

**FILED / PRODUIT**

Date: May 11, 2012

CT- 2011-004

Chantal Fortin for / pour  
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

# 93

**CT-2011-004**

**THE COMPETITION TRIBUNAL**

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

**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*.

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

**-AND-**

**AIR CANADA, UNITED CONTINENTAL HOLDINGS, INC., UNITED AIR LINES, INC.,  
and CONTINENTAL AIRLINES INC.**

**Respondents**

**WESTJET (an Alberta Partnership)**

**Intervenor**

**NOTICE OF MOTION OF THE INTERVENOR  
WESTJET (an Alberta Partnership)**

**TAKE NOTICE THAT** the Intervenor WestJet (an Alberta Partnership) (**WestJet**) will make a motion to the Competition Tribunal (the **Tribunal**), to be heard by telephone

conference or in person, as the Tribunal may direct, at such date and time as may be set by the Tribunal.

**THE MOTION IS FOR** an Order pursuant to paragraph 10 of the Confidentiality Order dated January 24, 2012 (the **Confidentiality Order**) that the documents identified as documents WestJet's outside counsel believe relate to the WestJet Topics, as identified in the April 5, 12 and 19, 2012 letters from outside counsel for WestJet, are related to the WestJet Topics, or alternatively, for an Order deferring until the hearing of this matter any determination of the relevancy of documents to the WestJet Topics.

**THE GROUNDS FOR THE MOTION ARE:**

1. Pursuant to paragraph 9 of the Confidentiality Order, WestJet's outside counsel and WestJet's initial Independent Expert may review the Protected Documents of the Parties to assess whether they believe any of the Parties' Protected Documents relate to the WestJet Topics.
2. WestJet's outside counsel Burnet, Duckworth & Palmer LLP (**BDP**), with assistance from WestJet's initial Independent Expert Dr. Douglas West, have conducted that review.
3. By letter dated April 5, 2012, BDP identified to outside counsel for the Parties and to Counsel for the Commissioner the Protected Documents of the Parties that BDP believes relate to the WestJet Topics.
4. By letter dated May 6, 2012, Stikeman Elliott LLP (**Stikeman**), outside counsel for Air Canada, wrote to BDP on behalf of all Respondents and advised that the Respondents do not agree with the identification of the documents by BDP. Stikeman disagreed with the designations of a substantial number of documents that had been identified as related to WestJet Topics on the basis of individual review. Stikeman objected to all of the documents identified by key word searching and stated that none of them should be treated as related to the WestJet Topics.
5. Pursuant to paragraph 10 of the Confidentiality Order, if the Parties do not agree with the assessment of WestJet's outside counsel, then WestJet's outside counsel may seek a

determination from the Tribunal about whether the identified Documents relate to the WestJet Topics.

6. Pursuant to paragraph 11 of the Confidentiality Order, Level A Protected Documents identified as relevant to the WestJet Topics, as agreed to by the Parties or as determined by the Tribunal, may be disclosed to WestJet's other Independent Experts.
7. WestJet does not have and does not intend to retain other Independent Experts.
8. This motion, contemplated by paragraph 10 of the Confidentiality Order, will have no practical effect on the proceedings. BDP and WestJet's initial Independent Expert Dr. West have already reviewed the Parties' Protected Documents. The Level A Protected Documents agreed to by the Parties or as determined by the Tribunal to be related to the WestJet Topics, which is a subset of those documents, will not be disclosed to any other person on behalf of WestJet.
9. Pursuant to paragraph 12 of the Confidentiality Order, Level B Protected Documents as agreed to by the Parties or as determined by the Tribunal, may be also disclosed to the Designated WestJet Representatives. However, the Parties produced only 85 Level B Protected Documents, of which only 43 are in dispute.
10. The resolution of the differences between the Respondents and WestJet regarding which documents are related to the WestJet Topics is impracticable at this stage in the proceedings.
11. The determination of which documents are relevant generally and which documents are relevant to the WestJet Topics will be made by the Tribunal at the hearing.
12. *Competition Act*, R.S.C. 1985, c. C-34, as amended.
13. *Competition Tribunal Rules*, Can. Reg. 2008-141, Rules 82-88.
14. Such further or other grounds as counsel may advise and the Tribunal permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:**

1. Order granting WestJet Leave to Intervene dated October 20, 2011;

2. Confidentiality Order dated January 24, 2012;
3. Scheduling Order dated March 6, 2012; and
4. Affidavit of Sheila Hyatt sworn May 11, 2012.

Dated this 11<sup>th</sup> day of May, 2012.



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