Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Air Canada,* 2012 Comp. Trib. 21
File No.: CT-2011-004
Registry Document No.: 165

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: 20120907
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 COMMISSIONER OF COMPETITION

[1] The Respondents have brought a joint motion for an order compelling the Commissioner of Competition to answer outstanding undertakings, refusals and questions taken under advisement. They also seek an order modifying the Scheduling Order of March 6, 2012. For the reasons that follow, an order will issue compelling the Commissioner to answer one of the 21 disputed questions.

I. ISSUES

[2] The first issue raised by the motion is the extent to which information disclosed to the Competition Bureau by Canadian or foreign government agencies in the course of the Bureau's investigation is subject to public interest privilege. The second issue raised by this motion is whether information collected by the Bureau during its investigation from other third parties, including WestJet, an intervenor in these proceedings, is similarly protected from disclosure during discoveries. The last issue to be decided is whether certain questions, regarding efficiencies and competition, asked by counsel for the Respondents during the examinations for discovery were improperly answered or improperly refused by the Commissioner.

II. ANALYSIS

Issue 1: Public Interest Privilege and Government/Regulatory Bodies

[3] The Federal Court of Appeal and the Competition Tribunal have recognized the existence of a class of documents, created or obtained during the course of a Competition Bureau investigation, protected by public interest privilege, and which not need to be disclosed during the discovery phase (see, e.g., *Director of Investigation and Research v. D & B. Companies of Canada Ltd.* (1994), 58 C.P.R. (3d) 353, leave to appeal to SCC refused, 24423 (November 21, 1994), and *Commissioner of Competition v. United Grain Growers Ltd.*, 2002 Comp. Trib. 35). The Tribunal, in its earlier decisions, examined the concept of public interest privilege in light of information collected from complainants and market participants during the Bureau's investigation. In subsequent cases, the Tribunal held that information collected from government bodies was similarly protected from disclosure during discoveries, as it was the disclosure of that information that was in issue (see *United Grain Growers*).

[4] The Respondents submit that the details of any conversations the Bureau may have had with Transport Canada, the US Department of Transportation, the US Department of Justice, and any other Canadian or foreign regulators should be disclosed because the policy rationale underlying the privilege is absent. Put more precisely, unlike competitors, distributors and suppliers who may be vulnerable to reprisals if it became known that they had spoken to the Bureau, such was not the case for regulatory authorities.

[5] I agree with J. Lemieux in *United Grain Growers* that limiting the protection granted by public interest privilege to only information collected from those who fear reprisal would draw too narrowly the rationale for the privilege. The rationale for the privilege also includes protecting from information disclosure, subject to the constraints of use at the hearing, so as to encourage information providers to be forthcoming and candid in their discussions with the Bureau (see *United Grain Growers*, at para 60). The rationale which underlies the privilege lies,

in part, on the importance attached to the relationship between the parties (see Wigmore's four conditions necessary to the establishment of a privilege against the disclosure of communications: "(1) The communications must originate in a confidence that they will not be disclosed. (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties. (3) The relation must be one which in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation", as cited in *Slavutych v. Baker et al.*, [1976] 1 S.C.R. 254, at 260). To accept the Respondents' argument would have the privilege extend only so far as the Tribunal determined a party could be intimidated or hurt. This is a novel proposition to which I do not accede.

[6] The Respondents are, however, entitled to obtain from the Commissioner, prior to examinations for discovery, a complete summary aggregating the information, both favourable and unfavourable to the Commissioner's position, obtained from third parties (see, e.g., *Director of Investigation and Research v. Canadian Pacific Ltd*. (1997), 78 C.P.R. (3d) 421 and *Commissioner of Competition v. Toronto Real Estate Board*, 2012 Comp. Trib. 8). In this case, the Respondents received a Summary of Third Party Information and an Updated Summary of Third Party Information (collectively, the "Summaries").

[7] While, in certain limited circumstances, the public interest privilege may be over-ridden by a more compelling competing interest, I find that the Respondents have failed to meet the high standard that exists in that regard (see *Commissioner of Competition v. Sears Canada Inc.*, 2003 Comp. Trib. 19 and *United Grain Growers*, at para 51). Their argument is essentially based on the alleged inadequacy of the Summaries which they describe as "wholly deficient".

[8] It is my view that it is the alleged inadequacy of the Commissioner's Summaries that lies at the heart of the Respondents' motion, but such deficiencies are not sufficient to outweigh any public interest in the protection of the information sought. The question of whether the public interest privilege can be over-ridden is, in this case, academic, as the Respondents did not establish, in the record or in argument, failures, inadequacies, or lacunae, which would call into question the adequacy of the Summaries. Moreover, if the Respondents felt that the Summaries were improperly shielding information that would otherwise be disclosed, they were free to request that the Tribunal arrange for a judicial member not sitting on this case to review the documents and the Summaries to ensure the adequacy and accuracy of the latter. No such request was made.

[9] In these circumstances, the questions identified as "Question refused on Grounds of Public Interest Privilege/Section 29 related to Regulatory Bodies" in Schedule B, as provided by counsel for the Respondents at the hearing of the joint motion, do not require further action by the Commissioner.

Issue 2: Public Interest Privilege and WestJet and others

[10] WestJet was granted leave to intervene on October 20, 2011, and, after serving an affidavit of documents on the parties, was examined for discovery in accordance with the Tribunal Order granting leave (*The Commissioner of Competition v. Air Canada*, 2011 Comp. Trib. 21). WestJet produced to the Respondents all the documents it had provided to the Bureau during the Bureau's inquiry and the Respondents' joint motion therefore proceeded only against the Commissioner.

[11] The Respondents, in their joint motion, seek an order compelling the Commissioner to produce all the interview notes or other notes reflecting interviews or other communications between WestJet and the Bureau as well as a court file under seal. Given the specific circumstances in this case and, in particular, the amount of information already disclosed to the Respondents with respect to WestJet, the Respondents have failed to establish that the public interest privilege in this case is over-ridden by a more compelling competing interest. Questions A-16 and A-22 do not require further action.

[12] Any concerns the Respondents may have with respect to the adequacy of the Commissioner's Summaries regarding WestJet, as was emphasized by counsel for the Respondents at the hearing of the joint motion, should be addressed by way of a request that the Tribunal arrange for a judicial member not sitting on this case to review the documents and Summaries.

[13] Question A-14, which asks the Commissioner to "[a]dvise of when the Bureau first spoke with WestJet about this matter, and whether the initial discussion was at the initiation of the Bureau or WestJet", relates to the manner in which the Commissioner has conducted her investigation and the Respondents have failed to establish its relevance (see *Director of Investigation and Research v. Southam Inc.* (1991), 38 C.P.R. (3d) 68, at 73).

[14] The information sought in Question U-8 ("Identify the information the Bureau says it cannot disclose about Porter [and p]roduce all information obtained from Porter"), Question R-40-42 ("Produce documents or communications in any form provided by any market contacts"), and Question R-114-115 ("Produce the letters sent by members of the public") is subject to public interest privilege and is protected from disclosure during the course of discoveries. The Commissioner stated that all relevant information, including any information provided by Porter, had been summarized in the Summaries. I appreciate that evidence of inadequacy or omission may be difficult to obtain to impugn the Summaries; that said the Respondents did not point to any type of evidence, which, given the nature of the case and issues, one would logically expect to be present. The comparison with the WestJet summary suggested differences in the degree of disclosure, but did not establish that the differences were material. Again, the Respondents were free to request that a judicial member review the adequacy and accuracy of the Summaries.

[15] With respect to Question A-33, which seeks information about the Bureau's review of the A++ merger, I conclude that the Commissioner should answer this question. It is relevant to this proceeding and providing a summary, as was done with respect to other relevant information

collected by the Bureau in the course of its investigation, would not place the public interest privilege in jeopardy.

Issue 3: Other Questions

[16] Question relating to the position which the Commissioner proposes to take should be distinguished from those relating to the facts upon which that position is based. In *Canada (Director of Investigation and Research) v. NutraSweet Co.*, [1989] C.C.T.D. No. 54 (QL), the Tribunal held that "[o]n discovery it is facts which have to be disclosed, not the conclusion, which either party intends to argue, should be drawn from those facts." The party examining is entitled to ask relevant questions that are grounded in the pleadings, but is not entitled to economic opinions (*Director of Investigation and Research v. Washington* (1996), 70 C.P.R. (3d) 317).

[17] The conclusion regarding the presence or absence of effective competition on specific transborder routes is one that, while factually based, will likely be formed with the assistance of expert evidence (*Southam*, at 76). Question relating to barriers to entry and whether there has been effective entry in the past on transborder routes are also complex. Assuming that the Commissioner has already provided all relevant facts with respect to these topics, as she was obliged to do, Questions U-22, U-35, A-34 and A-44 do not require further action.

[18] I agree with the Commissioner that Questions U-37 and U-39, which ask the Commissioner to advise "which of the gains in efficiencies are 'not real' and why" and to identify "what efficiencies already have been gained by virtue of the non-anticompetitive aspects of the Alliance Agreements and the TBJV", require first information from the Respondents with respect to efficiencies. This information will be provided to the Commissioner at a later stage in these proceedings in accordance with the principles governing the burdens of proof regarding efficiencies and will be the subject of expert reports and testimony. These questions do not require further action.

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

[19] The Commissioner of Competition shall answer question A-33 on or before September 21, 2012.

[20] 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:

For the Applicant:

The Commissioner of Competition

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For the Respondents:

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