Canadian Airlines International Limited and **Air Canada** (*Appellants*)

v.

Canadian Human Rights Commission, Canadian Union of Public Employees (Airline Division) and **Public Service Alliance of Canada** (*Respondents*)

INDEXED AS: CANADIAN AIRLINES INTERNATIONAL LTD. v. CANADA (HUMAN RIGHTS COMMISSION) (F.C.A.)

Federal Court of Appeal, Richard C.J., Létourneau and Noël JJ.A.—Montréal, February 15, 2000.

* Editor's Note: Although this judgment was not selected for full-text publication after it was rendered on February 15, 2000, because it is frequently cited by both counsel and the Federal Courts, it is now being published in the *Federal Courts Reports* in order to facilitate access to the profession.

Practice — Parties — Intervention — Appeal from interlocutory decision of Federal Court Trial Division granting Public Service Alliance of Canada (PSAC) leave to intervene in judicial review applications pertaining to Canadian Human Rights Tribunal decision — Motions Judge providing no reasons for order granting leave — Relevant factors to consider in determining whether to grant intervention set out herein — PSAC failing to demonstrate how expertise would assist in determination of issues placed before Court by parties —PSAC's interest "jurisprudential" in nature — Such interest alone not justifying application to intervene — Without benefit of motion Judge's reasoning, not possible to see how intervention could have been granted without falling into error — Appeal allowed.

STATUTES AND REGULATIONS CITED

Canadian Human Rights Act, R.S.C., 1985, c. H-6, s. 11.
Federal Court Rules, 1998, SOR/98-106, r. 109.

CASES CITED

REFERRED TO:

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General), [1990] 1 F.C. 74, (1989), 41 Admin. L.R. 102, 29 F.T.R. 267 (T.D.); *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 84, (1989), 41 Admin. L.R. 155, 29 F.T.R. 272 (T.D.); *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, (1989), 45 C.R.R. 382, 103 N.R. 391 (C.A.); *R. v. Bolton*, [1976] 1 F.C. 252 (C.A.); *Tioxide Canada Inc. v. Canada*, [1995] 1 C.T.C. 285, (1994), 94 DTC 6655, 174 N.R. 212 (F.C.A.).

APPEAL from an interlocutory decision of the Federal Court—Trial Division granting the Public Service Alliance of Canada leave to intervene in judicial review applications pertaining to a decision

of the Canadian Human Rights Tribunal (*Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [1998] C.H.R.D. No. 8 (QL)). Appeal allowed.

APPEARANCES

Peter M. Blaikie for appellants.
Andrew J. Raven for respondent Public Service Alliance of Canada.

SOLICITORS OF RECORD

Heenan Blaikie, Montréal, for appellants.
Raven, Allen, Cameron & Ballantyne, Ottawa, for respondent Public Service Alliance of Canada.

The following are the reasons for judgment rendered in English by

[1] NOËL J.A.: This is an appeal from an interlocutory decision of the Trial Division granting the Public Service Alliance of Canada (PSAC) leave to intervene in the judicial review applications brought by the Canadian Human Rights Commission (the Commission) and the Canadian Union of Public Employees (Airline Division) (CUPE). These judicial review applications pertain to a decision of the Canadian Human Rights Tribunal (the Tribunal) [*Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [1998] C.H.R.D. No. 8 (QL)] rejecting a complaint by CUPE, that the appellants paid discriminatory wages to their flight attendants, pilots and technical operations personnel.

[2] By this decision, the Tribunal held *inter alia* that the above-described employees of Air Canada and Canadian Airlines International Limited (Canadian) work in separate "establishments" for the purposes of section 11 of the *Canadian Human Rights Act* [R.S.C., 1985, c. H-6] since they are subject to different wage and personnel policies.

[3] PSAC did not seek to intervene in the proceedings before the Tribunal.

[4] The Tribunal's decision was released on December 15, 1998. The Commission and CUPE filed judicial review applications on January 15, 1999, and PSAC's application for leave to intervene was filed on May 6, 1999. The sole issue with respect to which leave to intervene was sought is whether the pilots, flight attendants and technical operations personnel employed by Air Canada and Canadian respectively are in the same "establishment" for the purposes of section 11 of the Act.

[5] The order allowing PSAC's intervention was granted on terms but without reasons. The order reads:

The Public Service Alliance of Canada (the Alliance) is granted leave to intervene on the following basis:

(a) the Alliance shall be served with all materials of the other parties;

(b) the Alliance may file its own memorandum of fact and law by June 14, 1999, being within 14 days of the date for serving and filing the Respondent Canadian Airlines International Limited and the Respondent Air Canada's memoranda of fact and law as set out in the order of Mr. Justice Lemieux, dated March 9, 1999;

(c) the Applicant Canadian Union of Public Employees (Airline Division) and the Applicant Canadian Human Rights Commission and the Respondents Canadian Airlines International Limited and Air Canada may file a reply to the Alliance's memorandum of fact and law by June 28, 1999, being 14 days from the date of service of the Alliance's memorandum of fact and law;

(d) the parties' right to file a requisition for trial shall not be delayed as a result of the Alliance's intervention in this proceeding;

(e) the Alliance shall be consulted on hearing dates for the hearing of this matter;

(f) the Alliance shall have the right to make oral submissions before the Court.

[6] In order to succeed, the appellants must demonstrate that the motions Judge misapprehended the facts or committed an error of principle in granting the intervention. An appellate court will not disturb a discretionary order of a motions judge simply because it might have exercised its discretion differently.

[7] In this respect, counsel for PSAC correctly points out that the fact that the motions Judge did not provide reasons for her order is no indication that she failed to have regard to the relevant considerations. It means however that this Court does not have the benefit of her reasoning and hence no deference can be given to the thought process which led her to exercise her discretion the way she did.

[8] It is fair to assume that in order to grant the intervention the motions Judge would have considered the following factors which were advanced by both the appellants and PSAC as being relevant to her decision:[1]

(1) Is the proposed intervener directly affected by the outcome?

(2) Does there exist a justiciable issue and a veritable public interest?

(3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(4) Is the position of the proposed intervener adequately defended by one of the parties to the case?

(5) Are the interests of justice better served by the intervention of the proposed third party?

(6) Can the Court hear and decide the case on its merits without the proposed intervener?

[9] She also must have had in mind rule 109 of the *Federal Court Rules, 1998* [SOR/98-106] and specifically subsection (2) thereof which required PSAC to show in the application before her how the proposed intervention "will assist the determination of a factual or legal issue related to the proceeding."

[10] Accepting that PSAC has acquired an expertise in the area of pay equity, the record reveals that:

1. PSAC represents no one employed by either of the appellant airlines;

2. the Tribunal's decision makes no reference to any litigation in which PSAC was or is engaged;

3. the grounds on which PSAC has been granted leave to intervene are precisely those which both the Commission and CUPE intend to address;

4. nothing in the materials filed by PSAC indicates that it will put or place before the Court any case law, authorities or viewpoint which the Commission or CUPE are unable or unwilling to present.

[11] It seems clear that at its highest PSAC's interest is "jurisprudential" in nature; it is concerned that the decision of the Tribunal, if allowed to stand, may have repercussions on litigation involving pay equity issues in the future. It is well established that this kind of interest alone cannot justify an application to intervene.[2]

[12] Beyond asserting its expertise in the area of pay equity, it was incumbent upon PSAC to show in its application for leave what it would bring to the debate over and beyond what was already available to the Court through the parties. Specifically, it had to demonstrate how its expertise would be of assistance in the determination of the issues placed before the Court by the parties. This has not been done. Without the benefit of the motion Judge's reasoning, we can see no basis on which she could have granted the intervention without falling into error.

[13] The appeal will be allowed, the order of the motions Judge granting leave to intervene will be set aside, PSAC's application for leave to intervene will be dismissed and its memorandum of fact and law filed on June 14, 1999, will be removed from the record. The appellants will be entitled to their costs on this appeal.

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[1] *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 (T.D.), at pp. 79–83; *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 84 (T.D.), at p. 88; *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90 (C.A.).

[2] See *R. v. Bolton*, [1976] 1 F.C. 352 (C.A.) (*per* Jackett C.J.); *Tioxide Canada Inc. v. Canada*, [1995] 1 C.T.C. 285 (F.C.A.) (*per* Hugessen J.A.).