



Reference: *Commissioner of Competition v. Air Canada*, 2002 Comp. Trib. 18
File no.: CT2001002
Registry document no.: 0100

IN THE MATTER of an application by the Commissioner of Competition under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER of the *Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service*, SOR/2000-324 made pursuant to subsection 78(2) of the *Competition Act*;

AND IN THE MATTER of certain practices of anti-competitive acts by Air Canada.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Air Canada
(respondent)

and

WestJet Airlines Ltd.
(intervenor)



Dates of pre-hearing conferences: 20020502 to 20020503
Member: McKeown J. (Chairman)
Date of reasons: 20020522
Reasons signed by: McKeown J.

REASONS AND ORDER REGARDING MATTERS CONSIDERED AT PRE-HEARING CONFERENCE ON MAY 2 AND 3, 2002

BACKGROUND

[1] The application filed by the Commissioner of Competition (the “Commissioner”) alleges abuse of dominant position by Air Canada pursuant to section 79 of the Competition Act, R.S.C. 1985, c. C-34 (the “Act”) and the Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service, SOR/2000-324 (the “Airline Regulations”). The application alleges, among other things, that Air Canada responded to the entry of WestJet Airlines and CanJet Airlines on seven routes in central and Atlantic Canada by increasing its capacity and/or decreasing its fares in a manner that did not cover the avoidable costs of operating the flights on the affected routes, contrary to paragraphs 1(a) and 1(b) of the Airline Regulations.

[2] On May 15, 2001, in an effort to focus the hearing of the aforementioned application, the Tribunal ordered, with the consent of the parties, that the following preliminary issues be determined before proceeding with the balance of the application (“Phase I”). Paragraphs 4 and 5 of the Order Regarding Issues to be Determined at the Hearing dated May 15, 2001, (the “Phase I Order”) sets out the following questions:

[4] (...)

- (a) Between the period from April 1, 2000, to the date of the application, has Air Canada operated or increased capacity at fares that do not cover the avoidable costs of providing the service, within the meaning of paragraphs 1(a) and 1(b) of the Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service (the “Airline Regulations”), SOR/2000-324, on the Toronto-Moncton/Moncton-Toronto route?
- (b) Between the period from July 1, 2000, to the date of the application, has Air Canada operated or increased capacity at fares that do not cover the avoidable costs of providing the service, within the meaning of paragraphs 1(a) and 1(b) of the Airline Regulations, on the Halifax-Montreal/Montreal-Halifax route?

[5] THE TRIBUNAL FURTHER DECLARES THAT in determining these issues, it will consider and answer at least the following questions:

- (a) What is the appropriate unit or units of capacity to examine?
- (b) What categories of costs are avoidable and when do they become avoidable?
- (c) What is the appropriate time period or periods to examine?
- (d) What, if any, recognition should be given to “beyond contribution”?

[3] Phase I of the hearing started on August 29, 2001, before a panel constituted of Madame Justice Sandra J. Simpson, Dr. Lawrence P. Schwartz and Mr. Lorne Bolton. Since September 2001, the hearing has been adjourned on two occasions: (a) on September 11, 2001, due to terrorist attacks on the United States; and (b) on October 15, 2001, on motion of Air Canada and over the objection of the Commissioner, on the grounds that the events of September 11, 2001,

had changed matters relevant to the issue of avoidable costs and that the respondent required additional time to assess the effects of such changes.

[4] On October 26, 2001, the Tribunal ordered the hearing to recommence on April 15, 2002. However, the presiding judicial member was unable to preside at the recommencement of the hearing of this matter set for April 15, 2002. On the basis that she would be available to hear the matter in September, I ordered that the hearing of the preliminary proceeding shall recommence in the fall of 2002, likely during the month of September, at a date to be determined by the Tribunal (see Order Regarding Motion to Constitute a New Panel, issued on February 22, 2002). Since then, I informed counsel on April 11, 2002, at a pre-hearing conference held in Toronto, that the presiding judicial member will not be available to hear the matter in September as previously anticipated.

ORDERS REQUESTED

[5] In this context, the Commissioner moves for (a) an order amending the Phase I Order, to provide that the periods referred to at paragraphs 4(a) and 4(b) of the Phase I Order shall end respectively on February 28, 2002, and on November 30, 2001; (b) an order that Air Canada produce cost and revenue data for the routes at issue in the application for the period from March 1, 2001, to February 28, 2002, in the same format as produced for prior periods, as set out in Schedule "A" to the Amended Notice of Motion (Motion to Amend Phase I Order and to Compel Production and Answers to Undertakings) ("Amended Notice of Motion"), dated March 28, 2002; (c) an order that Air Canada produce cost and revenue data for all domestic routes for the period from March 1, 2001, to February 28, 2002, in the same format as provided by Air Canada for prior periods as set out in Schedule "B" to the Amended Notice of Motion; (d) an order that Luc Piché and Paul Brotto, on behalf of the respondent, re-attend, at the respondent's own expense, to answer all outstanding undertakings given and questions refused at their examinations for discovery held on November 22, 2001, and February 15, 2002, and all proper questions arising therefrom, on a date to be agreed upon by counsel no later than 30 days following the date of this Order.

[6] Further, the Commissioner filed a motion, with the consent of the respondent, for an order that the hearing before the panel in the above-noted application, constituted of Madam Justice Sandra J. Simpson, Dr. Lawrence P. Schwartz and Mr. Lorne Bolton, be terminated; for an order that a new Tribunal panel to be named by the Chairman, be constituted to hear this application; and for an order that the hearing before the newly constituted panel commence on October 7, 2002, tentatively. When considering subsections 8(2), 9(2), and 10(2) of the Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.) and Rule 39 of the Federal Court Rules 1998, SOR/98-106, and the parties' consent, I come to the conclusion that it is appropriate under the circumstances to order the termination of the hearing before the seized Tribunal panel, to appoint a new panel and to recommence the hearing before a newly constituted panel on October 7, 2002, tentatively. With respect to scheduling, counsel agreed at this pre-hearing conference to file a schedule for the hearing of the preliminary proceeding with the anticipated time required.

[7] I will deal with each of the requested orders separately below.

(a) An amendment to extend the periods under consideration referred to at paragraphs 4(a) and 4(b) of the Phase I Order

[8] In Phase I of the hearing, the Tribunal will have to determine whether Air Canada operated flights below avoidable costs from April 1, 2000, to the date of the application (March 2001). As I stated above, in October 2001, Air Canada sought and obtained from Justice Simpson an adjournment over the Commissioner's objection on the basis that the information about its costs in the post September 11, 2001, environment would assist the Tribunal in its redetermination of the Phase I issues.

[9] The Commissioner now moves for an order amending the Phase I Order, to provide that the periods referred to at paragraphs 4(a) and 4(b) of that Order shall end respectively on February 28, 2002, and on November 30, 2001. The Commissioner argues that it is appropriate to modify the Phase I Order slightly to extend the periods referred to at paragraphs 4(a) and 4(b), because it will allow the Tribunal to consider Air Canada's more recent performance, and hence render a decision that will advance the resolution of the entire application. Counsel submits that failure to amend the time periods may result in a stale or outdated exercise from the outset given that it would be based on a time period which ended more than a year ago, with the risk that it may no longer reflect Air Canada's costs post-September 11.

[10] Air Canada opposes the Commissioner's motion on the grounds that the Commissioner is seeking to increase the period of time in which Air Canada is alleged to be engaged in predatory conduct and is inconsistent with the consent of the parties to divide the hearing in two phases. Air Canada also submits that it would only complicate, lengthen and delay the hearing. Hence, Air Canada submits that the hearing should proceed as planned to address the Phase I issues and questions as presently formulated. Counsel for Air Canada points out that the purpose of Phase I is to develop an avoidable costs test that may be applied to the conduct under examination in the Commissioner's application and that the routes selected simply provide a sample data through which the parties may illustrate how their respective avoidable costs tests may be applied in a real world scenario. Air Canada does not object to providing certain relevant data for the periods ending February 28, 2002 and November 30, 2001.

[11] The Commissioner submits that the Tribunal has jurisdiction to amend the questions referred to it for determination by the parties on consent by virtue of section 72 of the Competition Tribunal Rules, SOR/94-290 and Rule 399 of the Federal Court Rules 1998. Counsel submits that it is appropriate to vary the order by reason of a matter that arose or was discovered subsequent to the making of the order. Rule 399(2) states:

(2) On motion, the Court may set aside or vary an order

(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or

(b) where the order was obtained by fraud.

[12] Further, counsel for the Commissioner relies on a decision of the Federal Court of Appeal, *Re Saywack and Minister of Employment and Immigration*, 27 D.L.R. (4th) 617, which deals with the principles involved when one seeks to vary or set aside an order. The Commissioner also relies on section 106 of the Act which provides for variation of orders made under Part VIII of the Act. Counsel argues that if the Tribunal were to rely on section 106 of the Act, the test would be met because the circumstances that led to the making of the order have changed and the order would, as a result, have been different.

[13] The Commissioner submits that because the Phase I Order is a procedural order and not a judgment incorporating a settlement of a case, there are no different principles that ought to be applied. The order was made on consent and hence does not change or take away the Tribunal's jurisdiction to vary it based on changed circumstances.

[14] Air Canada submits that the Commissioner is trying to double the period of time in which he alleges that Air Canada operated capacity below avoidable costs, and that this attempt is inconsistent both with the order that was consented to and with the pleadings. Air Canada also submits that granting the Commissioner's motion would be inconsistent with the objective behind having a bifurcated hearing.

[15] Further, Air Canada submits that the Phase I Order ought not be amended on the Commissioner's unilateral request as the legal test for changing a consent order has not been met. The Commissioner cannot, on the present state of the law, file a reference to the Tribunal. Air Canada refers to the decision of the Federal Court of Appeal in *Canada (Director of Investigation and Research) v. Air Canada*, 104 D.L.R. (4th) at 138, where the court states:

I start from the proposition which I take to be self-evident that a statutory power to vary an order vested in the tribunal which has made that order is necessarily constrained by the same limits as were imposed on the power to make the order in the first place. Put another way, a tribunal cannot invoke a power to vary its earlier order as the justification for making an order it did not have the power to make the first time.

[16] I come to the conclusion that the Tribunal should not amend the questions and issues referred to it and now comprised in the Phase I Order without the consent of Air Canada. It is clear that this "quasi-reference" process requested by the parties, where the Tribunal was asked to hear and determine certain issues first, before proceeding with the balance of the application, could not have taken place without the consent of the parties. It is doubtful that the Commissioner could have come to the Tribunal originally and asked the Tribunal to split this case in two parts without Air Canada's consent. The consent of the parties to proceed with what was intended as an informal and expeditious proceeding is essential. The two routes and time periods selected in the Phase I Order were chosen by counsel for Air Canada and for the Commissioner on consent, as appropriate sample routes for purposes of the analysis.

[17] Second, extending the time periods may complicate and lengthen the hearing, hence preventing the very purpose of having the bifurcated hearing, which is to answer quickly the important conceptual questions to develop a proper avoidable costs test.

[18] Furthermore, both sides still agree that Phase I is going to advance the matter and that those four questions are the key questions to be answered in Phase I.

(b) Production of certain relevant cost and revenue data

[19] The Commissioner moves for an order that Air Canada produce cost and revenue data for the routes at issue in the application for the period from March 1, 2001, to February 28, 2002, in the same format as produced for prior periods, as set out in Schedule “A” and Schedule “B” to the Amended Notice of Motion. Schedule “A” requests information for the affected routes stated at number 1: data drawn from flight profitability system and numbers 2, 3 and 4, which relates to the load factor data, the cost data and flight schedule. Schedule “B” requests information that relates to all domestic mainline routes. The Commissioner argues that this data is relevant in terms of how Air Canada’s costs and revenues have been affected, if at all, by the September 11 events and producible because the application alleges that Air Canada continues to operate flights below avoidable costs after the date of the application.

[20] Further, the Commissioner relies on the fact that Air Canada sought and received a lengthy adjournment of the Phase I hearing on the basis that more information would become available as a result of its response to the downturn caused by the events of September 11, 2001. Finally, the Commissioner points out that Air Canada’s expert relied on cost and revenue data beyond March 1, 2001. The Commissioner submits that the production of the information would ensure that both the Tribunal and the Commissioner, not just Air Canada, have the data necessary to address the issues and decide the case. The Commissioner submits that this information should be produced, whether or not the motion to extend the time period is granted.

[21] Air Canada submits that the Commissioner’s motion seeking to require Air Canada to produce extensive cost and revenue data as requested is irrelevant because it is outside the scope of the Phase I Order both with respect to time period and markets. However, counsel submits that Air Canada agrees to provide information on costs, the “328 reports” found at number 3(a) of Schedule “A” for comparison purposes of its costs post-September 11. As for information requested in Schedule “B”, counsel submits that it has nothing to do with September 11, and will not help the Tribunal determine Air Canada’s avoidable costs and should not be provided.

[22] Although, as I stated above, I am of the view that the periods referred to at paragraphs 4(a) and 4(b) of the Phase I Order cannot be extended without the consent of Air Canada, I am nevertheless willing to order the production of some information that extends these periods. Firstly, Air Canada agreed at the hearing of this motion to produce such information, such as the “328 reports”. Furthermore, Air Canada submitted that the character of costs might have changed as a result of the events of September 11, 2001. Secondly, I think it could be useful for the Commissioner and for the Tribunal to have a look at whether, if at all, the September 11 events affected Air Canada’s ability to avoid costs and hence assess the validity of the test being developed. I also note that Air Canada sought and was granted an adjournment on the grounds that the events of September 11, 2001, had changed matters relevant to the issue of avoidable costs and that it required additional time to assess the effects of such changes. At this stage, and in light of my previous decision not to extend the time periods, I am not prepared to order the production of all the information requested by the Commissioner in a post-September 11

environment especially in light of the Commissioner's request to have it provided in a format that differs from that in which Air Canada compiles its information. Nevertheless, if such information became necessary and was requested by the panel, the panel may revisit this issue in due course. Keeping in mind the purpose of Phase I of the hearing, the issues and evidence must be limited to greatest extent possible. Failure to achieve this means that the application should be heard in its entirety in one hearing.

(c) Answers to undertakings and questions refused on discovery

[23] The Commissioner submits that Air Canada has failed to answer its undertakings on discovery and refused to answer proper questions. The Commissioner moves for an order that Luc Piché and Paul Brotto, on behalf of the respondent, re-attend, at the respondent's own expense, to answer all outstanding undertakings given and questions refused at their examinations for discovery held on November 22, 2001, and February 15, 2002, and all proper questions arising therefrom, on a date to be agreed upon by counsel no later than 30 days following the date of this Order.

[24] Air Canada submits that it properly refused to answer a number of questions during two days of examinations for discovery held since the adjournment of the hearing. However, Air Canada refused to answer some questions (set out in Schedule "A" of the Amended Notice of Motion) on the basis that they refer to matters outside the scope of the Phase I Order, outside the scope of the orders allowing further discovery or are of minimal relevance.

[25] At this stage of the proceedings, Air Canada has already produced detailed cost and revenue data regarding each of the specified routes at issue in the application for the entire period to be addressed in the Phase I Order. This information included monthly cost information by aircraft type by route and revenue data provided on a per flight basis, per day basis for all of the specified routes from the period of January 2000 to March 2001, as requested by the Commissioner.

[26] It is well established in law that the Tribunal exercises discretion over the discovery process in cases before it pursuant to paragraph 21(2)(d) of the Competition Tribunal Rules and Canada (Director of Investigation and Research, Competition Act) v. Air Canada, [1989] C.C.T.D. No. 2 (QL). There is no automatic right to discovery by any party. Rather, the Tribunal may make orders respecting examination for discovery where the process is "desirable". Further, contrary to the assertions that discovery is bound only by the low threshold of relevance, I am of the view that consideration must be given to the fact that the hearing has already commenced. With that respect, I rely on the Federal Court decision of *Hayden Manufacturing Co. v. Canplas Industries Ltd.* (1998), 83 C.P.R. (3d) 19, at 23 (F.C.T.D.), where the court stated that there must be some limitation on general propositions allowing broad discovery, given the resources of courts and the concern over costs, congestion and delay.

[27] Since I have decided not to extend the periods referred to in the Phase I Order, the parties have all the information required for the hearing of the preliminary proceeding (Phase I Issues and Questions). However, I come to the conclusion that Air Canada should produce the following information and answer the following questions which I deem relevant for assessing the validity of the avoidable costs test to be developed.

[28] With respect to the category of information: “General Ledger for 2000 and 2001”, Air Canada shall produce the entire Air Canada Ledger for the year 2000 in electronic form, the complete General Ledger for Air Canada and Air Canada Regional for 2001 and to provide similar documents to exhibit 300439 (the extract from Air Canada Mainline’s General Ledger Account Cost Information). Air Canada should also provide a document, if such a document exists, designed to provide further information about General Ledger categories including a more detailed explanation and breakdown of General Ledger codes than what is provided at Tab 6 of the Commissioner’s Supplementary Motion Record (Motion to Amend Phase I Order and to Compel Production and Answers to Undertakings), entitled “Air Canada Chart of Accounts”, dated May 24, 2001, (Appendix 1 to the Air Canada 300 Manual).

[29] With respect to “questions that relate to events after the date of the application”, the Commissioner requests that Air Canada produce documents pertaining to new routes and initiatives planned since March 2001 including: (a) all new routes added or proposed to be added to the Air Canada system; (b) Air Canada’s Tango brand (to the extent the documents have not already been provided); (c) Air Canada’s “Jetz” service, and (d) Air Canada’s proposed discount operation (sometimes referred to as “Zip”). This information goes beyond the scope of the hearing of preliminary proceeding.

[30] With respect to questions that relate to answers that directly arise from documents produced by Air Canada from July 20, 2001, to October 1, 2001, and on January 18, 2002, the Commissioner seeks to obtain answers from Air Canada to questions relating to documents received after July 20, 2001, in response to the two questions ordered by Justice Nadon to be answered (in particular those relating to the Ottawa/San Jose route). The Commissioner also seeks to be advised by Air Canada as to whether adjustments were made to the routes (apart from Toronto/Moncton) including by way of taking out capacity or changing fares, in an attempt to improve the performance of those bottom 20 performing routes.

[31] The Commissioner’s request for answers by Air Canada to questions relating to documents received after July 20, 2001, in response to the two questions ordered by Justice Nadon to be answered (in particular those relating to the Ottawa/San Jose route) is problematic. Indeed, it appears that Justice Simpson has already dealt with the matter in the Order dated October 22, 2001. While Justice Simpson ruled at paragraph 10 of the Order that:

...the Commissioner is entitled to compel the re-attendance of a representative of Air Canada for oral examination for discovery on all documents and information provided to the Commissioner by Air Canada in the period from July 20, 2001, to and including October 1, 2001.

She nevertheless made it clear at paragraph 7 of that Order that:

...In my view, due to his failure to take advantage of the Nadon Order in a timely way, the Commissioner has lost his opportunity to conduct examinations for discovery on the two questions which the Nadon Order said should be answered by Air Canada and on the documents produced by Air Canada on June 27 and July 12, 2001. [emphasis added]

[32] The Commissioner has lost his right to seek answers to the two questions which the Nadon Order said should be answered by Air Canada.

[33] Finally, I am of the view that Air Canada should advise how long it takes Navitaire to deliver the results of the manipulation of cost and revenue data back to Air Canada and advise if adjustments were made to the routes (apart from Toronto/Moncton) including by way of taking out capacity or changing fares, in an attempt to improve the performance of those bottom 20 performing routes. Indeed, these questions are relevant because they relate to Air Canada's ability to respond in a timely way to information that routes are not performing adequately. Those questions are relevant to paragraph 5(c) of the Phase I Order that deals with the appropriate time period or periods to examine.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

Date of Hearing and Constitution of a New Panel

[34] The hearing before the panel constituted of Madam Justice Sandra J. Simpson, Dr. Lawrence P. Schwartz and Mr. Lorne Bolton is hereby terminated.

[35] A new Tribunal panel shall be constituted to hear the questions and issues comprised in the Phase I Order.

[36] The hearing before the newly constituted panel shall commence on October 7, 2002, tentatively.

Amendment to Phase I Order

[37] The Commissioner's motion for an order amending the Phase I Order, to provide that the periods referred to at paragraphs 4(a) and 4(b) of the Order be extended, is dismissed.

Production of documents and answers to undertakings

[38] Air Canada shall provide the Commissioner with information which indicates the air carriers' monthly profitability (revenues and expenses) by aircraft type on the Toronto/Fredericton, Toronto/Saint John, St. John's/Halifax, Montreal/Halifax, Ottawa/Halifax, Toronto/Charlottetown, and Toronto/Moncton routes from March 1, 2001, through February 28, 2002. This information should be reported in a similar format as an Air Canada "328 Report" (paragraph 3(a) of Schedule "A" to the Commissioner's Amended Notice of Motion).

[39] With respect to questions refused by Air Canada on examination for discovery, dated November 22, 2001, and February 15, 2002, and more specifically with the category of information: "General Ledger for 2000 and 2001", Air Canada shall produce the entire Air Canada Ledger for the year 2000 in electronic form, the complete General Ledger for Air Canada and Air Canada Regional for 2001 and to provide a similar documents to exhibit 300439 (the extract from Air Canada Mainline's General Ledger Account Cost Information).

[40] Air Canada shall also provide a document, if such a document exists, designed to provide "further information about general ledger categories" including a more detailed explanation and breakdown of General Ledger codes than what is provided at Tab 6 of the Commissioner's Supplementary Motion Record (Motion to Amend Phase I Order and to Compel Production and Answers to Undertakings), entitled "Air Canada Chart of Accounts", dated May 24, 2001, (Appendix 1 to the Air Canada 300 Manual).

[41] Air Canada shall advise how long it takes Navitaire to deliver the results of the manipulation of cost and revenue data back to Air Canada.

[42] Air Canada shall advise whether adjustments were made to the routes (apart from Toronto/Moncton) including by way of taking out capacity or changing fares, in an attempt to improve the performance of those bottom 20 performing routes.

DATED at Toronto, Ontario, the 22nd day of May, 2002.

(s) W.P. McKeown

APPEARANCES:

For the applicant:

The Commissioner of Competition

Donald B. Houston
W. Michael G. Osborne

For the respondent:

Air Canada

Katherine L. Kay
Eliot N. Kolers
Danielle K. Royal