



Reference: *The Commissioner of Competition v. Air Canada et al.*, 2011 Comp. Trib. 21

File No.: CT-2011-004

Registry Document No.: 61

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 by this order)

Date of hearing: 20111005

Before Judicial Member: Simpson J. (Chairperson)

Date of Order: October 20, 2011

Order signed by: Madam Justice Sandra J. Simpson



ORDER GRANTING WESTJET LEAVE TO INTERVENE

[1] **UPON** motion by WestJet (an Alberta Partnership) (“WestJet”) for leave to intervene in this proceeding pursuant to subsection 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c.19, as amended;

[2] **AND UPON** reviewing the affidavit of Hugh Dunleavy sworn on August 22, 2011;

[3] **AND UPON** hearing the submissions of counsel for the parties and for WestJet in Ottawa on Wednesday, October 5, 2011;

THE TRIBUNAL ORDERS THAT:

[4] Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Request for Leave to Intervene on behalf of WestJet dated August 23, 2011.

[5] WestJet is hereby granted intervenor status for the purpose of addressing the following topics which will hereinafter be referred as the “WestJet Topics”:

- (a) The Structural Barriers and their impact on WestJet’s ability to provide viable transborder air passenger services on the Transborder Overlap Routes;
- (b) The Contractual Barriers and their impact on WestJet’s ability to provide viable transborder air passenger services on the Transborder Overlap Routes;
- (c) The relationship between the Structural Barriers and the Contractual Barriers and how these impact competition in the airline industry generally and WestJet in particular;
- (d) The competitive impacts of the Alliance Agreements and the likely competitive impacts of the Proposed Merger on WestJet’s expansion plans involving the WestJet Served Transborder Overlap Routes;
- (e) The competitive impacts on WestJet’s ability to offer viable non-stop transborder air passenger services on the Transborder Routes;
- (f) The competitive impacts of the Alliance Agreements and the likely competitive impacts of the Proposed Merger on WestJet’s entry and expansion plans involving the WestJet Considered Transborder Overlap Routes;
- (g) The Competitive Impacts on Other Competing Routes that affect or are likely to affect WestJet;
- (h) The significant adverse effects on Canadian consumers if WestJet is unable to provide effective, viable air passenger services in competition with Air Canada, United and Continental;

- (i) The nature of the competitive landscape in transborder markets as it relates to WestJet;
- (j) The statements made and conclusions drawn by Air Canada concerning WestJet specifically and non-legacy carriers (to the extent they apply to WestJet) generally in the AC Response and adopted by United and Continental in the United/Continental Response.

[6] Regarding procedure, WestJet is:

- (a) Permitted to review the parties' discovery transcripts and productions subject to the Tribunal's upcoming Confidentiality Order. However, WestJet will not participate directly in the parties' examinations for discovery;
- (b) To prepare an affidavit of documents dealing with the WestJet Topics (the "WestJet Documents"). The WestJet Documents are to be produced to the parties.
- (c) To provide a representative for examination for discovery by the parties on the WestJet Topics and the WestJet Documents. However, counsel for the Commissioner will be the last to examine the WestJet representative, must not repeat questions asked by other counsel and may not, without leave, use the transcript of the examination for discovery of the WestJet representative at the hearing.
- (d) Permitted to adduce non-repetitive *viva voce* evidence about the WestJet Topics and the remedies sought that affect WestJet. No more than three witnesses are to be called for this purpose unless WestJet is granted leave to call additional witnesses within the time limit to be established in the Tribunal's upcoming Scheduling Order;
- (e) Permitted to conduct non-repetitive examinations and cross-examination of witnesses on the WestJet Topics;
- (f) Permitted to file expert evidence dealing with the WestJet Topics in accordance with the Rules of the Competition Tribunal but only if the Commissioner agrees. Failing an agreement, WestJet may seek the Tribunal's leave to file expert evidence;
- (g) Permitted to make non-repetitive written and oral argument dealing with the WestJet Topics; and

- (h) Permitted to attend and make representations at pre-hearing motions and case conferences where WestJet's interests are at issue.

DATED at Ottawa, this 20th day of October, 2011.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

APPEARANCES:

For the applicant:

The Commissioner of Competition

Edward J. Babin
Cynthia Spry

For the respondents:

Air Canada

Katherine L. Kay
Eliot N. Kolers

United Continental Holdings, Inc.,
United Air Lines, Inc.,
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For the intervenor:

WestJet (an Alberta Partnership)

Daniel J. McDonald
Alicia Quesnel