Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Air Canada*, 2012 Comp. Trib. 20
File No.: CT-2011-004
Registry Document No.: 164

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

AND IN THE MATTER OF the proposed transborder joint venture between Air Canada and United Continental Holdings, Inc.;

AND IN THE MATTER OF the "Marketing Cooperation Agreement" between Air Canada and United Air Lines, Inc.;

AND IN THE MATTER OF the "Alliance Expansion Agreement" between Air Canada and United Air Lines, Inc.;

AND IN THE MATTER OF the "Air Canada/Continental Alliance Agreement" between Air Canada and Continental Airlines Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for one or more Orders pursuant to sections 90.1 and 92 of the *Competition Act*;

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Air Canada, United Continental Holdings, Inc., United Air Lines, Inc., and Continental Airlines Inc.
(respondents)

and

WestJet (an Alberta Partnership)
(intervenor)

Date of hearing: 20120822
Before Judicial Member: Rennie J. (Chairperson)
Date of reasons and order: September 14, 2012
Reasons and order signed by: Mr. Justice D. Rennie (Chairperson)

REASONS FOR ORDER AND ORDER REGARDING SCOPE OF DISCOVERY TO BE PROVIDED BY THE RESPONDENTS

[1] The Commissioner of Competition has brought a motion for an order compelling the Respondents to answer outstanding undertakings, refusals and questions taken under advisement during examinations for discovery. The Commissioner also sought an order striking the efficiencies defences set forth in the responses. For the reasons that follow, the motion is granted in part.

I. ISSUES

[2] The first issue raised by this motion is whether information sought by the Commissioner with respect to two documents, which were provided to the Commissioner by the Respondents on June 9, 2011, and which describe efficiencies allegedly associated with the contested transborder joint venture, is privileged.

[3] The second issue is whether certain questions asked by counsel for the Commissioner during her examinations for discovery were improperly answered or improperly refused by the Respondents. The final issue raised by this motion is whether the efficiencies defences put forward by the Respondents in their responses should be struck because of an alleged breach of the Tribunal's Scheduling Order of March 6, 2012, or whether changes should be made to the timelines set out in that order.

II. FACTS

[4] On April 29, 2011, counsel for Air Canada wrote, by e-mail, to counsel for the Commissioner requesting to meet with the Competition Bureau to discuss the transborder joint venture between Air Canada and United Continental Holdings, Inc. In that e-mail, it proposed that the meetings would be "without prejudice discussions".

[5] Counsel to the Commissioner of Competition explicitly rejected any without prejudice meetings in an e-mail dated May 4, 2011. This response was sent to counsel for Air Canada and to counsel for United Continental Holdings, Inc., United Air Lines, Inc., and Continental Airlines Inc. (collectively, "UCH"):

> To the extent the parties wish to make quantifiable efficiencies or any submissions that relate to the transborder JV and fit within the context of our legislation and jurisprudence, we would appreciate receiving any such submissions prior to the 25th, so that we may begin to digest such submissions prior to the meeting. As has been indicated to you on several occasions, to the extent the parties would like the Bureau to consider any information as part of its substantive review, the Bureau needs to be able to rely on that information and will not consider information provided to it on a without prejudice basis.
>
> [emphasis added]

[6] There was no mention in subsequent correspondence from counsel for the Respondents about the above position taken by the Commissioner.

[7] On June 9, 2011, the Respondents disclosed to the Commissioner a letter summarizing cost efficiencies through their counsel as well as an efficiencies report prepared by Compass Lexecon (collectively, the "Efficiencies Documents"). The Efficiencies Documents described the efficiencies which the Respondents expected to arise from the proposed transborder joint venture. Neither the e-mail to which the Efficiencies Documents were attached nor the letter signed by counsel were marked "without prejudice". A "without prejudice" mention was only found in uncharacteristically small print in a less than predominant place on the front page of the Lexecon efficiencies report.

[8] The parties met on June 9, 2011, and counsel for the Commissioner has acknowledged that the meeting took place, in part, to discuss settlement.

[9] On June 27, 2011, the Commissioner filed a notice of application pursuant to sections 90.1 and 92 of the *Competition Act*, R.S.C. 1985, c. C-34, challenging the proposed transborder joint venture as well as agreements entered into by the Respondents. A Scheduling Order was issued on March 6, 2012.

[10] The Efficiencies Documents were included in the affidavit of documents that UCH provided to the Commissioner. On two subsequent occasions, documents which had been inadvertently produced were identified by UCH. The Efficiencies Documents were never listed amongst the inadvertently produced documents.

III. ANALYSIS

Issue 1: Privilege

[11] At the conclusion of the examinations for discovery, counsel for the Commissioner tabled a number of questions, in writing, arising from the Efficiencies Documents. These include:

- Provide the Original Schedule and the Optimized Schedule;
- Provide a detailed description of the methodology used to determine whether a flight in the Original Schedule could be consolidated. If a computer program was used to determine this consolidation, provide a copy of the computer program and a copy of the algorithm that demonstrates the business logic applied in the computer systems […];
- Provide all records relied on to determine and quantify consumer preferences for departure times in formulating and analyzing each of the Original and Optimized Schedules; and
- Provide all cost elements and their corresponding unit costs, all calculations, all models (in native format) and a detailed description of all methodologies used to compute the cost savings for each Cost Category for each of the Original and Optimized Schedules.

[12] The Respondents submit that the information sought by the Commissioner with respect to the Efficiencies Documents is protected by litigation, work product and settlement privilege.

[13] I find that the Efficiencies Documents themselves are not privileged. The Respondents voluntarily provided the Efficiencies Documents to the Commissioner and, given the circumstances of this case, the Respondents are precluded from subsequently invoking litigation or work product privilege (see e.g. Robert Hubbard, Susan Magotiaux & Suzanne M. Duncan, *The Law of Privilege in Canada*, loose-leaf, (Aurora, Ont.: Canada Law Book, 2006), at p. 12-3 and *Browne (Litigation guardian of) v. Lavery*, 58 O.R. (3d) 49, at para 17).

[14] The evidence adduced also establishes that any settlement privilege with respect to the Efficiencies Documents, had it existed, has been waived by all Respondents. The Commissioner explicitly rejected the possibility of accepting information on a without prejudice basis. The Respondents did not object to this position and the meeting was held without condition. While there was some hearsay affidavit evidence from counsel for Air Canada as to discussions between the Bureau and counsel, it fell far short of establishing that the Commissioner had resiled from her position and counsel, rightly, did not press any argument based on this evidence.

[15] Absent evidence showing that an explicit agreement had been entered into by the Respondents and the Commissioner with respect to this matter, I conclude that the Respondents waived any privilege that may otherwise have existed in respect of over the Efficiencies Documents; *Director of Investigation and Research v. Washington* (1996), 70 C.P.R. (3d) 324. As I find that both Air Canada and UCH have waived privilege, it is not necessary to address Air Canada's submissions with respect to common interest privilege.

[16] Counsel for the Respondents submit that the Efficiencies Documents should be distinguished from the expert work product underlying those documents and argue that, by seeking to obtain information about the Efficiencies Documents, the Commissioner is effectively seeking discovery of the Respondents' experts.

[17] In the circumstances of this case, I find that the Respondents properly refused to answer the Commissioner's subsidiary questions about the Efficiencies Documents.

[18] The importance of litigation privilege has been recognized by the case law. In order to achieve its purpose of ensuring the efficacy of the adversarial process, parties to litigation must be left to prepare their positions including those involving the preparation of expert opinions "without adversarial interference and without fear of premature disclosure" (*Blank v. Canada (Minister of Justice)*, 2006 SCC 39, at para 27).

[19] There is no examination of an expert prior to a hearing under the *Federal Courts Rules*, SOR/98-106, upon which I rely in accordance with Rule 34 of the *Competition Tribunal Rules*, SOR/2008-141 (see Rule 238 of the *Federal Courts Rules* and *Canadian Council of Professional Engineers v. Memorial University of Newfoundland* (1998), 159 F.T.R. 55). The expert report is a work in progress and, in this case, the Respondents have, under the Scheduling Order of March 6, 2012, until October 12, 2012, to serve their expert reports.

[20] The case law has recognized that litigation privilege, in the case of experts, ceases in two circumstances: (i) when deliberately waived and (ii) when the expert testifies. However, Hubbard

notes that the question of whether an expert must produce underlying working papers, and, if so when, is frequently litigated (*The Law of Privilege in Canada*, at p. 12-64):

> The issue of disclosure of expert reports and data supporting the reports is one of the most litigated topics in the area of litigation privilege. The issue is often whether production of the expert report (as is usually required by the rules of court) or production of the expert at trial to testify means that privilege over the other material used to prepare the reports or the testimony has been waived. The timing of the requirement is also frequently an issue, as some cases require disclosure only if the expert is called at trial, while others require disclosure of the underlying information once the report is released (which usually means the expert is to be called at trial, but not always).

[21] In my view, these questions are best left to the presiding judicial member to determine.

[22] In this case, considering the principles of fairness and consistency, the relevant legislation and the Tribunal's Scheduling Order, I find that the Respondents do not need to answer the Commissioner's 22 questions which arise from the Efficiencies Documents at this time. To order otherwise would, in effect, grant the Commissioner pre-hearing examination of an expert. While the *Competition Tribunal Rules* and the *Federal Courts Rules* require comprehensive and continuous pre-hearing disclosure, they do not extend to the disclosure of an expert's work in progress unless waived.

Issue 2: Questions improperly answered or refused

[23] The first category of disputed questions concerns data and documents relating to a 17-year period, from January 1, 1995, to May 31, 2012, (the "Request Period") and/or so-called "Request Routes", which include any indirect route that begins at a Canadian airport, includes a transborder segment, and ends at a non-Canadian airport. The determination of whether a particular question is permissible is a fact based inquiry (see *Canada v. Lehigh Cement Ltd.*, 2011 FCA 120, at para 25).

[24] The Respondents submit that answering these questions would impose a massive and disproportionate burden. Affidavit evidence filed on behalf of Air Canada states that "re-opening the process to accommodate the Commissioner's request would require a substantial amount of additional document collection and review from additional "custodians" at Air Canada." No further mention about the additional work required is found in this affidavit or the affidavit filed on behalf of UCH.

[25] Having examined the questions, I find that nine questions in this category need not be answered because they are overbroad in scope in that they require extensive information, over a 17-year period, for an indeterminate number of routes. They are as follows:

- AC A-28;
- AC A-48 / UCH A-WI-1;
- AC A-50 / UCH A-WI-3;
- AC A-51;
- AC A-52 / UCH A-WI-5;
- AC A-76 / UCH A-WI-29;
- AC A-88 / UCH A-WI-41;
- AC A-91 /UCH A-WI-44; and
- AC R-10

[26] Question AC A-54, which asks Air Canada to "[p]rovide all records prepared during the Request Period for the purposes of evaluating, analyzing, forecasting or modeling demand for Canada-United States transborder air passenger services", should be answered. While I accept Air Canada's position regarding the burden, I am not satisfied that this is a disproportionate burden given the relevance of the information to the matters in issue.

[27] The second category of disputed questions includes questions that the Respondents have refused to answer on the grounds of relevance and proportionality. I find that the questions posed by the Commissioner relating to these topics are relevant because there is a reasonable likelihood that they might elicit information which may directly or indirectly enable the Commissioner to advance her case or to damage the case of her adversary, or which fairly might lead to a train of inquiry that may either advance the Commissioner's case or damage the case of her adversary (see *Canada v. Lehigh Cement Ltd.*, 2011 FCA 120, at para 34). Further, the questions with respect to these topics were proper and would not place undue hardship on the Respondents.

- Information about markets as well as UCH's records that either support or contradict the assertion that indirect transborder routes are substitutes for direct transborder routes (Questions AC A-17; R-17; R-14; and UCH A-42)
- Information about the impact of Continental Airlines, Inc.'s full integration as a Star Alliance member on fares (Question AC A-85 (i))
- Only information about the amount of money that Air Canada is spending on Pearson and that is attributable to Pearson as a hub and that is attributable to the transborder joint venture (Question AC A-33; Question A-32 does not need to be answered)
- Information about Air Canada's past pricing strategies (Question AC R-4) and documents on the route pricing information (Question AC R-2)
- Information about the Respondents' cooperation on Canada-US transborder direct routes (Question AC A-53)
- Statistical information relating to A++ (Questions AC A-30 and A-31)
- Information about Air Canada's pay rates and benefits for Flight Crews/Cockpit and Cabin Crews/Cabin, as well as seniority distribution and collective agreements (Questions AC A-65; A-66; A-67; A-68; A-69; A-70; and A-72)

- Information about specific Air Canada's projections with respect to the implementation of the proposed transborder joint venture (Questions AC A-92 and A-93)

[28] Air Canada does not need to respond to Question R-15, which asks it to "advise as of March 18, 2009 whether it was more economically rational for Air Canada to compete with United or to cooperate with United in relation to yield", and Question A-16, as these questions invite an opinion.

[29] Question AC A-85 (ii) does not need to be answered as the Commissioner has failed to establish the relevance of this question which relates to an acquisition that occurred more than a decade ago.

[30] Question U-32, which asks Air Canada to "provide the market share numbers which Air Canada says are right", need not be answered as it invites an opinion. If framed properly, Air Canada is required to produce information in its possession reflecting its understanding of its market share at a given point in time.

[31] Question R-6, in which the Commissioner seeks access to the computer program "Profit AB", does not need to be answered. Counsel for Air Canada explained that the program is no longer in use.

[32] I agree with counsel for the Commissioner that Questions U-31, A-13, A-27, U-42, A-89 and A-90 were partially answered and that further details are required. As Air Canada did not formulate an objection to Question A-49, that question shall also be answered.

[33] Finally, I agree with counsel for UCH that Question A-19 ("Provide information on record of profit and loss of each individual flight as it exists in the normal monthly format going back to 1995") was properly answered and that further details are not required given the breadth of the question.

Issue 3: Appropriate Remedy

[34] The Commissioner's request for an order striking the efficiencies defences set forth in the responses is denied. The onus on the party moving to strike a defence is a heavy one and the Commissioner has failed to establish a clear link between the relief sought and the Respondents' failure to disclose specific information (see *Apotex Inc. v. Syntex Pharmaceuticals Int. Ltd.*, 2005 FC 1310, aff'd 2006 FCA 60). Granting such relief in the circumstances would be, as counsel for the Respondents submitted, "draconian" and disproportionate to the prejudice arising from the delay caused by the Respondents in answering the questions.

[35] While I agree that the Respondents could have provided answers to certain outstanding questions within a more acceptable time frame, in the circumstances of this case, I am unwilling to conclude that there was a breach of the Scheduling Order by the Respondents. The Scheduling Order explicitly contemplated the possibility of the filing of motions with respect to the answers to undertakings and refusals and, given the particular facts of this case, the present developments can be properly characterized as being part of the normal evolution of the case.

[36] The Respondents are to provide any answers on or before September 21, 2012.

[37] An amended Scheduling Order, which will set out amended dates for the service and filing of documents in accordance with the Direction issued on September 7, 2012, will be issued.

NOW THEREFORE, FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[38] The Respondent Air Canada shall answer Questions A-17, R-17, A-85(i), R-14, A-33, R-4, U-42, R-2, A-53, A-30, A-31, A-49, A-65, A-66, A-67, A-68, A-69, A-70, A-72, A-92, A-93, U-31, A-13, A-27, A-89 and A-90 on or before September 21, 2012.

[39] With respect to Question U-32, the Respondent Air Canada shall produce information in its possession reflecting its understanding of its market share at a given point in time.

[40] The Respondents United Continental Holdings, Inc., United Air Lines, Inc., and Continental Airlines Inc. shall answer question A-42 on or before September 21, 2012.

[41] As success on this motion has been divided, costs shall be in the cause.

DATED at Montreal, this 14th day of September, 2012.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

APPEARANCES:

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For the Respondents:

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