



Reference: *Commissioner of Competition v. Air Canada*, 2001 Comp. Trib. 26  
File no.: CT2001002  
Registry document no.: 042

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)



Date of pre-hearing conference: 20010711  
Member: Nadon J. (presiding)  
Date of order: 20010713  
Order signed by: Nadon J.

**ORDER ARISING FROM THE PRE-HEARING CONFERENCE ON JULY 11, 2001  
(DISCOVERY ISSUES)**

[1] FURTHER TO the motion brought by the Commissioner of Competition (the "Commissioner") for an order requiring that Luc Piché, Bill Bredt, Lise Fournel and Craig Landry, on behalf the respondent Air Canada, re-attend, at the respondent's own expense, to answer all outstanding undertakings given at their examination for discovery on June 6, 7, 8 and 18, 2001, and to answer all proper questions arising therefrom on a date to be agreed upon by counsel, no later than 90 days following the date of this order;

[2] AND FURTHER TO the motion brought by the Commissioner for an order requiring that Air Canada answer undertakings and questions refused or taken under advisement;

[3] AND FURTHER to the motion brought by the respondent, Air Canada, for an order requiring that a representative of the intervenor, WestJet Airlines Ltd. ("WestJet") attend at an examination for discovery to answer, to the best of his or her knowledge, information and belief, any proper question relating to the questions set out in the Tribunal's Order dated May 15, 2001 (the "Phase One Issues Order");

[4] AND FURTHER to the motion brought by the respondent, Air Canada, for an order requiring that WestJet deliver complete responses to the information requested of WestJet by the Commissioner, in an information request dated April 19, 2001;

[5] AND FURTHER to the motion brought by the respondent, Air Canada, for an order that David McAllister, the Commissioner's representative, answer undertakings and be compelled, if necessary, to re-attend at a subsequent examination for discovery, at such time to be determined by the Tribunal, to answer any proper questions;

[6] AND ON READING the documents submitted by the Commissioner, the respondent and the intervenor;

[7] AND ON HEARING the submissions of counsel for the parties and for the intervenor;

THE TRIBUNAL ORDERS THAT:

### **Examination for discovery**

[8] The respondent shall make a representative available to re-attend at a subsequent examination for discovery to answer all questions arising from the undertakings given during the course of the examination for discovery which took place on June 6, 7, 8 and 18, 2001, at a time and place to be agreed upon by counsel.

[9] The intervenor, WestJet, shall make a representative available to attend at an examination for discovery to answer, to the best of his or her knowledge, information and belief, any proper question relating to the following:

- (a) the story of the Hamilton-Moncton Route;
- (b) the issue of WestJet's own "avoidable costs"; and
- (c) WestJet's views about Air Canada's costs.

The examination for discovery shall take place in Calgary, Alberta, at a time to be agreed upon by counsel.

**[10]** The Commissioner's representative, David McAllister, shall re-attend at a subsequent examination for discovery to answer all questions arising from the undertakings given at the examination for discovery which took place on June 28 and 29, 2001, at a time and place to be agreed upon by counsel.

Refusals made at the examination for discovery of Air Canada's representatives

**[11]** Air Canada shall produce the "analysis decision documents" with respect to the decision to provide service between Ottawa and San Jose and Calgary and Abbotsford (question 3).

**[12]** Air Canada shall ascertain and advise whether the word "cancelled" used in exhibit 8 for all the flights referred to means that the flights are no longer operating or whether it means something else (question 4).

**[13]** Air Canada need not respond to question 1: "to inquire and produce system audits performed by Air Canada's auditors and any comments received from the auditors" as counsel for Air Canada indicated at the hearing that an answer has already been provided.

**[14]** Air Canada need not respond to question 6: "to produce copies of any documents or data beyond what has already been produced that Air Canada has provided to any of the experts retained by Air Canada or to any experts that will be retained by Air Canada in the future", as the obligation of the parties to make full disclosure is a continuing one.

Refusals made at the examination for discovery of the Commissioner's representative, David McAllister

**[15]** The Commissioner shall provide the Bureau's analysis of the impact on competition of Canada 3000's transactions to acquire Royal and CanJet (answer to question 65). This analysis shall be treated as a protected document designated as "Level A" pursuant to the interim confidentiality order dated May 31, 2001.

**[16]** With respect to question 34, the Commissioner shall provide a summary of the information filed with the Mergers Branch of the Competition Bureau in respect of the Royal/Canada 3000 and the CanJet/Canada 3000 transactions that refers to any of the specific routes stated in the "Phase One Issues Order".

[17] The Commissioner has undertaken to provide the answer to question 66: "to advise what I.M.P. communicated to the Bureau about its reasons for selling CanJet to Canada 3000."

[18] With respect to questions 59 and 63, the Commissioner has undertaken to request, by letter, the information sought by Air Canada.

[19] The Commissioner need not answer the following questions: 20, 23, 54, 40, 41, 25, 27, 28, 50, 51, 52, 9, 10, 17, 21, 24, 60, 70, 71 and 72.

DATED at Ottawa, this 13<sup>th</sup> day of July, 2001.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Marc Nadon

APPEARANCES:

For the applicant:

The Commissioner of Competition

Donald B. Houston  
Jeanne L. Pratt

For the respondent:

Air Canada

Katherine L. Kay  
Eliot N. Kolers

For the intervenor:

WestJet Airlines Ltd.

Daniel J. McDonald, Q.C.