



Reference: *The Commissioner of Competition v. Air Canada et al.*, 2012 Comp. Trib. 3

File No.: CT-2011-004

Registry Document No.: 78

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)

Decided on the basis of the written record.
Before Judicial Member: Simpson J. (Chairperson)
Date of Order: January 24, 2012
Order signed by: Madam Justice Sandra J. Simpson

CONFIDENTIALITY ORDER



[1] **FURTHER TO** the application filed by the Commissioner of Competition (the “Commissioner”) for an order or orders pursuant to sections 90.1 and 92 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”) regarding the proposed transborder joint venture agreement between United Continental Holdings, Inc. and Air Canada, the “Marketing Cooperation Agreement” between Air Canada and United Air Lines, Inc., the “Alliance Expansion Agreement” between Air Canada and United Air Lines, Inc., and the “Air Canada/Continental Alliance Agreement” between Air Canada and Continental Airlines, Inc.;

[2] **AND FURTHER TO** the draft confidentiality order filed on consent by the Commissioner, the Respondents and the Intervenor;

THE TRIBUNAL ORDERS THAT:

[3] For purposes of this Order:

- (a) “Affiliate” means an affiliated corporation, partnership or sole proprietorship within the meaning of subsection 2(2) of the Act;
- (b) “Designated Representatives” means up to three in-house counsel and up to two additional individuals designated by each of the Respondents (for greater certainty, United Continental Holdings, Inc., United Air Lines, Inc. and Continental Airlines Inc., collectively, shall be entitled to designate up to four Designated Representatives in accordance with this Order) as their respective representatives who will be permitted access to Documents designated as Level B Protected Documents in accordance with the terms of this Order, which designation as a Designated Representative shall be made by written notice to the Tribunal, with a copy sent concomitantly to the Commissioner and outside counsel to the Respondents;
- (c) “Designated WestJet Representatives” means one in-house counsel and up to two individuals designated by WestJet as its representatives who will be permitted access to Documents that relate to the WestJet Topics and are designated as Level B Protected Documents in accordance with the terms of this Order, which designation as a Designated WestJet Representative shall be made by written notice to the Tribunal, with a copy sent concomitantly to the Commissioner and outside counsel to the Respondents;
- (d) “Document” means any document whatsoever whether in physical or electronic form, including the things defined as “records” in subsection 2(1) of the Act;
- (e) “Independent Expert” means an expert retained by a Party or WestJet who (i) is not a current employee of a Respondent, WestJet or their respective Affiliates, (ii) has not been an employee of a Respondent, WestJet or their respective Affiliates within 2 years prior to the date of this Order, (iii) is not a current employee of a competitor of a Respondent, WestJet or their respective Affiliates; and (iv) has executed a Confidentiality Undertaking in the form attached as Schedule A;
- (f) “Parties” means the Commissioner and the Respondents, and “Party” means the Commissioner or a Respondent;
- (g) “Proceeding” means the application filed by the Commissioner (File Number CT-2011-004) for an order pursuant to sections 90.1 and 92 of the Act in regards to the proposed transborder joint venture agreement between United Continental

Holdings, Inc. and Air Canada, the “Marketing Cooperation Agreement” between Air Canada and United Air Lines, Inc., the “Alliance Expansion Agreement” between Air Canada and United Air Lines, Inc., and the “Air Canada/Continental Alliance Agreement” between Air Canada and Continental Airlines, Inc.;

- (h) “Protected Document” means any Document (including the information such Document contains) that is produced in the Proceeding, including Documents listed in expert reports, pleadings, affidavits, or submissions that:
 - (i) a Party or WestJet claims is confidential, or
 - (ii) the Tribunal has determined is confidential; and
- (i) “WestJet Topics” has the same meaning ascribed to it in the Tribunal’s Order dated October 20, 2011 pursuant to which WestJet was granted leave to intervene in this Proceeding.

[4] Disclosure of Documents containing any of the following types of information could cause specific and direct harm, and such Documents may be designated as Protected Documents:

- (a) Information relating to prices (to the extent that such prices have not been published or made generally known to competitors and customers), capacity, specific output or revenue data or market shares, or negotiations with customers about prices, rates or incentives;
- (b) Confidential contractual arrangements between any of the Parties, or between the Parties and their customers and/or suppliers, or between WestJet and its customers and/or suppliers;
- (c) Financial data or reports, or financial information relating to a Party or WestJet, their respective customers, or other third parties;
- (d) Business plans, marketing and strategic plans, budgets, forecasts, and other similar information;
- (e) Internal market studies and analyses; and
- (f) Other Documents containing competitively sensitive and/or proprietary information of a Party, WestJet or third parties.

[5] If information from a Protected Document is incorporated into any other Document, that Document shall be a Protected Document. Any Protected Document shall cease to be a Protected Document if: (a) it or the protected information contained therein becomes publicly available (except if it becomes publicly available through a breach of this Confidentiality Order); or (b) if the person who designated the Document as a Protected Document waives such claim.

[6] Protected Documents will be identified in the following manner for the purpose of this Proceeding:

- (a) A person who claims confidentiality over a Document shall at the time of production of a Protected Document mark it with the name of the entity producing the document, and with “Confidential – Level A” or “Confidential – Level B” on the face of each Document and on each page that is claimed as confidential;
- (b) All Documents designated as Protected Documents shall, on a preliminary basis, be treated as a Protected Document, pending further determination;
- (c) Following the exchange of Documents, the Parties (and WestJet to the extent that the Documents are Protected Documents designated by WestJet) shall use their

best efforts to agree as to whether the Documents (or portions thereof) are to be treated as Protected Documents; and

- (d) If agreement cannot be reached, the Parties (or WestJet to the extent that the Documents are Protected Documents designated by WestJet) may apply to the Tribunal to determine whether the Document or a portion thereof, is a Protected Document.

[7] Subject to a further order of the Tribunal, the consent of the Parties (and WestJet to the extent that the Documents are Protected Documents designated by WestJet), paragraph 11 below, or as required by law, Protected Documents marked “Confidential – Level A” (“Level A Protected Documents”) may only be disclosed to:

- (a) the Commissioner, Counsel for the Commissioner, and the Commissioner’s staff who are directly involved in the Proceeding;
- (b) outside counsel to the Parties, outside counsel to WestJet, and outside counsel’s staff who are directly involved in the Proceeding; and
- (c) Independent Experts retained by the Parties, and WestJet’s initial Independent Expert, and their staff who are directly involved in the Proceeding, who have executed a Confidentiality Undertaking in the form attached as Schedule A.

[8] Subject to a further Order of the Tribunal, the consent of the Parties (and WestJet to the extent that the documents are Protected Documents designated by WestJet), paragraph 12 below, or as required by law, Protected Documents marked “Confidential – Level B” (“Level B Protected Documents”) may only be disclosed to:

- (a) the Commissioner, Counsel for the Commissioner, and the Commissioner’s staff who are directly involved in the Proceeding;
- (b) outside counsel to the Parties, outside counsel to WestJet, and outside counsel’s staff who are directly involved in the Proceeding;
- (c) Independent Experts retained by the Parties, and WestJet’s initial Independent Expert, and their staff who are directly involved in the Proceeding, who have executed a Confidentiality Undertaking in the form attached as Schedule A; and
- (d) Designated Representatives of the Respondents who have executed a Confidentiality Undertaking in the form attached as Schedule A.

[9] WestJet’s outside counsel and WestJet’s initial Independent Expert retained by WestJet may review the Protected Documents of the Parties to assess whether they believe any of the Parties’ Protected Documents relate to the WestJet Topics, and WestJet’s outside counsel shall identify in writing to outside counsel for the Parties and Counsel for the Commissioner any of the Parties’ Protected Documents that they believe relate to the WestJet Topics.

[10] If the Parties or any of them do not agree with the assessment of WestJet’s outside counsel within 30 days, in writing, then WestJet’s outside counsel may seek a determination from the Tribunal about whether the identified Documents relate to the WestJet Topics.

[11] Level A Protected Documents identified by WestJet's outside counsel and its initial Independent Expert 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 who have executed a Confidentiality Undertaking in the form attached as Schedule A.

[12] Level B Protected Documents identified by WestJet's outside counsel and its initial Independent Expert as relevant to the WestJet Topics, as agreed to by the Parties, or as determined by the Tribunal, may be disclosed to the Designated WestJet Representatives and to WestJet's other Independent Experts who have executed a Confidentiality Undertaking in the form attached as Schedule A.

[13] A Party or WestJet may at any time and with prior reasonable notice to the other Parties re-designate any of its own Level A Protected Documents as Level B Protected Documents or public Documents, and/or may re-designate any of its own Level B Protected Documents as public documents. Where another Party or WestJet disputes the re-designation, the Tribunal shall determine the proper designation. Documents re-designated as public shall cease to be Protected Documents and shall form part of the public record if introduced into evidence at the hearing of the Proceeding, unless the Parties (and WestJet to the extent that the Documents are Protected Documents designated by WestJet) agree otherwise or the Tribunal so orders.

[14] If a Party (or WestJet) is required by law to disclose a Protected Document, or if a Party (or WestJet) receives written notice from a person who has signed a Confidentiality Undertaking pursuant to this Order that they are required by law to disclose a Protected Document, that Party (or WestJet) shall give prompt written notice to the Party (or WestJet) that claimed confidentiality over the Protected Document so that a protective order or other appropriate remedy may be sought.

[15] Outside Counsel for a Party and his or her staff, outside counsel for WestJet, Counsel for the Commissioner, the Commissioner and her staff, and Independent Experts and their staff, may make copies of any Protected Document as they require in connection with the Proceeding.

[16] Nothing in this Order prevents a Party or WestJet from having full access to Protected Documents that originated from that Party or WestJet, as applicable.

[17] For greater certainty, all persons who obtain access to Documents through this Proceeding are subject to an implied undertaking to use the Documents and information solely for the purposes of this Proceeding (including any application or proceedings to enforce any order made by the Tribunal in connection with this Proceeding) and any related appeals.

[18] The Parties (and WestJet to the extent that the documents are Protected Documents designated by WestJet) shall provide the Tribunal with redacted versions of Protected Documents at the time of filing the Protected Document, which redacted versions may be distributed to the public.

[19] At the hearing of the Proceeding:

- (a) Protected Documents tendered as evidence at the hearing of the Proceeding shall be identified and clearly marked as such, in accordance with paragraph 6(a), above;
- (b) The Tribunal may determine whether the Document should be treated as a Protected Document;
- (c) Protected Documents shall not form part of the public record unless the Party or Parties claiming confidentiality (or WestJet to the extent that the Documents are Protected Documents designated by WestJet) waive the claim, or the Tribunal determines that the Document is not a Protected Document; and
- (d) Documents over which no privilege or confidentiality claim has been asserted shall form part of the public record in this Proceeding if introduced into evidence or otherwise placed on the record. Public Documents shall be marked "Public" on the face of the document.

[20] The termination of the Proceeding shall not relieve any person to whom Protected Documents were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such Protected Documents in accordance with the provisions of this Order and any confidentiality agreement.

[21] Upon completion or final disposition of the Proceeding and any related appeals, all Protected Documents and any copies of Protected Documents, with the exception of Protected Documents in the possession of the Commissioner and her staff, shall be destroyed or returned to the Party (or WestJet to the extent that the Documents are Protected Documents designated by WestJet) that produced them unless the Party (or WestJet) that produced the Protected Documents states, in writing, that they may be disposed of in some other manner, provided that outside counsel to the Parties, Counsel to the Commissioner, and outside counsel to WestJet may keep one set of Protected Documents in their files.

[22] This Order shall be subject to further direction of the Tribunal and may be varied by order of the Tribunal.

DATED at Ottawa, this 24th day of January, 2012.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

[23] Schedule "A": CONFIDENTIALITY UNDERTAKING

IN CONSIDERATION of being provided with information or documentation in connection with the proceeding in the Competition Tribunal, File Number CT-2011-004 (the "Proceeding"), between the Commissioner of Competition (the "Commissioner") and Air Canada, United Continental Holdings, Inc., United Air Lines, Inc., and Continental Airlines, Inc. (collectively with the Commissioner, the "Parties") over which claims for confidentiality have been advanced ("Protected Documents"),

I, _____, of the city of _____, of the [province/state of] _____, hereby undertake and agree to maintain the confidentiality of any Protected Document that I obtain, and in particular:

1. I will not disclose a Protected Document to any other person, except to a person permitted to receive it under the Confidentiality Order of the Competition Tribunal (the "Tribunal") dated January ____, 2012, or such further Order as the Tribunal may make.
2. I will not use the information or documentation so obtained for any purpose other than in connection with the Proceeding (including any application or proceedings to enforce any Order made by the Tribunal in connection with the Proceeding, and any application under section 106 of the *Competition Act* to vary or rescind any Order made by the Tribunal in connection with the Proceeding), and any related appeals.
3. Upon completion of this Proceeding and any related appeals, I agree that all Protected Documents in my possession shall be dealt with in accordance with instructions from counsel for the Party I am retained by or as prescribed by Order of the Tribunal. I may retain in my confidential files, subject to the requirements of confidentiality imposed by this undertaking, materials prepared by me, such as my expert report, as well as study results and materials of a general nature which do not replicate any confidential information from a Protected Document.
4. I have read the Confidentiality Order, a copy of which is attached to this undertaking, and agree to be bound by it. I acknowledge that any breach of this undertaking by me will be considered to be a breach of the Confidentiality Order of the Competition Tribunal.
5. I acknowledge and agree that the Party (or WestJet to the extent that the documents are Protected Documents designated by WestJet) that claims confidentiality over a Protected Document may not have an adequate remedy at law and would be irreparably harmed in the event that any of the provisions of this undertaking are not performed in accordance with its specific terms or otherwise breached. Accordingly, I agree that the Party (or WestJet to the extent that the documents are Protected Documents designated by WestJet) that claims confidentiality over a Protected Document shall be entitled to injunctive relief to prevent breaches of this undertaking and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled at law or in equity.

6. In the event that I am required by law to disclose any Protected Document that is subject to this undertaking, I will provide **[insert name of retaining or employing Party]** with prompt written notice so that the person that claimed confidentiality over such information or documentation may seek a protective Order or other appropriate remedy. In any event, I will furnish only that portion of the Protected Document that is legally required and I will exercise my best efforts to obtain reliable assurance that confidential treatment will be accorded to it.

7. I will promptly, upon the request of the person providing a Protected Document, advise where it is kept by me.

8. I hereby attorn to the jurisdiction of the Competition Tribunal to resolve any disputes arising under this agreement.

SIGNED, SEALED AND DELIVERED before a witness this ____ day of _____, _____.

Name of Signatory:

Name of Witness:

COUNSEL

For the applicant:

The Commissioner of Competition:

David R. Wingfield
Jonathan Hood
Nicholas J. Cartel
Tara DiBenedetto

For the respondents:

United Continental Holdings, Inc.
United Air Lines, Inc.
Continental Airlines, Inc.:

Randall Hofley
Ryder Gilliland
Jason Gudofsky

Air Canada:

Katherine L. Kay
Eliot N. Kolers
Mark E. Walli

For the intervenor:

WestJet (an Alberta Partnership):

Daniel J. McDonald
Alicia Quesnel