner must have commenced an inquiry to determine whether the airline has engaged in abuse of dominant position (s. 79). There is also a form of irreparable harm requirement: the Commissioner must consider that there will be harm either to competition or to a competitor that cannot adequately be remedied by the Tribunal.

The Commissioner does not have to give notice to or receive representations from the target of a temporary order. However, the target can appeal the order to the Tribunal.

The Commissioner issued a temporary order against Air Canada in October 2000. Air Canada challenged the temporary order in the Tribunal and lost. Air Canada also challenged the temporary order power before the Quebec Superior Court. It lost, and appealed.

Air Canada raised two arguments on appeal: first, that s. 104.1 infringes s. 2(e) of the *Canadian Bill of Rights*; second, that s. 104.1 constitutes an unconstitutional grant of injunctive power to the Commissioner.

Bill of Rights

The Quebec Court of Appeal held that s. 104.1 infringes s. 2(e) of the *Bill of Rights*. Since in enacting s. 104.1 Parliament chose not to declare (as it could have) that s. 104.1 operates notwithstanding s. 2(e), s. 104.1 is inoperative. Section 2(e) protects a person's right to "a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations".

The court concluded that the nature of the Commissioner's decision in making a temporary order and its impact on the target require a high degree of procedural fairness. The following factors led the court to this conclusion:

- A temporary order is in the nature of an interlocutory injunction
- Breach of a temporary order attracts criminal liability, since a temporary order has the force of an order of the Tribunal
- Although strictly speaking there is no *lis* between parties when a temporary order is made, the order affects many people (the target, its competitors, others) and involves the opposition of conflicting interests
- Temporary orders can cause irreparable harm to a target
- The fact that the order is temporary and not final does not mean that there is no duty of fairness owed
- The Commissioner applies principles of substantive law to individual cases in making a temporary order; he does not decide broad matters of social or economic policy

The court found that s. 104.1 does not provide the required procedural fairness. Section 104.1 results in the Commissioner having a multiplicity of roles: in addition to his usual roles of investigator and applicant before the Tribunal, s. 104.1 assigns him the role of receiving a complaint, making a decision whether to make a temporary order, and then, having made the order, the role of respondent in any appeal to the Tribunal. This confusion of roles offends the *nemo iudex in sua causa* principle, the court held. Section 104.1 explicitly denies the target a hearing before a temporary order is issued, thus offending the *audi alteram partem* principle, the court held.

The court then considered whether this infringement of s. 2(e) of the Bill of Rights was justifiable. The court held that it was not: the necessity of according such an exorbitant power to an investigator had not been demonstrated. Nor had it been demonstrated that the Competition Tribunal could not exercise the temporary order power instead. The court noted that Parliament gave the Tribunal a very similar interim order power in enacting s. 103.3.

Grant of injunctive power

Air Canada argued that s. 104.1 gave the Commissioner the power to issue injunctions, a power reserved to superior courts of inherent jurisdiction, thus breaching s. 96 of the *Constitution Act, 1867*.

The court characterized the power granted by s. 104.1 as a power to make orders relating to competition or the economy. In this way it is similar to the powers of the Competition Tribunal itself. The power exercised by the Commissioner under s. 104.1 was not within the exclusive jurisdiction of superior courts in 1867; consequently, s. 104.1 does not infringe s. 96 of the *Constitution Act, 1867*.