



Reference: *Commissioner of Competition v. Air Canada*, 2001 Comp. Trib. 19
File no.: CT2001002
Registry document no.: 024

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 conference call: 20010531
Member: Simpson J. (Presiding)
Date of order: 20010531
Order signed by: Simpson J.

INTERIM CONFIDENTIALITY ORDER

FURTHER TO the motion by the Commissioner of Competition for an interim confidentiality order;

AND FURTHER TO the draft interim confidentiality order filed by the Commissioner;

AND ON HEARING SUBMISSIONS of counsel for the Applicant, the Respondent and the Intervenor;

THE TRIBUNAL ORDERS THAT:

[1] For purposes of this order:

(a) "Protected Documents" shall mean the documents (including the information they contain) produced by the Applicant, the Respondent and the Intervenor (collectively, the "Parties") in this application, with respect to which claims for confidentiality have been advanced which claims have not been withdrawn in writing or determined by the Tribunal, and shall consist of Level A Protected Documents and Level B Protected Documents. Protected Documents adduced in evidence at the hearing of this application shall be identified as such and clearly marked as Level A or Level B Protected Documents;

(b) Level A – Protected Documents designated as "Level A" may be disclosed to outside counsel for the Parties, outside counsel's staff directly involved in this application, independent experts retained by the Parties who have executed Confidentiality Undertakings in the form of Schedule A hereto, the Commissioner of Competition (the "Commissioner") and the Commissioner's staff directly involved in this application;

(c) Level B – Protected Documents designated as "Level B" may be disclosed to outside counsel for the Parties, outside counsel's staff directly involved in this application, independent experts retained by the Parties who have executed Confidentiality Undertakings in the form of Schedule A hereto, the Commissioner, the Commissioner's staff directly involved in the application and the representatives of Air Canada and WestJet Airlines Ltd. ("WestJet") who have been designated pursuant to paragraph 7 of this order and who have executed Confidentiality Undertakings in the form of Schedule A hereto.

[2] This order shall apply to all persons who acquire access to Protected Documents through this application.

[3] No Protected Documents produced in this application shall be disclosed or form part of the public record except with the prior written consent of the Party that claimed confidentiality over the document or in accordance with this order or any other order of the Tribunal.

[4] At or before the time of production of any Protected Documents, the Party producing the document shall provide outside counsel for each other Party with written notice identifying whether the Protected Documents identified by them should be designated as Level A or Level B.

[5] All documents identified as Protected Documents shall, on a preliminary basis, be afforded the highest confidentiality level designation claimed by any of the Parties pending further determination of the confidentiality level pursuant to this order.

[6] Following the exchange of documents, the Parties shall use their best efforts to agree on appropriate levels of confidentiality for the Protected Documents or portions thereof. If agreement cannot be reached, any of the Parties may apply to the Tribunal to determine the confidentiality or level of confidentiality of any Protected Document or portion thereof.

[7] Air Canada may designate up to four individuals and WestJet may designate two individuals as their respective representatives who will be permitted access to Level B Protected Documents in accordance with the terms of this order. Such designation shall be made by written notice to the Tribunal, with copies sent to the other Parties. Any Party may make a motion to the Tribunal objecting to such designation.

[8] Outside counsel for a Party shall only disclose Level A Protected Documents to outside counsel's staff directly involved in this application, to independent experts retained by the Parties, to the Commissioner and to the Commissioner's staff directly involved in this application.

[9] Outside counsel for a Party shall only disclose Level B Protected Documents to outside counsel's staff directly involved in this application, to independent experts retained by the Parties, to the representatives designated by Air Canada and WestJet pursuant to paragraph 7 of this order, to the Commissioner and to the Commissioner's staff directly involved in this application.

[10] Independent experts and designated representatives shall not copy or disclose Protected Documents directly or indirectly to any other person, except for persons permitted to receive such Protected Documents by this order or other order of the Tribunal.

[11] Prior to gaining access to Protected Documents referred to in this order, independent experts and designated representatives permitted by this order to such access shall execute a Confidentiality Undertaking in the form attached as Schedule A. A Confidentiality Undertaking signed pursuant to this order shall be filed promptly with the Registrar of the Tribunal who shall retain all such agreements in confidence until completion or final disposition of this application and any related appeals, at which time the agreements may be disclosed to the Parties upon request.

[12] If a Party is required by law to disclose a Protected Document, or if a Party 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 shall give prompt written notice to the Party that claimed confidentiality over the Protected Document so that the Party that claimed confidentiality may seek a protective order or other appropriate remedy.

[13] For greater certainty, all persons, including the Commissioner and his staff, who obtain access to documents through the discovery process in this application are subject to an implied

undertaking to use the documents and information for the purposes of this application and any related appeals only.

[14] Outside counsel for a Party, and the Commissioner and his staff, may make such copies as they require in connection with these proceedings. Outside counsel for the Parties, and the Commissioner and his staff, may provide sufficient copies of Protected Documents to experts in paper or electronic format or both. Experts shall not make further copies of Protected Documents that are provided in paper format. Outside counsel for Air Canada and WestJet shall number and date the hard copies of Protected Documents they provide to their experts.

[14a] The data in the Protected Documents in electronic format is not to be printed in hard copy unless it is necessary to do so for purposes of working on the application. Experts shall not print hard copies of Protected Documents or hard copies which contain any data from Protected Documents provided in electronic format except as required in preparing their expert reports. In the event that either the Protected Documents or any data in the Protected Documents is printed in hard copy by an expert or under an expert's direction, the hard copy shall be shredded promptly as soon as it is no longer required and while in use shall be kept in confidence.

[15] Upon completion or final disposition of this application and any appeals, all Protected Documents and any copies of Protected Documents disclosed in accordance with this order, with the exception of Protected Documents in the possession of the Commissioner and his staff, shall be returned to the Party that produced the documents unless the documents have become public or the Party that produced the documents states, in writing, that they may be disposed in some other manner.

[16] The termination of proceedings in this application shall not relieve any person to whom Protected Documents were disclosed pursuant to this order from the obligation of maintaining the confidentiality of such documents and information in accordance with the provisions of this order and any Confidentiality Undertaking.

[17] Nothing in this order prevents a Party from having full access to Protected Documents that originated from that Party.

[18] This order shall be subject to further direction of the Tribunal.

DATED at Vancouver, this 31st day of May, 2001.

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

(s) Sandra J. Simpson

SCHEDULE A

UNDERTAKING TO THE COMPETITION TRIBUNAL

IN CONSIDERATION of being provided with information or documentation in connection with this Application over which claims for confidentiality have been advanced, I,

_____, of the City of _____ in the Province of _____, hereby undertake to maintain the confidentiality of the information or documentation so obtained. I will not copy or disclose the information or documentation so obtained to any other person, nor will I use the information or documentation so obtained for any purpose other than in connection with this Application and any related appeals.

Upon completion of this Application and any related appeals, I undertake that all such information or documentation, and any copies of same, shall be dealt with as directed by order of the Competition Tribunal.

I acknowledge that I am aware of the order granted by the Competition Tribunal on _____, in this regard, a copy of which is attached to this undertaking, and agree to be bound by same. I acknowledge that any breach of this undertaking by me will be considered to be a breach of the said order of the Competition Tribunal. I further acknowledge and agree that the Commissioner of Competition ("Commissioner"), Air Canada and WestJet Airlines Ltd., or any other owner of the information or documentation 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 are otherwise breached. Accordingly, I agree that any one or more of the Commissioner, Air Canada and WestJet Airlines Ltd., or any other owner 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.

In the event that I am required by law to disclose any of the information or documentation which 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 information or documentation which is legally required and I will advise the person to whom I am obliged to disclose such information or documentation that it is subject to a confidentiality order of the Competition Tribunal.

I will promptly, upon the request of the person providing the information or documentation, advise where such information or documentation is kept by me and at the conclusion of my involvement in this Application and any related appeals, subject to any Order of the Competition Tribunal, deliver to the said person the information or documentation without retaining any copies thereof.

I acknowledge that in giving this undertaking I have attorned to the jurisdiction of the Competition Tribunal in respect of this undertaking.

SIGNED, SEALED AND DELIVERED before a witness this _____ day of _____, 2001.

(Witness Signature)

(Signature)

(Print Name)

(Print Name)

APPEARANCES:

For the applicant:

The Commissioner of Competition

Donald B. Houston
Michael Osborne

For the respondent:

Air Canada

Katherine L. Kay
Eliot N. Kolers

For the intervenor:

WestJet Airlines Ltd.

Alicia K. Quesnel