

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Air Canada et al.*, 2011 Comp. Trib. 13  
File No.: CT-2011-004  
Registry Document No.: 54

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)



Decided on the basis of the written record.  
Before Judicial Member: Phelan J.  
Date of Reasons and Order: September 20, 2011  
Reasons and Order signed by: Mr. Justice M. Phelan

**REASONS AND ORDER REGARDING MOTION FOR EXTENSION OF TIME FOR  
LEAVE TO INTERVENE AND LEAVE TO INTERVENE**

## I. INTRODUCTION

[1] Hubert Horan (“Horan”) is a resident of Phoenix, Arizona. He has asked for an extension of time to file his motion for leave to intervene. He has also filed his leave to intervene materials.

[2] The matter before the Tribunal is an application by the Commissioner of Competition against the subject airlines to prohibit the airlines from “merging” in respect of a proposed transborder joint venture and from implementing certain provisions of agreements.

## II. BACKGROUND

[3] Horan claims to have a 30 year aviation career in which he has performed consulting work for 30 airlines and has held airline management positions in four airlines.

[4] His application, unsupported by any affidavit evidence as to how he would be affected by the application, highlights his experience in airline competition and his own studies, papers and presentations focused on his concern that competition (or airline) regulators are not adequately addressing efficiency gains in mergers that would create consumer benefits.

[5] Horan’s explanation for his lateness in filing is that the Commissioner has failed to fully address the alleged consumer benefits raised by the airlines. He allegedly only became aware of this supposed deficiency on August 29, the date of the Commissioner’s Reply. Apparently Horan is concerned about the failure to address “double marginalization” or “metal neutrality” concepts. He further expresses concerns that these issues will not be addressed by other parties because of lack of resources or expertise.

## III. ANALYSIS

[6] The Tribunal has a wide discretion to vary or extend deadlines (see Rules 2 and 5 of the *Competition Tribunal Rules*, SOR/2008-141). However, the usual rules of the Federal Court for extensions of time provide useful factors which may, in appropriate cases, influence the Tribunal’s discretion.

[7] The usual basic requirements for an extension of time are (1) a reasonable excuse for delay and (2) an arguable case on the merits (see *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263, 63 N.R.106, and *Patel v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 670). To these factors have been added such others as the existence of a continuing intention to pursue the matter and a weighing of relative prejudice.

[8] This Tribunal has considered similar factors (see, for example, *The Director of Investigation and Research v. Tele-Direct (Publications) Inc.*, 64 C.P.R. (3d) 509).

[9] Horan’s excuse for lateness is founded on a misconception of the role of an intervenor. His reason for waiting to file leave to intervene was to determine if the Commissioner was dealing with the case as he thought it should be handled. He wanted to ensure that the

Commissioner “demonstrated a full understanding of the basis of these claims” of consumer benefits.

[10] It is not the role of an intervenor to overtake the Commissioner’s case and to fill in “gaps” which the Commissioner is capable of addressing in her case, if she so desires (see, for example, *Washington v. Canada (Director of Investigation and Research)*, 78 C.P.R. (3d) 479).

[11] Horan’s explanation for delay is not a valid ground for an extension because it is based on a false premise of what role he could play in the proceedings.

[12] Horan also fails to establish that he has an arguable case on the merits. The test for intervenor status has been well summarized in *Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2011 Comp. Trib. 2 :

[19] In *The Commissioner of Competition v. Canadian Waste Services Holdings*, 2000 Comp. Trib. 9, Mr. Justice McKeown reviewed the above case law and listed the requirements to be met by a proposed intervenor. They are:

- (a) The matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal’s consideration or must be a matter sufficiently relevant to the Tribunal’s mandate (see *Director of Investigation and Research v. Air Canada* (1992), 46 C.P.R. (3d) 184 at 187, [1992] C.C.T.D. No. 24 (QL)).
- (b) The person seeking leave to intervene must be directly affected. The word “affects” has been interpreted in *Air Canada, ibid.*, to mean “directly affects”.
- (c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (see *Tele-Direct*).
- (d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (see *Washington v. Director of Investigation and Research*, [1998] C.C.T.D. No. 4 (QL) (Comp. Trib.)).

[13] Horan fails to establish how, if he could overcome the hurdle of lateness, he “is directly affected” by the Commissioner’s application. He describes the impact of the Commissioner’s application as follows in his request for leave to intervene:

The Competition Tribunal’s decision in this case will directly affect my ongoing work to ensure that airline consolidation is properly justified by legally required evidence of consumer benefits, and that airline consolidation does not harm consumers or log-run [sic] industry efficiency by creating anti-competitive market power.

[14] This statement, which is not found in his affidavit, is insufficient to conclude that he is *directly* affected by the Commissioner’s application. As the Tribunal held in *Canada (Director of Investigation and Research) v. A.C. Nielsen Company of Canada*, [1994] C.C.T.D. No. 9 (QL), a

particular interest in competition law is not in and of itself a ground for granting leave to intervene.

[15] In the circumstances, there is no evidentiary basis for a conclusion that he is directly affected.

[16] Horan does not show how he can bring a unique or distinct perspective, except in the guise of his expert opinion evidence; something a party could do if so inclined.

[17] Horan therefore fails to establish that he has an arguable case on the merits.

[18] The issue of continuing intention is at least neutral as it appears that Horan was somewhat equivocal about this matter.

[19] While a short delay to allow the motion to intervene does not itself cause prejudice, granting the motion to extend time on the grounds sought does. It would allow an intervention on unsupportable grounds.

[20] The Tribunal need not make any further comment on whether Horan's evidence would be relevant or of assistance to the Tribunal.

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

[21] Mr. Horan's application to extend the time to file leave to intervene and his leave to intervene are dismissed.

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

SIGNED on behalf of the Tribunal by the Acting Chairperson.

(s) Michael L. Phelan

**COUNSEL:**

For the applicant:

The Commissioner of Competition

Cynthia L. Spry

For the respondents:

Air Canada

Katherine L. Kay

Eliot N. Kolers

Mark E. Walli

United Continental Holdings, Inc.,

United Air Lines, Inc.,

and Continental Airlines, Inc.

Ryder Gilliland

Jason Gudofsky

Randall Hofley

Micah Wood

For Hubert Horan:

Self-represented