CT-2000/004

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended

AND IN THE MATTER OF an Application by Air Canada pursuant to subsection 104.1(7) of the *Competition Act*

AIR CANADA

Applicant

- and -

COMMISSIONER OF COMPETITION

Respondent

AFFIDAVIT OF JOHN M. BAKER
(sworn October 31, 2000)

I, **JOHN M. BAKER**, of the City of Westmount, in the Province of Quebec, MAKE OATH AND SAY:

INTRODUCTION

1. I am the Senior Vice-President and General Counsel of Air Canada, the Applicant herein, and was involved in the many negotiations and discussions with various parts of the federal government, including the Commissioner of Competition (the "Commissioner"), the Respondent herein, and the Competition Bureau, the agency he heads, surrounding what ultimately became the acquisition by Air Canada of Canadian Airlines Corporation, then the parent company of Canadian Airlines International Limited (collectively, "Canadian").

2. As such, I have knowledge of the matters to which I depose hereinafter. Where I have sworn to matters based on information obtained from others, I have stated the source of my information and in all such instances verily believe it to be true.

3. In Air Canada's view, it is important to understand the context of the discussions and the ensuing legislative and regulatory enactments regarding domestic air transportation services which arose in connection with Air Canada's acquisition of Canadian. As we have seen in other legal proceedings taken in connection with this matter (as discussed below), CanJet Airlines ("CanJet"), the beneficiary of the Temporary Order made by the Commissioner which is challenged in this Application, has made a number of allegations about its "reliance" on certain undertakings given by Air Canada in connection with the Canadian acquisition and its "understanding" of what Air Canada could and could not do going forward. As stated above, I was involved in the negotiations with various branches of government and can therefore provide Air Canada's view of the events. Although I am the General Counsel to Air Canada, I swear this Affidavit to provide a recitation of the facts and of Air Canada's view of the events. Neither I nor Air Canada intend in any way to raise issues in this Affidavit that would be subject to legal privileges, nor in any way to waive those privileges by swearing this Affidavit.

OVERVIEW OF THIS APPLICATION

4. Air Canada brings the within Application to the Competition Tribunal seeking to set aside, or alternatively to vary, the order made by the Commissioner on October 12, 2000 (the "Temporary Order"). The Temporary Order prohibits Air Canada from offering a particular fare (the L14EASTS fare) on five routes in Eastern Canada (the "Restrained Routes").

5. The Temporary Order is the first such order ever issued by the Commissioner pursuant to a new power found in section 104.1 of the *Competition Act*, an amendment

enacted following the acquisition by Air Canada of Canadian. The legislation gives to the Commissioner the ability to make an order restraining conduct for a period of twenty days, subject to extensions of the temporary order for two periods of thirty days each. The Commissioner decides, on his own, without the assistance of either the Competition Tribunal or a court of competent jurisdiction, whether to make the order. He is not obliged to receive representations or evidence from the affected party before making the order. In making the Temporary Order, the Commissioner acts as investigator, prosecutor, judge and jury, all without need for the target of the order to be heard.

6. Section 104.1 of the *Act* is the subject of a constitutional challenge by Air Canada in the Superior Court of Quebec. In connection therewith, Air Canada sought a stay of the Temporary Order from the Quebec court on the usual common law stay principles, which was denied. Air Canada determined not to appeal the stay decision. The actual constitutional challenge is pending before the Superior Court, with a timetable for the hearing presently being finalized but likely to be heard in the new year.

7. Thus, the Temporary Order remains in force. Earlier today, the Commissioner's counsel advised Air Canada's counsel that the Temporary Order will be extended for an additional thirty days.

8. As more fully explained in the Affidavit of Lise Fournel of Air Canada filed in support of the within Application, Air Canada offered to and then did provide information and material to the Commissioner's representatives from the Competition Bureau once Air Canada learned that the Commissioner had received a complaint from CanJet, the instigator behind the issuance of the Temporary Order. However, Air Canada was given no opportunity to make representations or present evidence to the Commissioner regarding the issuance of the Temporary Order. Furthermore, the information and material which Air Canada had earlier provided to Bureau

representatives demonstrated that Air Canada did not engage in any anti-competitive acts as alleged in the Temporary Order.

9. It is Air Canada's view that the Commissioner could not reasonably have formed the opinion the Temporary Order recites as the basis for the issuance of the Temporary Order. The Temporary Order states (*inter alia*):

> AND THE COMMISSIONER is of the opinion that Air Canada has engaged in conduct which could constitute anti-competitive acts in that Air Canada has reduced its fees to target CanJet on the [Restrained Routes];

10. The anti-competitive act which Air Canada "could" have engaged in is not further identified in either the Temporary Order nor in the letter accompanying the Temporary Order sent by counsel to the Commissioner to Air Canada (Exhibit "G" to the Fournel Affidavit). Subsection 104.1(3) of the *Competition Act* obliges the Commissioner to promptly give written notice of the order, together with the grounds for it, to every person against whom it is made or who is directly affected by it. The letter from the Commissioner's counsel merely repeats the bald allegations in the Temporary Order without elaboration.

11. In Air Canada's view, the information and material provided to the Commissioner demonstrates that Air Canada did not engage in the anti-competitive acts as alleged in the Temporary Order; there was no basis for the Commissioner to have reached an opposite view.

12. As elaborated upon below, it appears to Air Canada that the Commissioner issued the Temporary Order in the absence of evidence to support the basis he claims to have relied on. The Commissioner also ignored relevant evidence which undermines his bald allegation in the Temporary Order about Air Canada's conduct. The Temporary Order identifies as possible anti-competitive acts that "Air Canada has reduced its fees to target CanJet on the [Restrained Routes]". There is no such

definition of anti-competitive acts in the Regulations which expand the definition of anti-competitive acts in the context of the domestic airline industry, for the purposes of section 79 of the *Competition Act* (the abuse of dominance section), or elsewhere. A fare reduction, "targeting" CanJet or otherwise, is not an anti-competitive act. Indeed, the state of the law in Canada is that reducing prices to meet or match competition cannot be anti-competitive (*Boehringer Ingelheim (Canada) Inc.* v. *Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Gen. Div.))

13. Furthermore, in issuing the Temporary Order the Commissioner appears to have been guided by irrelevant and inappropriate considerations, such as the need for "more time" to obtain certain information, which is not the test under the legislation (unlike, for example, in section 100 of the *Act* dealing with interim orders where the need for more time to complete the inquiry is a specified basis for the Tribunal – not the Commissioner – to make an interim order).

THE ACQUISITION BY AIR CANADA OF CANADIAN

14. Air Canada acquired Canadian as a result of a transaction that began in October of 1999 and was completed on July 5, 2000.

15. As became exceedingly apparent after Air Canada completed the acquisition of Canadian, Canadian had been in a precarious financial state for some time. It became clear during the months prior to and during acquisition period that Canadian as an entity was not going to be able to survive economically. The culmination of the negotiations between Air Canada and the Commissioner occurred in December 1999, just before Christmas. At the time, Canadian had some 16,000 employees who would have lost their jobs just before Christmas had Canadian failed. Thousands of Canadian passengers would have their travel plans cancelled.

16. The Air Canada acquisition of Canadian was the culmination of competing proposals to restructure the Canadian airline industry. In January of 1999, Canadian had initiated discussions with Air Canada about a possible merger; in June of 1999 Air Canada made an offer to Canadian to acquire its international routes; on August 13, 1999 an order pursuant to section 47 of the *Canada Transportation Act 1996* was issued creating a process to permit the two major Canadian airlines and other interested persons to develop an arrangement that would lead to the orderly restructuring of the airline industry; and on August 24, 1999 Onex Corporation ("Onex") made an unsolicited takeover bid for Air Canada as part of Onex's proposal to restructure the Canadian airline industry.

17. In response to the Onex unsolicited takeover, on October 19, 1999, Air Canada announced its own comprehensive plan to restructure Canada's airline industry (the "Air Canada Plan"). That plan included making an offer to acquire all or substantially all or the outstanding shares of Canadian and repurchase up to 36.4% of its (Air Canada's) outstanding common shares. As part of the Air Canada Plan, Air Canada also announced its intention to create a low-fare air carrier which would operate from Hamilton, Ontario, to initially serve up to twenty (20) destinations in Canada.

18. As these events were unfolding, the Commissioner was evaluating the competition aspects of a potential restructuring of the Canadian airline industry. The Commissioner based his review on the assumption that the result of this process would be the emergence of a single dominant air carrier in Canada. In essence, this was not a question of whether approval would be given to the creation of a dominant airline; a dominant airline would emerge, whether because of some form of acquisition (Onex of Air Canada or Air Canada of Canadian) or the failure of Canadian. The Commissioner identified very significant competition concerns if a dominant carrier emerged in Canada.

19. On October 26, 1999, the Government of Canada announced that it intended to introduce legislation designed to authorize the Government to review and approve any proposal pertaining to restructuring of the Canadian airline industry and to apply conditions and issue regulations relevant to all policy issues arising therefrom (the "Policy Framework").

20. The Government also indicated that legislative changes would be introduced to ensure that the terms and conditions attached to a restructuring proposal would be complied with and to provide the Minister of Transport with the appropriate powers of sanction. At the time, it was not known when legislation would be enacted to implement the Policy Framework, and it was not known precisely what terms and conditions would be imposed on any such proposal and the effect it would have on any such proposal.

21. On November 5, 1999, the Quebec Superior Court issued a judgment in connection with proceedings which had been filed before the court by Air Canada and certain of its shareholders to enjoin Onex from proceeding further with its offer on the grounds that it was illegal and violated the *Air Canada Public Participation Act*. The Court's judgment declared that Onex's offer proposed a course of action that was illegal under that statute. Late that afternoon, Onex announced that it was withdrawing its offer.

22. On November 11, 1999, 853350 Alberta Ltd. (a company in which Air Canada held 10% of the voting shares) presented its formal offer, pursuant to the Air Canada Plan, to purchase all or substantially all of the outstanding shares of Canadian.

23. Pursuant to the Policy Framework, the Commissioner of Competition reviewed Air Canada's proposed acquisition of Canadian and again expressed the view that the emergence in Canada of a single dominant air carrier, whether through the transaction

or as a result of Canadian's financial failure, would raise significant competition concerns in the Canadian airline industry. Accordingly, as a condition of the approval of the acquisition, Air Canada and 853350 Alberta Ltd. agreed to provide, among other things, certain competition-related undertakings to the Commissioner (the "Undertakings"). Attached to this my Affidavit as **Exhibit "A"** is a copy of a letter dated December 21, 1999 from the Commissioner to Stikeman Elliott, counsel to Air Canada, approving the transaction, together with the associated Undertakings.

24. The Undertakings address matters pertaining to the operation of an airline. In particular, section 10 of the Undertakings entitled "Eastern Canadian Discount Carrier" was negotiated and agreed to by Air Canada as a direct response to the Commissioner's concerns over Air Canada's stated intention to create a low-fare air carrier operating from Hamilton, Ontario.

25. It is important to note that the Commissioner's "no action" letter regarding the acquisition of Canadian by Air Canada makes clear the reality of the situation at the time, including the fact that Canadian was on the brink of insolvency. The Commissioner approved the deal, notwithstanding that Air Canada would be dominant, as the best deal that could be done in a bad situation. To suggest that Air Canada was given the "privilege of dominance" is misleading at best. To quote the Commissioner's own words in his letter:

> The Bureau has concluded that Canadian is facing imminent insolvency, necessitating the need for urgent action. The Bureau also acknowledges that there is not likely to be a competitively preferable purchaser of Canadian in the absence of the proposed transaction. Given the situation, and on the basis of the Undertakings provided by Air Canada and the Offeror, the Bureau does not consider that there is a competitively preferable alternative to the proposed transaction. In other words, the proposed

> transaction with the Undertakings is preferable to the liquidation of Canadian.

26. On February 17, 2000, in accordance with the Policy Framework, the Government of Canada tabled Bill C-26, *An Act to amend the Canada Transportation Act, the Competition Act, the Competition Tribunal Act and the Air Canada Public Participation Act and to amend another Act in consequence.* Among other things, Bill C-26 specified that mergers and acquisitions of airline undertakings, including the merger of Air Canada and Canadian resulting from the transaction, had to be approved by the federal Cabinet on such terms and conditions as were considered appropriate by Cabinet. In this regard, Bill C-26 specifically provided that the transaction had been approved by Cabinet and that the Undertakings are deemed to be terms and conditions of the Cabinet's approval.

27. On May 4, 2000, Air Canada officials appeared before the House of Commons Standing Committee on Transport during its hearings concerning Bill C-26 and, at that time, provided its written submissions on Bill C-26. Among other things, in these written submissions Air Canada expressed its significant concerns over section 104.1 of the *Competition Act*. Attached to this my Affidavit as **Exhibit "B"** is a copy of Air Canada's written submissions to the Standing Committee.

28. The reality was that at the time the offer was made by Air Canada to purchase Canadian, there was a great deal of uncertainty about what would be the legislative and regulatory regime in which Air Canada would operate after completion of the acquisition. Air Canada repeatedly emphasized its need to know, in advance, the legislative and regulatory framework in which it was to operate. Government representatives indicated that this was not possible and the deal proceeded in the absence of draft legislation and regulations. While the Undertakings were signed on

December 21, 1999, the legislation was not introduced until February of 2000 and ultimately received assent in late June 2000.

29. Air Canada had been told that Regulations would be introduced "respecting anti-competitive acts of persons operating a domestic service" which were meant to provide some further guidance to Air Canada. The Regulations were to elaborate on the acts in the context of an abuse of dominance evaluation pursuant to section 79 of the *Competition Act*. Although the Commissioner approved the acquisition in December of 1999, the draft Regulations were circulated to Air Canada for comment only in early summer 2000 and were ultimately enacted on August 23, 2000.

30. Accompanying the draft Regulations was a Regulatory Impact Analysis Statement in which the Government stated that:

> The Government chose the alternative of relying on a strengthened *Competition Act* as opposed to a full industry regulatory regime to address the potential concerns about the potential for Air Canada to abuse its dominant market position. This approach maintains the Government's policy on relying on competition and market forces to protect the interests of consumers. These Regulations provide clarity to industry participants by identifying anti-competitive acts which would be reviewable by the Bureau.

Also stated in that document was:

> These Regulations extend the existing abuse of dominance provisions of the *Competition Act* and could be viewed as a code of conduct by Air Canada inasmuch as they specify the type of behaviour which is likely to be challenged by the Competition Bureau. The Regulations under the *Competition Act* do not impose any direct cost on Air Canada, or require it to seek prior approval to implement marketing or other business plans. This

> approach is much less intrusive and less costly to both Air Canada and the Government than a full industry specific regulatory regime.

31. In providing its comments to the Government regarding the proposed Regulations, Air Canada repeatedly expressed its concerns that it had to "know the rules" and that it had to have the ability to respond to competition. Air Canada also asked for confirmation from the Commissioner's representatives that the usual rules regarding predatory pricing and abuse of dominance would apply: the response from the Bureau representatives was "absolutely".

32. The Regulatory Impact Analysis Statement echoes that view in explaining the context for the Regulations and the way in which the definitions of anti-competitive acts "fit" with an abuse of dominance analysis, as follows:

> To succeed in an application under the abuse of dominance provisions, the Bureau must satisfy the Tribunal that (a) the firm in question is, by virtue of a high market share and barriers to entry into the industry, dominant to a degree that it can influence prices in a relevant market, (b) this firm has engaged in a "practice of anti-competitive acts" and (c) the result is "substantial prevention or lessening of competition." The proposed Regulations relate directly to part (b) above by defining the type of conduct which would constitute a "practice of anti-competitive acts" in the context of the airline industry. However, the Regulations do not alter the rest of market dominance or a substantial impact on competition which the Tribunal must find before it can make an order.

33. The Regulations create a list of anti-competitive acts for the purpose of the definition provision (section 78) relating to the abuse of dominance provision in section 79. With respect to pricing issues, the Regulations state:

> 1. For the purposes of paragraph 78(1)(j) of the *Competition Act*, the following acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, are anti-competitive acts:
>
> (a) operating capacity on a route at fares that do not cover the avoidable cost of providing the service;
>
> (b) increasing capacity on a route or routes at fares that do not cover the avoidable cost of providing the service;

34. There is no definition of avoidable cost in the Regulations. To Air Canada's knowledge, the concept of "avoidable cost" had, up until the passage of the Regulations, not been adopted in legislation or by judicial bodies in the enforcement of anti-trust laws relating to predation or monopolization anywhere in the world. The Bureau promised draft Guidelines regarding avoidable cost in the airline industry by late September or mid-October 2000 at the latest. No such Guidelines have been provided to date. Furthermore, the Bureau has not identified for Air Canada its view of the precise meaning of and scope of avoidable cost.

35. Thus Air Canada is left trying to make pricing and other competitive decisions on what it has been assured are the "usual rules". However, the fact that the Commissioner issued a Temporary Order in the CanJet situation and in the face of all of the circumstances and evidence in his possession (as set out in the Fournel Affidavit) suggests that the "usual rules" are not being applied by the Commissioner and the Bureau.

36. The Commissioner and the Government emphasized that the new regime would be more beneficial for the Government and Air Canada because it "is consistent with the Government's policy of relying on competition and market forces to protect the interests of consumers" and because the Regulations "do not impose any direct cost on Air Canada, or require it to seek prior approval to implement marketing or other business plans. This approach is much less intrusive and less costly to Air Canada and

the Government than a full industry specific regulatory regime". Notwithstanding these statements of policy and intention, the reality is very different. The Government is not "relying on competition and market forces"; instead, the Commissioner is prohibiting Air Canada from responding to competition. Furthermore, while "prior approval to implement marketing or other business plans" isn't required, when Air Canada takes steps in accordance with the "usual rules" as it did in the CanJet situation, a Temporary Order has been issued, necessitating a challenge to the Tribunal. In the meantime, Air Canada is forced to charge higher prices than it would otherwise charge, and consumers have a less competitive environment and fewer alternatives. The "Government's policy of relying on competition and market forces" is not being followed.

37. Furthermore, in the case of the Temporary Order issued by the Commissioner to protect CanJet, Air Canada still does not know "what it did wrong". In connection with the constitutional challenge in Quebec, David McAllister, a senior commerce officer with the Civil Matters Branch of the Competition Bureau, swore an affidavit in support of the Commissioner's position that the Temporary Order should not be stayed (the McAllister Affidavit is attached hereto as **Exhibit "C"** to my Affidavit). In his Affidavit Mr. McAllister discusses aspects of the "rules" regarding predatory behaviour and abuse of dominance and states:

> On the basis that Air Canada responded in a targeted way to CanJet's entry with substantially reduced fares and the removal of the Saturday night stay requirement, the Commissioner was of the opinion that Air Canada's actions could constitute anti-competitive acts on five of the seven routes identified by CanJet.

38. For Air Canada to respond "in a targeted way" with "substantially reduced fares and the removal of the Saturday night stay requirement" (assuming that is all factually true) does not constitute an anti-competitive act pursuant to the Regulations.

THE COMMISSIONER'S CONDUCT

39. The situation involving Air Canada and the Canadian airline industry is, as any newspaper review reveals, intensely political.

40. It is often said that the objective of competition law is to protect competition, not to protect a competitor. CanJet has apparently nonetheless been able to persuade the Commissioner to take the latter approach. It is, in Air Canada's view, noteworthy that Royal Airlines, a vigorous competitor to both CanJet and Air Canada, takes a dismissive view of the complaints of CanJet and its allegations that Air Canada was engaged in predatory pricing behaviour, stating that its own view of Air Canada's competitive response is that it was reasonable. The *National Post* article referred to in the Fournel Affidavit (Exhibit "D" to her Affidavit) also contains the following passage.

> Two industry sources not affiliated with Air Canada made the same point, calling the bureau action "ridiculous" and "bogus".
>
> Said one industry source: "Anything they were doing to Canjet, they've been doing out west for over four and a half years [to WestJet]. It's competition. That's how it works."

41. CanJet's statements about the impact on it of Air Canada's L14EASTS fares have been rather theatrical and inconsistent. In a calculated press campaign CanJet repeatedly stated that it needed the Commissioner to take steps to "get Air Canada off our backs" and made a number of assertions that unless the Commissioner stopped Air Canada, CanJet would go out of business. In the weekend papers during the week before the Commissioner made the Temporary Order, Mr. Rowe of CanJet said:

> "Air Canada is deliberately trying to crush us and the bureaucrats have taken a month pondering their navels." said Mr. Rowe. "They're operating as a discount carrier on our routes. How do you compete with this monster?"

Attached hereto as **Exhibit "D"** to this my Affidavit are articles from the *Ottawa Citizen* and *Toronto Star* from Sunday, October 7, 2000.

42. Four days later, the *Halifax Herald* ran a story (Exhibit "I" to the Fournel Affidavit) quoting Mr. Rowe as saying CanJet is "very much alive"; he stated further that the October 2 article was "a bit overstated and CanJet is far from ready to fold". He went on to say:

> "We are not going out of business," he said. "Our loads are increasing and we are getting a lot of support. CanJet is here to stay, and it would be helpful if the government got Air Canada off our backs."

43. The very next day the Commissioner issued the Temporary Order. In the recitals to the Temporary Order, the Commissioner states that he "considers that in the absence of a temporary order CanJet is likely to be eliminated as a competitor on specific routes and suffer other harm that cannot be adequately remedied by the Tribunal". When Air Canada pointed out in its Affidavit material filed in the Quebec constitutional challenge the inconsistency between the earlier CanJet statements and the Commissioner's stated conclusion about harm to CanJet, on the one hand, and the statements from Mr. Rowe on the day before the Temporary Order was actually made, on the other hand, CanJet responded in Mr. Rowe's Affidavit by stating:

> The article is quoted out of context in that I was forced by the adverse media reports announcing the imminent demise or grounding of CanJet as a result of Air Canada's predatory conduct, to reassure the public, the financial institutions supporting CanJet and CanJet's employees that "we were in it for the fight" confident that I was to see the appropriate authorities upholding the law and stopping Air Canada's predatory conduct.

44. CanJet's most recent position, therefore, appears to be that Mr. Rowe will say what is necessary to "reassure" whomever needs reassurance.

SUMMARY OF AIR CANADA' S POSITION

45. Air Canada's frustration with the issuance of the Temporary Order and the basis for its Application to set it aside can be summarized as follows:

- Air Canada offered to and did provide information and material to the Commissioner to demonstrate that it had not engaged in any anti-competitive acts.
- The information and material in the possession of the Commissioner support Air Canada's contention as described above.
- Air Canada's conduct was a measured, competitive response to CanJet, based on the "usual rules", being the only rules or guidance provided by the Competition Bureau.
- Matching prices is pro-competitive, not anti-competitive.
- When looked at in its entirety, Air Canada's competitive response to CanJet did not even constitute matching in that its ticket prices were higher and the impugned fares carried more restrictive terms and conditions than CanJet's.
- The Commissioner's Temporary Order on its face identifies conduct which cannot be anti-competitive acts under the Regulations.
- To the extent that the Affidavit filed by David McAllister from the Competition Bureau (in the Quebec case) provides additional insight into the Commissioner's view of the matter, it refers to predatory pricing in the context of abuse of dominance. Examples of what would be anti-competitive conduct as identified by the Commissioner are set out at paragraph 16 of the McAllister Affidavit. Air Canada did not engage in those activities in response to CanJet, nor does the Commissioner allege that it did.
- What is identified in the McAllister Affidavit (paragraph 74) as the "basis" for the Commissioner's opinion that Air Canada's actions "could" constitute anti-competitive acts does not meet the definition of such acts.

- There was no consideration by the Commissioner of the impact on competition nor of the other factors in a predatory pricing or abuse of dominance analysis.

- The reliance by the Commissioner on a stated need for more time is not a statutory basis for making a Temporary Order.

- The Commissioner appears to have allowed himself to be swayed by vociferous and apparently relentless complaining by CanJet. CanJet says (in the Affidavit of Ken Rowe filed in the constitutional case in Quebec) "[CanJet] asked the Commissioner to issue a section 104.1 order to restrain Air Canada while the Commissioner and his staff investigate Air Canada's conduct. The Commissioner issued such an order on October 12, 2000." Royal, a competitor to both CanJet and Air Canada, did not complain to the Commissioner, and indeed is skeptical about CanJet's complaint. The Commissioner's Temporary Order has the effect not of promoting competition, but of promoting one competitor – CanJet.

- The Commissioner is apparently being pressured by inappropriate considerations. If he is to be allowed to act as a judge (which Air Canada feels is inappropriate), he must conduct himself judicially.

- Air Canada has no way of knowing in what circumstances it will be faced with a Temporary Order. It is clear to Air Canada that the "usual rules" are not being applied by the Commissioner; furthermore no other guidance to replace or supplement these rules have been communicated by the Commissioner.

46. I swear this Affidavit in support of Air Canada's Application to set aside or vary the Temporary Order.

SWORN BEFORE ME at the City of Montreal, in the Province of Quebec on October 31, 2000.

_____

Commissioner for Taking Affidavits

_____

JOHN M. BAKER

AIR CANADA Applicant	and	COMMISSIONER OF COMPETITION Respondent	CT-2000 / 004

THE COMPETITION TRIBUNAL

AFFIDAVIT OF JOHN M. BAKER
(sworn October 2000)

STIKEMAN ELLIOTT
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Katherine L. Kay LSUC#: 28493T
Tel: (416) 869-5507

Eliot N. Kolers LSUC #: 38304Y

Fax: (416) 947-0866

Solicitors for the Applicant